



REPUBLIC OF KENYA



**Kimani v Mbugua (Civil Appeal E205 of 2023)
[2024] KEHC 14102 (KLR) (Civ) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E205 OF 2023**

**BK NJOROGE, J
NOVEMBER 14, 2024**

BETWEEN

GEORGE MARUBU KIMANI APPELLANT

AND

JOSEPH GATHERI MBUGUA RESPONDENT

RULING

1. This is an Appeal arising from the decision of Hon. M.W. Murage (SRM) delivered on 22/2/2023. It arises out of proceedings in (Milimani) CMCC No. E929 of 2022.
2. This is a running down claim where the Appellant challenges the decision of the Trial Court on both liability and quantum.
3. The Appellant was the unsuccessful Defendant while the Respondent was the Plaintiff before the Trial Court.

Background facts

4. The Respondent sued the Appellant as a result of a road traffic accident that occurred on 15/6/2021. This was along Juja road in Nairobi. It involved the Respondent who was pushing a handcart.

The Appellant was the owner of the Motor Vehicle KAZ 507W, driven by his driver, servant and or agent on the material date. The Respondent sued the Appellant for the negligence and or carelessness and or recklessly of the Appellant's driver in the management and or driving of the motor vehicle. This is a claim based on vicarious liability. The Respondent pleaded that he was knocked down by the Appellant's motor vehicle.



5. The Appellant denied any liability. He attributed the accident to the negligence on the part of the Respondent and sought total or at least some contributory negligence. He also blamed an unknown motor cycle for causing the accident. Through a Police Officer's testimony, it was stated that the unknown motor cyclist hit the handcart. That it is this handcart that then hit the Appellant's motor vehicle.
6. The Trial Court after considering the evidence adduced, found both the parties to blame. It held the Appellant 90% liable while the Respondent was found to be 10% liable for the accident.
7. On quantum, the Trial Court found that the Respondent had sustained injuries. It proceeded to assess the General damages at Kshs.350,000/-.
8. The Trial Court proceeded to deliver Judgment in favour of the Respondent against the Appellant as follows;
 - a. General damages Kshs.350,000.00
 - b. Add Special damages Kshs. 3,550.00Kshs.353,550.00
Less 10% Liability Kshs. 35,355.00
Total Kshs.318,195.00
9. The Respondent was also awarded the costs and interest of the suit at Court rates.
10. This decision is what has triggered this Appeal.
11. The Appeal was admitted for hearing on 24th May, 2024. Directions that the Appeal be disposed of by way of written submissions were also given. Further directions that the parties do file written submission were granted on 29/2/2024, 9/5/2024, 24/5/2024, 8/8/2024 and 25/9/2024. The Appellant for reasons that remain unclear has not complied with the directions for filing written submissions. The Respondent has complied and filed written submissions dated 13/9/2024. The Court has perused the submissions filed as well as the authorities referred to.
12. This matter was flagged down for the Rapid Results Initiative (RRI) during the month of September, 2024. The Respondent's Counsel appeared before the Court virtually on 23/9/2024. Miss. Mumbi holding brief for Mr. Waiganjo confirmed the filing of the Respondent's submissions. The Appellant's Counsel did not attend. The matter was reserved for this Judgment.

Issues for determination

13. The Appellant filed a Memorandum of Appeal, that lists 6 Grounds of Appeal. As earlier stated, the Appeal challenges the findings of the Trial Court on liability and quantum.
14. Having perused the Record of Appeal, the Grounds of Appeal and the Submissions filed herein, the Court frames 3 issues for determination as follows;
 - a. Was liability approved correctly before the Trial Court?
 - b. Was the award on quantum excessive?
 - c. What reliefs flow from this Appeal?



Analysis

15. This is a first Appeal. The Court is therefore duty bound to re-look, re-consider and re-evaluate the evidence presented before the trial court afresh. Then this Court has to reach its own conclusions. However, this Court has to bear in mind that it neither saw nor heard the witnesses, and should make allowances for such. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] E.A 123.
16. When it comes to interfering with the exercise of judicial discretion, the Court turns to the case of *Mbogo & another Vs. Shah* [1960] E.A. 93. The assessment of awards of general damages is an exercise of Judicial discretion. The Appellate Court will not interfere unless the trial Court misdirected itself and has clearly been wrong in exercise of the discretion, that there has been a resultant injustice.
17. The Court proceeds to analyse the 3 issues in seriatim as follows;
 - a. Was liability apportioned correctly before the trial Court?
18. The Grounds of Appeal filed by the Appellant on liability, challenge the apportionment at 10%:90% in favour of the Respondent.
19. In absence of written submissions by the Appellant, the Court lacks the benefit of the current arguments in advancement of the Appeal. The Court has had the benefit of perusing Appellant/Defendant's undated submissions filed before the Trial Court.
20. The Appellant submitted briefly that;

“According to the Claimant on the date of the alleged accident, he was a cart pusher. The Police Abstract blames an unknown motor cycle which hit the Plaintiff towards motor vehicle registration number KAZ 507W....”

“You Honour the Plaintiff has not introduced any evidence to support a claim of negligence on the Defendant. The Police abstract filed in court does not blame the driver of KAZ 507W. Without prejudice to the foregoing and in the unlikely event that this Honourable Court holds the Defendant liable at any proportion, we submit on quantum as follows.”
21. The Respondent in his submissions before this Court urges the Court to uphold the Trial Court's finding on liability. It was submitted that the Respondent who was a handcart pusher was hit by motor vehicle KAZ 507W.
22. It was submitted that a driver of a motor vehicle on the road has to always be alert and anticipate incidents and accidents. A driver has to be alert and exercise outmost attention. The Court was referred to *Juma -vs- Rabote* (suing as the legal representative of the Estate of Leonard Taabu Rabote (Deceased) Civil Appeal E044 of 2022) [2023] KEH 2009 (KLR) (22nd March, 2023).

“In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.”



Further, In the case of *Mary Njeri Murigi v Peter Macharia & another* [2016] eKLR, this court expressed itself thus:

“A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof.”

In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

That seems to have been the position in *Isabella Wanjiru Karangu v Washington Malele Civil Appeal No 50 of 1981* [1983] KLR 142 and *Mahendra M Malde vs George M Angira Civil Appeal No 12 of 1981*, and *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] eKLR where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.”

23. The Court notes that the trial record shows the Respondent testified and adopted his witness statement. He maintained that the motor vehicle that hit him was KAZ 507W. He confirmed that there was a motor cycle but it did not hit him.
24. PW2 PC Jesse Mwilu Kasyoka confirmed their details.
25. The Appellant called DW1 one David Mburu who was the conductor of motor vehicle KAZ 507W on the material date. He blamed the Respondent for crossing over from the right to the left lane. He denied the motor vehicle KAZ 507W caused the accident.
26. DW2 PC Kawira testified for the Appellant as follows;

“The Accident involved KAZ 507W. Toyota Shark being driven by David Mburu versus a pusher Joseph Gathiri Mbugua who is an unknown motor cycle rider who speed off. The pusher was pushing the hand cart from right to left, the unknown motor cycle hit the hand cart and the pusher was pushed to motor vehicle KAZ 507W. His foot was overrun by the motor vehicle.”
27. In cross examination she stated;

“The parties involved were motor vehicle KAZ 507W, pusher and an unknown motor cycle. Motor vehicle KAZ 507W run over the Plaintiff.”
28. The Court has taken note that the two Police Officers who testified on opposing sides were neither eye witness nor the investigating officer. The investigating officer was one Corporal Magano, who was not summoned by either side. This Court will take it that the two police officers’ evidence was based on what was on the investigation file held by the Traffic Police.
29. This Court is of the considered opinion that the motor vehicle that hit the Respondent is the Appellant’s motor vehicle KAZ 507W. Those were ethe facts presented before the Trial Court. In essence the Appellant deflects the blame upon the unknown handcart pusher.



30. The Court notes that the Appellant did not plead these facts or seek any apportionment of blame, to the unknown motor cyclist. These facts are not pleaded in the Statement of Defence filed. No Third-party proceedings were taken out by the Appellant, before the Trial Court.

It is therefore very doubtful that the Trial Court could have apportioned any liability upon the unknown motor cyclist who was not before it. This blame worthiness could also not be shifted upon the Respondent. The Court relies upon *Felix Kitavi Wambua -vs- Santurina Kainyu and Godfrey Micheni Ngara* (suing as legal representatives of David Mwiti Micheni – Deceased [2018] eKLR

“It is therefore evident that the appellant did not attribute any blame on the motorcycle. The defence makes no reference to the cyclist. The submissions in this appeal does not attribute any blame on the deceased.

Before the trial court, the appellant alleged in his pleadings that the deceased was to blame. In this appeal, the blame has shifted to the motor cyclist. The appellant did not enjoin the owner of the other vehicle or the cyclist. This court cannot hold that either the cyclist or the other vehicle were to blame as they were not parties to the original suit. How will the respondent be able to execute against non-parties should this court hold such a non-parties to blame. I do find that the appellant’s submissions are just an afterthought. The trial court correctly held the appellant 100% liable. The appellant’s own passenger blamed him for the accident.”

31. The Trial Court apportioned liability at 10%:90% and this Court finds that there is no reason to depart from this finding.
- b. Was the award on quantum excessive?
32. Save from filing the Grounds of Appeal, the Appellant has not placed any materials before this Court to persuade it that the award on quantum is excessive.
33. The Respondent suffered injuries as follows;
- a. Dislocation – right foot small toes;
- b. Laceration – right foot top;
- c. Swollen, tender, painful – right ankle.
34. The Respondent Submitted (before the Trial Court) for an award of Kshs.600,000/- in general damages. He relied on *Nicholas Njoroge Thiongo -vs- Joseph N. Ngerenwa* [2010] eKLR where an award of Kshs.600,000 was made.
35. The Appellant (before the Trial Court) submitted for an award of Kshs.200,000/-. He relied upon *Isaac Mwenda Micheni -vs- Mutegei Murango* [2004] eKLR and *Patricia Adhiambo Omolo -vs- Emily Mandala* [2020] eKLR. Awards between Kshs.100,000/- to 180,000/- made.



36. As earlier stated, the Appellant has not placed any materials by way of submissions, to persuade this Court that the award of Kshs.350,000/- is excessive.

37. The Court relies upon the decision in Butt -vs- Khan [1978] eKLR.

“ An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entity erroneous estimate. It must be shown that the Judge proceeded on the wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

38. On Special Damages, the Court sees no reason to disturb the award of Kshs.3,550.00 already made. The same was proved to the required standards.

c. What reliefs flow from this Appeal?

39. The Court finds no merit in the Appeal.

40. As to costs, the same should follow the event. The Respondent is entitled to the costs of the Appeal.

Determination

41. The Appeal lacks merit and is dismissed in its entirety.

42. The Costs of the Appeal are awarded to the Respondent.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024

NJOROGE BENJAMIN K

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

Court Assistant

