



**Kinyanjui v Wanyonyi (Civil Appeal E117 of 2023)  
[2024] KEHC 15957 (KLR) (5 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15957 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E117 OF 2023  
REA OUGO, J  
NOVEMBER 5, 2024**

**BETWEEN**

**JACOB NDUNGU KINYANJUI ..... APPELLANT**

**AND**

**EDWARD TEMBA WANYONYI ..... RESPONDENT**

*(Being an appeal against the judgment/decree of the Principal Magistrate's Court at Sirisia Law Courts by Honourable J.O Manasses (RM) on 7th September 2023 in SPMCC NO E073 OF 2022)*

**JUDGMENT**

1. On 7<sup>th</sup> August 2022, a road accident occurred between motor vehicle registration number KBU 742K Mitsubishi Pajero and motor vehicle reg. no. KDG 503L Mazda CX-5 at Mayanja area. The respondent sought the pre-accident value of motor vehicle registration number KBU 742K Mitsubishi Pajero, general damages for the injuries sustained, and special damages.
2. The appellant filed his statement of defence and denied being responsible for the accident,
3. The trial magistrate in his judgment entered liability at 70:30 in favour of the respondent and made the following award on damages:
  - a. General damages Kshs 500,000/-
  - b. Pre-accident value of the vehicle Kshs 720,000/-
  - c. Special damages Kshs 39,770/-Total Kshs 1,259,770/-  
Less 30% contribution Kshs 881,839/-



4. The appellant aggrieved by the finding of the lower court has filed this instant appeal on the following grounds:
  1. THAT the learned trial magistrate erred in law and in fact in awarding the respondent a sum of Kshs 500,000/- on general damages which award is inordinately excessive considering the injuries sustained by the respondent and existing court awards in comparable injuries.
  2. That the learned magistrate misdirected himself by failing to consider sufficiently the appellant's submissions, the medical report on record, the treatment notes, the pleadings and the evidence thereby arriving at a wrong decision on general damages which has occasioned a miscarriage of justice.
  3. The learned trial magistrate grossly misdirected himself ignoring the principles applicable and relevant authorities on general damages cited in the written submissions presented and/or filed by the appellant.
  4. That the learned trial magistrate proceeded on wrong principles when assessing the general damages to be awarded to the respondent and failed to apply precedents and tenets of the law applicable thereby arriving at a figure which is manifestly excessive.
  5. That the learned trial magistrate erred in law and in fact in applying a high inflation rate thereby arriving at an erroneous award in general damages that is inordinately excessive for such injuries.
  6. That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstances occasioning a miscarriage of justice by deviating from existing and established judicial principles on accident claims.
  7. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
  8. That the learned magistrate erred in law and in fact in misapprehending and misunderstanding the extent and severity of the injuries suffered by the respondent thereby leading to an erroneous estimate of injuries sustained by the respondent.
  9. That the learned magistrate erred in law and fact in apportioning liability at 70%:30% thus failed to appreciate the appellant's statement of defence, the totality of the evidence before him against the weight of the evidence tendered by the respondent/plaintiff and did not consider the submissions on behalf of the appellant.
  10. That the learned trial magistrate erred in law and in failing to appreciate the reasonable and sufficient evidence tendered in court hence erroneously held the defendant/appellant 70% liable.
  11. That the learned magistrate erred in law and fact in holding the appellant/defendant liable for negligence yet the evidence of Pw4 police officer was not conclusive on whether the appellant/defendant was to blame for the occurrence of the accident.
  12. That the learned senior resident magistrate misdirected himself in law by assessing and awarding damages that were manifestly excessive and incomparable to the current judicial awards and not commensurate with the nature of injuries sustained by the respondent.
5. The appellant seeks that it be absolved from any liability and that the award on general damages be set aside.



6. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* [1968] EA 123.
7. Dr Joseph Sokobe (Pw1) produced the medical report in favour of the respondent and testified that he sustained both soft and skeletal tissue injuries.
8. Edward Temba Wanyonyi (Pw2) adopted his witness statement. He testified that he was in the vehicle with his wife, Fabian Wekesa and Renson Juma Temba heading towards Malaba from Kanduyi. He indicated that he was turning right when he was hit by the appellant. The accident was caused by the appellant as he was speeding and did not heed the indicators. The appellant did not apply brakes, slow down or make any manoeuvre to avoid ramming into the Pajero. On cross-examination, he testified that he wanted to turn and had even indicated when he was hit. He also testified that the appellant's driver was driving at high speed because of the impact which pushed his car to the drainage. He sought to recover the medical expenses and another car as the vehicle had been written off. The vehicle was extensively damaged and he sustained injuries.
9. George Mathu (Pw3) testified that he is a motor vehicle assessor with Maka Assessors based in Eldoret. He testified that the vehicle was damaged beyond repair. The pre-accident value was Kshs 720,000/- based on the year of manufacture and the salvage value was Kshs 80,000/-. It would require Kshs 648,000/- to do the repairs.
10. PC Jackline Were No 81576 (Pw4) testified that she is attached to Bungoma traffic base. She recalled that on 7/8/2022 an accident occurred near Mayanja market involving a Mitsubishi Pajero KBU 742K and a Mazda CX5 Reg No. KDG 503L. Both vehicles were heading towards the Malaba direction. The appellant's vehicle was behind the respondent's vehicle. The respondent indicated that he was turning on the right side of the road and in the process, he was hit by the appellant which was overtaking another vehicle. The respondent lost control and rolled several times. The appellant was overtaking without due care. On cross-examination, she testified that she was not the investigating officer. Stephen Nyongesa (Pw5) testified that he works with Amlarai Enterprises, a car towing company. He produced the receipt for towing for KBY 742K for Kshs 18,500/-.
11. Jacob Ndungu Kinyanjui (Dw1) adopted his witness statement. He testified that on the material day, two vehicles were ahead of him and were heading in the same direction. Suddenly the respondent swerved to the right side of the road while he was in the process of overtaking the two vehicles. The respondent did not ascertain that it was safe to make the turn. He applied emergency brakes, hooted, and swerved on the extreme left side but due to cross proximity, his vehicle rammed into the appellant's vehicle. He testified that he was not at high speed and was not charged with any traffic offence. He testified that the respondent turned without indicating as his vehicle lacked indicators and was in bad shape. He testified that he was driving at 80 Km/hr and was behind the appellant's vehicle. He testified that he was not in the wrong lane and was trying to overtake.

### **Analysis And Determination**

12. The only issues raised by the appeal are whether the trial magistrate correctly apportioned liability between the parties and whether the award of damages was manifestly excessive.



13. The appellant submits that the scrutiny of the evidence on record does not justify the apportionment of liability at the ratio 70:30. It was submitted that the appellant was not the author of the accident. The trial magistrate erred in holding that the respondent had on a balance of probability proved his case against the appellant. It was submitted that the respondent was 100% liable.
14. The respondent on the other hand submitted that section 73(4) of the *Traffic Act* clearly states that no vehicle shall be driven so as to overtake other traffic unless the driver of the vehicle has a clear and unobstructed view of the road ahead. The accident would not have happened if the appellant had not overtaken the motor vehicle.
15. The trial magistrate entered liability at 70:30 in favour of the respondent based on his assessment. In this case, the only people who witnessed the accident were Pw1 and Dw1. The police officer testified that she was not the investigating officer. Pw1 testified that he indicated and turned right when the appellant hit his vehicle from behind. On the other hand, Dw1 testified that the respondent did not indicate despite seeing that he was already overtaking. It is plausible that the respondent indicated that because the appellant was not careful and driving at high speed, he hit the respondent's vehicle. Similarly, the appellant's testimony is also plausible. If at all the respondent failed to indicate, and while the appellant was overtaking, he suddenly made a right turn, he would be liable. Therefore, this court cannot ascertain the parties whose action or inaction caused the accident, liability is apportioned at 50:50.
16. On quantum, the appellant submits that both Dr. Z Gaya and Dr. Sokobe were of the opinion that the appellant sustained soft tissue injuries and fractured the 5<sup>th</sup> rib. Both doctors were clear that the respondent did not suffer any permanent disability. The sum of Kshs 500,000/- awarded by the trial court was excessive.
17. On the other hand, the respondent submitted that the amount awarded by the trial court was not inordinately high nor excessive to warrant this court's interference with it; it was within the range of the cited decisions.
18. In an appeal against the assessment of damages, an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR* thus:

“The principles to be observed by an 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 the 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 so inordinately high that it must be a wholly erroneous estimate of the damage.
19. In this case, it is not in contention that the respondent sustained the following injuries: a deep cut wound on the occipital; scalp, blunt injury to the chest, blunt injury to the right shoulder, bruises in the right elbow and cracked 5<sup>th</sup> rib. The trial court awarded Kshs 500,000/- as general damages. In *Blue Horizon Travel Co. Ltd vs Kenneth Njoroge [2020] eKLR* the court awarded the respondent Kshs. 400,000/= for soft tissue injuries and fractured ribs L1-6 and R 11-12, right haemothorax, fracture-dislocation of the right hip and fracture-dislocations of right shoulder joints. It is clear that the injuries in *Blue Horizon Travel Co. Ltd (supra)* were severe and they called for a higher award in damages. In this case, the respondent sustained soft tissue injuries and a fractured 5<sup>th</sup> rib, therefore the award of



Kshs 500,000/- was manifestly excessive, In *Real Tilak Enterprises v Samuel Musembi Mutuku* [2019] KEHC 10062 (KLR) the plaintiff sustained 2 fractured ribs and soft tissue injuries and was awarded Kshs 150,000/-. I therefore set aside the trial court award of Kshs 500,000/- on general damages and substitute it with an award of Kshs 150,000/-.

20. The appellant submitted that the pre-accident value was Kshs 720,000/- while the salvage value was Kshs 80,000/-. However, the trial court should have subtracted the salvage value but failed to do so. The Court of Appeal in *Jimnah Munene Macharia vs. John Kamau Erera* Civil Appeal No. 218 of 1998 was of the view that:

“Where there is no proof of actual repair the plaintiff is only entitled to the pre-accident value less the salvage value.”

21. I agree with the submissions of the appellant the trial court ought to have subtracted the salvage value. Therefore, the award on the value of the vehicle ought to have been Kshs 640,000/- (720,000 less 80,000).
22. According to the appellant, the respondent only proved special damages of Kshs 14,720/- but was awarded Kshs 39,770/-. Pw3 issued a receipt, Pexh 17(b), worth Kshs 6,000/- for the accident assessment. Pw5 produced the receipt for towing charges, Pexh 20, showing the respondent paid Kshs 18,500/-. A further receipt for towing charges was issued for Kshs 3,500/-. Pw1 equally produced the receipt for the medical report for Kshs 6,000/-. The medical receipts for treatment totalled Kshs 8,470 and the receipt for the motor vehicle search was for Kshs 550/-. Special damages were therefore pleaded and proved.
23. Consequently, I find that the appeal succeeds. I hereby set aside the judgment of the trial court and enter judgment in favour of the appellant in the following terms:
- a. Pre- accident Value of Motor vehicle Kshs 640,000/- (720,000 less Kshs 80,000/- being the salvage value).
  - b. General damages of Kshs 150,000/-  
Total Kshs 790,000/-  
Less 50% Kshs 395,000/-
  - c. Special damages of Kshs 39,770/-  
Net total Kshs 434,770/-
  - d. The Appellant shall have the costs of the appeal.
  - e. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 5<sup>TH</sup> DAY OF NOVEMBER 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Miss Ochieng -For the Appellant

Mr Shikhu -For the Respondent

Mr. Kizito -C/A

