



**Mule v King’ola & another (Civil Appeal E081 of 2021)
[2023] KEHC 24170 (KLR) (9 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E081 OF 2021
GMA DULU, J
OCTOBER 9, 2023**

BETWEEN

LUCAS MBUVI MULE APPELLANT

AND

BENJAMIN KING’OLA 1ST RESPONDENT

**JANET WAENI KING’OLA, JENNIFER NGARI KING’OLA AND
BENJAMIN MWONGELA KING’OLA (SUED AS THE TRUSTEES OF
THE BENEFICIARIES OF THE ESTATE OF KOLI KING’OLA SAMWEL -
DECEASED) 2ND RESPONDENT**

*(From the judgment of Hon. G. R. Sagero delivered on 2nd November 2021
in Makueni Chief Magistrate’s Court Civil Case Number 212 of 2019)*

JUDGMENT

1. In a judgment delivered on 2nd November 2021, the trial Magistrate entered judgment for the plaintiff (now appellant) against the defendants (now respondents and concluded as follows:-

“I have considered the nature of injuries suffered by the plaintiff and guided by the authorities cited, I am minded to assess general damages at Kshs. 400,000/= On special damages although the plaintiff submitted for Kshs. 5,000/= in the further amended plaint at paragraph 5 the plaintiff has sought for Kshs. 2,100/= which is supported with receipts. The same is awarded. In the upshot there is judgment for the plaintiff against the defendant of Kshs. 322,100/= being general damages of Kshs. 400,000/= less 20% contribution plus Kshs. 2,100/= special damages. The plaintiff will also have costs of the suit and interest.”



2. Dissatisfied with the judgment and award of the trial court, the appellant (who was the plaintiff in the trial court) filed this appeal through counsel Mutuka Wambura & Associates Advocates, and relies on a Memorandum of Appeal dated 1st December 2021 listing the following grounds:-
 1. The learned Magistrate erred in law and fact by disregarding the appellants testimony when the same was not rebutted by the respondents.
 2. The learned trial Magistrate erred in law and fact by apportioning liability of 20% on the appellant when there was overwhelming evidence indicating that the appellant was not liable for the accident.
 3. The learned Magistrate erred in law and in fact in failing to find the respondents 100% liable despite the overwhelming evidence on record to this effect.
 4. The learned Magistrate erred in law and fact by failing to take into consideration the appellant's evidence. Quantum on liability hence arriving at a wrong decision.
 5. The learned Magistrate erred in law and fact by failing to consider the appellant's submissions and authorities on liability and quantum hence arriving at an erroneous finding.
 6. The learned Magistrate erred in law and fact in awarding general damages of Kshs. 400,000/= that were inordinately low in the circumstances which was not commensurate to the injuries suffered by the appellant.
3. In response to this Memorandum of Appeal, the respondents filed a cross-appeal through counsel Cootow & Associates Advocates on 30th November 2021 on the following grounds:-
 1. That the learned Magistrate erred in law and in fact in shifting the burden of proof in an action founded on negligence to the respondents thereby misdirecting herself in law and thus arriving at a completely erroneous decision.
 2. That the learned trial Magistrate erred in law and in fact in failing to consider all the material facts that had been placed before the court and thereby failed to take into account relevant matters that he ought to have considered and instead considered irrelevant matters and as a result arrived at a completely erroneous decision.
 3. The learned trial Magistrate erred in law and in fact in apportioning liability at 80% to 20% in favour of the appellant when the evidence and testimony adduced during trial clearly showed that the appellant's negligent and reckless acts were what occasioned the accident, the subject matter of the suit herein.
 4. The learned Magistrate erred in law and in fact by misdirecting himself leading to a finding on liability when the evidence adduced did not support such a finding and thereupon assessing damages erroneously without any evidence on liability having been established.
 5. That the learned trial Magistrate erred in law and in fact in failing to appreciate or taking into consideration the respondents' submissions at all.
 6. That the learned trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the respondents.



7. That the trial Magistrate erred in awarding the sum of Kshs. 400,000/= as general damages which was inordinately high and excessive in the circumstances thus occasioning a miscarriage of justice.
 8. That the learned trial Magistrate consequently erred in law and in fact in awarding costs and interest thereto.
4. The appeal and cross-appeal were canvassed through written submissions. In this regard, I have perused and considered the submissions filed by counsel on both sides. I acknowledged that both sides cited and relied on decided court cases.
 5. This is a first appeal. That being the position, I have to be guided by the principle consistently applied by courts that I have a duty to revisit and evaluate the evidence on record afresh and make my own independent conclusions while bearing in mind that I did not have the opportunity of seeing witnesses testify, and give due allowance for that disadvantage – see *Selle & Another =Versus= Associated Motor Boat Company Ltd (1968) EA 123*.
 6. This appeal is on both liability and quantum of damages. With regard to liability which is a finding based on facts, I have to be guided by the reasoning in the case of *Mwangi =Versus= Wambugu (1984) KLR 453* in which it was held that an appellate court will normally not interfere with a finding of fact unless such finding is based as no evidence, or it is based on a misapprehension of the evidence. With regard to a finding on liability I have to be guided by the principle that there is no liability without fault, see *Kiema Mutuku =Versus= Kenya Cargo Handling Services Ltd (1991) KLR*.
 7. With regard to an appellate court’s power to interfere with the quantum of damages assessed by a trial court, I have to be guided by the principle restated in the case of *Kenfro Africa Ltd & Another =Versus= Lubia & Another (1985) eKLR* in which it was stated that

“...the principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage.”
 8. Coming back to our appeal, at the trial the appellant called two witnesses. PW1 was Joseph Biwot a Clinical Officer at Makueni County Referral Hospital. He testified that he received a patient by the name Lukas Mbuvi Mule 34 years. He produced treatment notes, and also medical examination report from Nector Health Care. He did not capture level of incapacity suffered in the report.
 9. PW2 was Lucas Mbuvi Mulei the plaintiff, who is the appellant herein. He stated that he was a boda boda rider, and on 1st September 2019 while riding the motor cycle he suddenly met a Probox motor vehicle which was at high speed which collided with him, and he sustained injuries.
 10. Both witnesses were cross-examined. The defendants (now cross-appellants) did not call any witnesses, and parties counsel filed submissions and the trial court then rendered its judgment.
 11. Coming back to liability, only the appellant testified as to what happened during occurrence of the accident. The driver of the motor vehicle (Probox) said to be dead, did not testify, nor did any other witness for the respondent or cross-appellants herein. The appellant was cross-examined thus his evidence put to test.



12. I note that the appellant stated in examination in chief that the motor vehicle was at high speed, lost control and crossed to his side and hit him. The defence counsel in cross-examination did not ask the appellant any question on whether he also contributed to or could have mitigated the accident.
13. From the above evidence, and bearing in mind the standard in civil cases of proof of balance of probabilities, in my view, the Magistrate erred in finding the appellant liable in contributory negligence, as the pleadings of the parties were mere allegations to be proved through evidence tendered in court, which should be done through the evidence to be tendered by either party. Even if the driver of the motor vehicle herein did not testify like in this case, the evidence of PW1 could have established contributory negligence through cross-examination, but in the present case where there was no indication of contributory negligence, in the evidence of the appellant, it cannot be said that the appellant was liable in contributory negligence.
14. I thus find that the trial court erred in finding contributory negligence against the appellant, and find that the driver of the motor vehicle was 100% liable in negligence.
15. I now turn to the quantum of damages assessed by the trial court. Such assessment of quantum of general damages has to be in line with comparable awards for similar injuries suffered.
16. The injuries suffered by the appellant herein were not seriously contested. They were blunt injuries at the right ankle joint, deep cut wound at left anterior aspect of knee joint, and closed fracture proximal left fibula bone. No permanent incapacity was testified to in evidence.
17. In my view from the evidence on record, and the authorities cited to the trial court, the award of general damages of Kshs. 400,000/= cannot either be said to be inordinately low or inordinately high. I will thus uphold the award of general damages.
18. The effect of my above findings is that the cross-appeal is dismissed, and the appeal is allowed in regard to liability.
19. Consequently, and for the above reasons I order as follows:-
 - i. The cross-appeal is hereby dismissed.
 - ii. I allow the appeal to the extent that I set aside the 20% contributory negligence entered by the trial court, and instead find that the respondents (cross appellants) were 100% liable in negligence.
 - iii. The general damages payable to the appellant will be Kshs. 400,000/= plus special damages Kshs. 2,100/=
 - iv. The respondents (cross-appellants) will pay the appellant's costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Ms. Motuku for appellant

Ms. Osewe holding brief for Owino for respondent

