



REPUBLIC OF KENYA



**Irungu & another v Kamiti & 2 others (Civil Appeal E050 of 2021)  
[2024] KEHC 14027 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14027 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E050 OF 2021  
J WAKIAGA, J  
NOVEMBER 12, 2024**

**BETWEEN**

**JOSEPH MWEANGI IRUNGU ..... 1<sup>ST</sup> APPELLANT**

**DAVID KARIUKI KAMAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOYCE WAIRIMU KAMITI ..... 1<sup>ST</sup> RESPONDENT**

**ADEDE ABOTH FRANK ..... 2<sup>ND</sup> RESPONDENT**

**KENETH MUICO NGANGA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgement of Hon. M. W. Kurumbu (PM)  
delivered on 31st September 2021 in Kandara CMCC NO.148 of 2017)*

**JUDGMENT**

1. By an amended Complaint dated 23<sup>rd</sup> August 2017, the Respondents sued the Appellants for general and special damages arising out of a road traffic accident on the 15<sup>th</sup> day of May 2016 along Thika-Kandara road involving motor vehicle registration number KBK 639 V owned by the 1<sup>st</sup> Appellant and driven by the 2<sup>nd</sup> Appellant, wherein the 1<sup>st</sup> Respondent was traveling and motor vehicle registration number KAJ 405 K, owned by 2<sup>nd</sup> Respondent and driven by the 4<sup>th</sup> Respondent.
2. It was contended that the said accident and subsequent injuries and damages was caused by the negligence of the Appellants and 2<sup>nd</sup> and 3<sup>rd</sup> Respondent particulars whereof were pleaded.
3. By a statement of defence thereon filed on 12<sup>th</sup> October 2017, the Appellants denied the accident and attributed the cause thereof to the negligence of the Respondents herein. By a statement of defence dated 2<sup>nd</sup> October 2017, the 3<sup>rd</sup> Respondent attributed the cause of the accident to the negligence on the part of the Appellants.



4. By a judgement thereon dated 9<sup>th</sup> September 2021, the Court found the Appellants liable at 40% against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents at 60% and awarded general damages at Kshs. 650,000 and special damages at Kshs. 28,000.
5. Being dissatisfied by the said determination, the Appellants filed this appeal and raised the following grounds of appeal:
  - a. The learned trial Court erred in fact and in law in assessing the evidence presented and therefore arriving at the wrong determination on liability.
  - b. The Court erred in apportioning liability at 40% against the Appellant while the evidence presented overwhelmingly relieved the Appellants of any contribution to the accident.
  - c. The award in damages was excessive considering the injuries sustained by the 1<sup>st</sup> Respondent.
  - d. The Court proceeded on wrong principles when assessing the damages and misdirected herself in ignoring the principles applicable in awarding quantum.

## **SUBMISSIONS**

6. Directions were issued on the disposal of the appeal by way of written submissions and on behalf of the Appellants it was submitted that the evidence of PW1 was that he visited the scene and found matatu KBK 639 V on its lane facing Kandara and blamed motor vehicle registration number KAJ 405 K for leaving its lane and encroached on the lane of the Appellant's motor vehicle thereby causing the accident. It was contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should have been wholly blamed for the accident at 100%
7. On quantum it was submitted that the first Respondent sustained the following injuries:
  - a. Deep cut wound on the forehead, right heel and nose.
  - b. Head concussions.
  - c. Blunt injuries to the chest, back right shoulder and fingers.
  - d. Bruises on the right shoulder.
  - e. Fracture of the right tibia fibula.
8. It was contended that the award was inordinately high taking into account the injuries sustained by the 1<sup>st</sup> Respondent and an award of Kshs. 300,000 was proposed supported by the following decisions of this Court:
  - a. *Jitan Nagra v Abednego Nyandusi Oigo* [2018] eKLR where an award of Kshs.450,000 was given to the Plaintiff who had sustained fracture of the tibia fibula, fracture of the right femur among other injuries.
  - b. *Herbart Otara Murube v Dankan Ochora* [2022] eKLR where Kshs.450,000 was awarded to the Plaintiff who sustained fracture right tibia, right ankle dislocation among other injuries.
  - c. *Atunga v Mogambi* [2022] KEHC 9854 (KLR) where an award of Kshs.550,000 was given to the Plaintiff who sustained fracture of the right tibia fibula bones, dislocation of the right hip joint among other injuries.
9. The 1<sup>st</sup> Respondent submitted that the trial Court exercised judicial discretion based on the evidence on record in apportioning liability guided by authorities placed before her and therefore should not



- be interfered with by the appellate Court unless it was based on wrong principles. In support of this submission reliance was placed on the case of Mbogo v Shah [1968] EALR 93.
10. The rest of the Respondents did not file submissions as at the time of this Judgement.
  11. This being a first appeal, the Court is under a duty to re-evaluate the evidence tendered before the lower Court to come to its own determination thereon while giving allowance that unlike the trial Court it did not have the advantage of seeing and hearing witnesses.
  12. On behalf of the 1<sup>st</sup> Respondent PW1 Sergeant Stephen Masaku testified that he visited the scene and noted that KAJ 405 K a Nissan Sunny was from Thika towards Kandara when it veered off to the lane of the Matatu and was hit on the left side by the Matatu registration Number KBK 639V. He recommended that the driver be charged with causing death. In cross examination he confirmed that the driver of the matatu was to blame for veering off his lane.
  13. PW2 Joyce Wairimu Kimiti, the 1<sup>st</sup> Respondent stated the motor vehicle registration number KAJ 405K came onto their lane causing a collision from which she sustained injuries. In cross examination she stated that the matatu was overspeeding and that she blamed both drivers.
  14. On behalf of the Defendants DW1 Kenneth Muico Nganga the 3<sup>rd</sup> Respondent testified that he was driving motor vehicle registration number KAJ when he met with the Appellant's motor vehicle which was overspeeding and which hit his motor vehicle on the left and that he blamed the driver thereof for not being careful and overspeeding. In cross examination he stated that the driver was moving from side to side. DW2 PC Peter Kipsang Bett stated that the 3<sup>rd</sup> Respondent was to blame for driving on the wrong lane but stated that there was no eye witness to the accident.
  15. The Appellant did not call any evidence.
  16. From the proceedings herein, there are only two issues for determination:
    - a. Whether the Court erred on its determination on liability
    - b. Whether the award in damages was excessive so as to be interfered with by this Court.
  17. The issue of liability is a matter of evidence as tendered by the trial Court.
  18. In finding on liability the Court had this to say "I note that PC Bett and Sergeant Masaku stated one thing in common ..... that KAJ 405K was driven in the wrong lane .....it was hit by the matatu on the left side .... The fact that KAJ 405K was hit on the left side yet it was coming from Thika towards Kandara shops that it had completely left its lane and encroached onto the lane of the oncoming traffic which is where KBK 639K was..... from the evidence it is clear that the driver of KAJ should bear higher percentage of liability. .... the driver of KBK will also bear part of the liability. If he had kept a proper look out for other road users and driven at more reasonable speed in the circumstances, there is chance he would have completely avoided hitting KAJ 405 K or mitigated the impact "
  19. The question is whether this finding of fact is based on the evidence on record? A look at the testimony of PW1 and DW1 who were the only eye witnesses to the accident and in view of the fact that the Appellants did not call any evidence to rebut this account save for relying on the testimonies of the police officers who visited the scene after the accident, I am satisfied that this finding of fact was based on the evidence on record and as such will not interfere with the same.
  20. On quantum, the injuries sustained by the 1<sup>st</sup> Respondent were not disputed and in reaching the award herein, the trial Court was supported by decisions of this Court which are binding upon him and will not fault the same noting that the same were within the acceptable ranges of the award based on the



injuries sustained by the Plaintiff and should not be reduced to Kshs.400,000 on the strength of the authorities submitted by the Appellant.

21. I note that the Court relied on the following cases: Jitan Nagra (supra) a 2018 decision where the Court awarded Kshs. 450,000, Mwavita Johnathan v Silivian Onunga [2017] Kshs. 400,000, Ibrahim Kalema Lewa v Esteel Co limited [2016] eKLR where Kshs. 800,000 was awarded.
22. The Appellant has submitted the following cases in support of their contention on reduction of the award: Herbart Otara Marube (supra) Kshs. 450,000 and Atunga v Mugambi (supra) Kshs. 550,000.
23. In arriving at the award herein the Court considered the rate of inflation and the injuries sustained by the 1<sup>st</sup> Respondent which are the acceptable principles in assessment of damages and should therefore not be faulted simply on the basis that the Appellant would have preferred a low award noting that before the trial Court they had submitted an award of Kshs.300, 000 which the Court considered and dismissed.
24. In the final analysis I find no merit on the appeal herein, which I dismiss on its entirety and affirm the trial Court's finding both on liability and quantum. The 1<sup>st</sup> Respondent shall be entitled to cost from the Appellants and it is ordered.

**DATED SIGNED AND DELIVERED AT MURANGA THIS 12<sup>th</sup> DAY OF NOVEMBER 2024**

**J. WAKIAGA**

**JUDGE**

In the presence of :

No appearance by the parties

Jackline – Court Assistant

