



**Dahir v Mwenda (Civil Appeal E176 of 2023)
[2024] KEHC 15791 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E176 OF 2023
CJ KENDAGOR, J
DECEMBER 16, 2024**

BETWEEN

RUIME DAHIR APPELLANT

AND

JACKSON MWENDA RESPONDENT

(Being an Appeal from the Judgment of the Honourable Eric Otieno Wambo, Principal Magistrate, delivered on 20th September, 2023 in Nkubu PMCC E023 of 2022)

JUDGMENT

Introduction

1. The Respondent got involved in a road traffic accident on 14th October, 2021 along the Nkubu-Chuka road. She was walking along the road when a vehicle knocked her down as a result of which she sustained severe bodily injuries. She blamed the Appellant for the accident and sued him claiming General Damages, Special damages of Kshs.43,100/=, Future medical expenses, and loss of earnings and future earning capacity.
2. The Court delivered a judgment on 20th September, 2023 in favor of the Respondent in the following terms; it found the Respondent had suffered a fracture of the left clavide among other fractures of tibia and fibula and soft tissue injuries. It found liability at 5:95% in favor of the Respondent against the Appellant, General Damages for pain, suffering and loss of amenities at Kshs.900,000/=, Future Medical expenses at Kshs.100,000/=, Special damages at Kshs.42,000/=. It held that the Respondent had not proved loss of earnings and earning capacity and thus did not award any amount under that heading.
3. The Appellant was dissatisfied with the judgment of the Court and appealed to this Court vide a Memorandum of Appeal dated 23rd October, 2023 in which he listed the following grounds of Appeal;



1. That the Honourable Principal Magistrate erred in law and fact in holding that the Respondent had proved negligence against the Appellant contrary to the evidence tendered.
2. That the Honourable Principal Magistrate erred in law and in fact in awarding an excessive amount in General damages for pain, suffering, and loss of amenities not within the range of conventional awards for similar injuries and as such arrived at an erroneous figure.
3. That the Honourable Principal Magistrate erred in law and in fact in awarding damages for future medical expenses which were not specifically pleaded.
4. The Appellant asked the Court to allow the appeal and set aside the entire judgment of the Honourable Eric Otieno Wambo, Principal Magistrate, delivered on 20th September, 2023 in Nkubu PMCC E023 of 2022. He also asked the Court to make a determination on liability and quantum of damages.
5. The Respondent was also dissatisfied with the Judgment of the trial Court and appealed to this Court through a Memorandum of Cross-Appeal dated 22nd February, 2024 in which she listed the following grounds of appeal;
 1. That the Honourable Principal Magistrate erred in law and fact by not finding Ruime Dahir entirely liable on negligence.
 2. That the trial Magistrate erred in law and in fact in awarding an amount that was too low in General damages for pain, suffering, and loss of amenities.
 3. That the Honourable Principal Magistrate erred in law and in fact by not awarding loss of earnings and future earning capacity despite the same being pleaded.
6. She asked the Court to allow the Cross Appeal and set aside the entire judgment of the Honourable Eric Otieno Wambo, Principal Magistrate delivered on 20th September, 2023 in Nkubu PMCC E023 of 2022. She also asked the Court to review in the upward the liability and quantum of damages.
7. The Appellant raised a preliminary objection of the Respondent's Memorandum of Cross Appeal on grounds that the Cross Appeal did not attain the mandatory requirements of Section 79G of the *Civil Procedure Act*, for having been filed without the leave of the Court.
8. The Preliminary Objection was canvassed by way of written submissions and the parties filed submissions on the same. The Appeals were also canvassed by way of written submissions and both parties filed their respective submissions.

Appellant's Written Submissions

9. The Appellant submitted that the Respondent's Cross Appeal should be dismissed because it was filed without leave of Court. He argued that Section 79G of the *Civil Procedure Act* requires a party to obtain the leave of Court to file an appeal where the party has failed to file the appeal within 30 days. He argued that, by the time the Respondent filed her Cross-Appeal, 30 days had lapsed from the date he served her with the Memorandum of Appeal.
10. With regard to his Appeal, he submitted that the lower Court was wrong in holding that he was liable for the alleged accident. He argued that there was no admissible evidence to prove contact between his motor vehicle and the Respondent. He argued that there was no basis to blame him because the Respondent did not claim to have noted the vehicle's registration details and the people who claimed to have seen the accident were not called as witnesses.



11. He also submitted that the lower Court was wrong in finding that the Respondent had suffered fractures on tibia and fibula. He argued that the Respondent did not prove these injuries because there was a discrepancy between the medical report and the P3 Form. Although the P3 Form did not indicate injuries on the upper and lower limbs, a subsequent medical report indicated that the Respondent had suffered fractures on the tibia and fibula.
12. Lastly, he argued that the Respondent did not prove special damages of Kshs.550/= for motor vehicle search because she did not produce a receipt. In addition, he submitted that the lower Court should not have awarded future medical expenses because the Respondent had not pleaded the same. He also argued that the award was nonetheless not warranted because the fracture had united and no complications were envisaged. Lastly, he submitted that the general damages awarded for pain and suffering were excessive. And that the amount should be reviewed down wards to Kshs.350,000/=.

Respondent's Written Submissions

13. The Respondent opposed the Appellant's Preliminary Objection and urged this Court to dismiss it. She submitted that the Preliminary Objection was defective because it was anchored on a non-existent law. She argued that Section 79G of the *Civil Procedure Act*, on which the Preliminary Objection was based, talks about appeals and does not address cross-appeals. She submitted that the law does not establish the timelines within which a cross-appeal should be filed. In the alternative, she argued that there was no inordinate delay in filing the cross-appeal because she filed it at the earliest point in time.
14. She also submitted that the lower Court was right in finding the Appellant liable for the accident because she had placed sufficient evidence to prove the Appellant's motor vehicle occasioned the said accident. She submitted that the evidence of the Police Officer and the Police Abstract were sufficient prove that the Appellant's motor vehicle caused the accident. She also submitted that the award for General Damages was significantly low. She argued that the lower Court failed to consider the seriousness of the injuries and the fact that she had suffered a 10% permanent disability.

Issues for Determination

15. I have considered the grounds of appeal and submissions by both counsels for the parties and I am of the view that the issues for determination are;
 - a. Whether the Preliminary Objection is merited.
 - b. Whether Respondent proved Appellant's liability on a Balance of Probabilities.
 - c. Whether Respondent proved she sustained Fractures on Tibia and Fibula.
 - d. Whether the award of Kshs.900,000/= for General Damages was a reasonable estimate.

The Duty of the Court

16. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily



to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the Preliminary Objection is merited

17. The Appellant submitted that the Respondent’s Cross Appeal should be dismissed because it was filed without leave of Court. He argued that Section 79G of the *Civil Procedure Act* requires a party to obtain the leave of Court to file an appeal where the party has failed to file the appeal within 30 days. He argued that, by the time the Respondent filed her Cross-Appeal, 30 days had lapsed from the date he served her with the Memorandum of Appeal.
18. I have relooked at the law on this issue to ascertain whether a person seeking to file a cross-appeal must do so within 30 days of service of the Memorandum of Appeal. It appears that there is no express law governing procedural timelines within which a cross-appeal ought to be filed. In *Bulsho Trading Company Ltd v Rosemary Likhola Mutakha & another* [2020] eKLR, the High Court appreciated this fact and held as follows;

“If the law was to assume that a respondent’s right to appeal is extinguished by the fact that he/she was beaten in time by the appellant, this would be a very unfair turn of events. This is however not the case. Order 42 Rule 32 of the Civil Procedure Rules in my view, clearly provides for cross-appeal but did not provide for the procedure to be followed. The route proposed by the learned judge Odunga would be time consuming and untidy without adding any value..... 13. It is my proposal therefore, that the Rules Committee takes up the matter and craft the procedural rules so as to breathe life to Order 42 Rule 32 of the Civil Procedure Rules”.
19. However, Courts have generated a jurisprudence to govern this issue and fill this statutory vacuum. They have established principles to guide litigants in filing cross-Appeals. On the issue of timelines, the courts have consistently held that a person desiring to file a cross-appeal should do so within the timelines given to an appellant to file an appeal. The timelines start to run after being served with the Memorandum of Appeal. If the person does not file the cross-appeal within the timelines provided, he should seek leave of the Court.
20. These principles were established in *Kenya Power & Lighting Co. Ltd v Peter Langi Mwasi* [2018] eKLR, where the Court held as follows;

“13. The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time”.
21. In this case, the Magistrate did not issue a direction on the timelines within which the parties could consider appealing the judgment. In the absence of such directions, this Court falls back to Section



79G of the Civil Procedure Rules which provide that parties have a right to appeal within 30 days of a judgment. It states;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”.

22. Having found that the timelines start to run upon service of the Memorandum of Appeal, I have relooked at the record to determine whether the Respondent filed the Cross-Appeal within 30 days of receipt of service of the Memorandum of Appeal. The Appellant has not stated the exact date on which he served the Respondent with the Memorandum of Appeal and the Respondent did not expressly admit that she was served with the Memorandum of Appeal. I have also perused the file and there is no affidavit of service to prove the Appellant had served the Memorandum of Appeal.
23. Without prove of service, this Court cannot determine with certainty whether the cross-appeal was filed within or outside 30 days of service of the Memorandum of Appeal. For this reason alone, the Appellant’s Preliminary Objection must fail. Consequently, the Respondent’s Cross-Appeal is properly on record.

Whether Respondent proved Appellant’s liability on a Balance of Probabilities

24. The Appellant submitted that the lower Court was wrong in holding that he was liable for the alleged accident. He argued that there was no admissible evidence to prove contact between his motor vehicle and the Respondent. He argued that there was no basis to blame him because the Respondent did not claim to have noted the vehicle’s registration details and the people who claimed to have seen the accident were not called as witnesses.
25. I have perused the record and it appears that the lower Court relied on the testimony of the Police officer and the Police Abstract to link the Appellant to the accident. A perusal of the typed proceedings show that the Respondent admitted she did not identify the number plate herself but she relied on the accounts of other people who witnessed the accident. The Respondent did not call the people who witnessed the accident to come and give evidence in Court. He relied on the Police Abstract and Police officer who investigated the case. This Court is being asked to determine whether the Police Abstract and the testimony of the Police officer were sufficient to prove liability.
26. In *Z O S & C A O (Suing as the Legal Representatives in the Estate of S A O (Deceased) v Amollo Stephen* [2019] eKLR, the Court expressed itself in respect to police abstract as follows:

“The police abstract produced as PEx. 3 dated 21/8/2018 only provides particulars of the reported accident; the owner of the subject motor vehicle involved, the injured person being the deceased, the insurance company and particulars thereof.....That being the case, it was incumbent upon the appellant, at the time of hearing, to either call an eye witness who saw the accident take place to prove any of the listed particulars of negligence attributed to the Respondent, or to call the police from Bondo Police Station, who investigated the accident to shed light on the results of the investigations; and as to who was to blame for the subject accident wherein the deceased lost his life.”



27. Similarly, in *Kibichi v Mathai* [2024] KEHC 4065 eKLR, the underscored the veracity of police abstracts and held as follows;

“From the foregoing, the police abstract is intended to capture particulars of the reported accident, owner of subject vehicle, injured person, insurance company and particulars thereof. I take note of the fact that police abstract is a public document and contents are filled by trained police officers who understand their work, understand integrity of public documents and the need to accurately fill particulars required to be filled in the police abstract. The contents of police abstract were not rebutted through any other evidence by the respondent/defendant. Bearing in mind that burden of proof on part of the appellant/plaintiff was on a balance of probabilities, in my view his prove through police abstract was sufficient in the absence of evidence to the contrary”.

28. I have perused the court record and the Police Abstract. I also note that the police officer who investigated the matter came to Court and testified. They all blamed the Appellant for the accident. The trial magistrate saw all the witnesses testify before him but he chose to believe the Respondent and the Police Officer. From the foregoing, I find that the Respondent proved on a balance of probabilities that the Appellant was liable for the accident. I uphold the lower court’s holding on this issue as well as the apportionment of liability.

Whether Respondent proved he sustained Fractures on Tibia and Fibula.

29. The Appellant also submitted that the lower Court was wrong in finding that the Respondent had suffered fractures on tibia and fibula. He argued that the Respondent did not prove these injuries because there was a discrepancy between the medical report and the P3 Form. Although the P3 Form did not indicate injuries on the upper and lower limbs, a subsequent medical report indicated that the Respondent had suffered fractures on the tibia and fibula.

30. Courts have justified possible discrepancies between medical reports and P3 Forms. They have held that a medical report is usually more detailed because it is made after all examination is done and after full treatment, unlike a P3 Form that is purely filed for assessment of the degree of injury. This observation was made in *Katheri Dairy Co-op. Society & another v M’marete M’guatu* [2014] eKLR, where the Court held;

“This should be noted in P3 form the injuries indicated in most of the time are not detailed as P3 Form is made before final examination of the patient and that detailed medical report that is made in the medical report. The medical report is usually detailed as it is made after all examination is done and after full treatment. Its purpose is to enable assessment of damages that can be awarded as opposed to P3 Form which is purely for assessment of the degree of injury to determine the nature of criminal charge to be preferred”.

31. Based on the foregoing, I find no reasons to fault the lower Court for preferring to rely on Dr. Gituura’s medical report over the P3 Form. I find that the Respondent proved, on a balance of probabilities, that he sustained fractures on tibia and fibula.

Whether the award of Kshs.900,000/= for General Damages was a reasonable estimate

32. Based on the above analysis, the Respondent sustained the following injuries; a fracture of the left clavide, fractures of tibia and fibula, and soft tissue injuries. The soft tissue injuries included deep laceration on the left gluteal region, multiple abrasions, bruises and lacerations on both forearms,



dorsum of both hands and both legs. He also sustained mild head injury (concussion) and blunt chest trauma (no visceral injuries). I also note that the first medical report assessed permanent incapacity at 10% while the second medical report did not find any permanent incapacitation. The average of the two reports is 5%.

33. I have relooked at comparable cases where parties sustained similar injuries like the Respondent in this case. I, however, find no reasons to disturb the lower Court's award for General Damages.
34. The other lower Court's awards are hereby upheld, i.e the award for Future Medical Expenses and the award for Special Damages. A perusal of the record and the exhibits confirms that they were well pleaded and proved. The Respondent's claim for Loss of Earnings and Loss of Earning Capacity is also declined for want of proof.

Disposition

35. The Appellant's Memorandum of Appeal is hereby dismissed.
36. The Respondent's Memorandum of Cross Appeal is also dismissed.
37. No order as to costs of this Appeal.
38. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 16TH DAY OF DECEMBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Sandi Advocate for Respondent

Ms Wangu Advocate for Appellant

