



**Eliua v Nzangani (Civil Appeal 150 of 2022)
[2024] KEHC 15660 (KLR) (9 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 150 OF 2022
MW MUIGAI, J
DECEMBER 9, 2024**

BETWEEN

SNOW MBULA ELIUA APPELLANT

AND

WINNIE NTHOKI NZANGANI RESPONDENT

*(Being an appeal from the Judgment of the Honourable Court
delivered on 27th October, 2022 at the Principal Magistrate Court at
Machakos by Honourable Anne Nyoike (P.M) in CMCC E 18 of 2022)*

JUDGMENT

Trial Court Record

1. The cause of action arose on 16.10.2020 at 6.00pm along Machakos- Nairobi road around Red Cross area whilst lawfully travelling as a fare paying passenger in motor vehicle registration KBW 028X when the driver negligently and carelessly caused it to veer off its lawful course and hit motor vehicle registration KCC 565U thereby causing a road accident and as a result, the Respondent sustained the following serious injuries;
 - a. Blunt injury right shoulder
 - b. Blunt injury left shoulder
 - c. Blunt injury to right and left pelvis
 - d. Blunt injury right leg
2. The Plaintiff sought general damages for pain, suffering and loss of amenities, special damages in the sum of Kshs 9,950 , costs and interest.



3. The Defendant filed a defence stated 16.03.2021 denying the contents of the Plaintiff and sought to have the Plaintiff dismissed with costs. The Defendant averred that if the accident occurred then it was because of the negligence of the Plaintiff.

Hearing

4. The Plaintiff called three witnesses.
5. PW1 was PC Gideon Cheptile who stated that the accident occurred on 16/10/2020 at around 1755 hours at Machakos Boys on the Machakos- Kyumvi road involving KCC 656 Toyota Prado being driven by Pius Musyoka Wambua and another registration no KBW 028X Toyota Matatu. He stated that the former vehicle was heading towards Nairobi when at the scene, it was rammed from the rear by the latter which was also heading towards Nairobi and as a result, passengers sustained injuries including Winnie Nthoki. He stated that as per the abstract, KBW 028X was to blame. He produced the police abstract and a payment voucher for Kshs 5,000 and stated that investigations were still pending.
6. Upon cross examination, he stated that the investigation officer is PC Ouma and was attending to other duties. He stated that he did not visit the scene. He did not know if the driver was charged. He stated that the investigating officer indicated motor vehicle KBW 028X was to blame.
7. PW2 stated that on 16.10.2020 she was heading to Nairobi when the vehicle she was in was hit from behind by KBW 028 and they were helped by good Samaritans and taken to Machakos Level 5. She conducted search on ownership of the vehicle. She produced the following documents;
 - a. P3 FORM
 - b. Treatment notes
 - c. Copy of records
 - d. Demand letter
 - e. Notice to insurance
 - f. receipts
8. In cross examination, she stated that she was seated on the front seat. She said the vehicle was at a high speed and she did not look at the speedometer. She stated that she did not avail other witnesses but there were other passengers in the vehicle.
9. In re- examination, she stated that she reported to the police after treatment, even the P3 was filed later.
10. PW3 was DR. John Mutunga who produced the medical report of PW1 whom he stated that he examined on 17.11.2020 and relied on the treatment notes and ID card. He stated that she was involved in a road traffic accident on 16.10.2020 along Machakos- Nairobi road and sustained injured on the shoulder blunt, blunt injury on the pelvis, blunt injury to the right leg. That she was treated as out patient, given pain killers and an abdomen scan revealed no internal injuries and healing anticipated gradually.
11. He stated that at the time of examination, she had pain on the shoulder as the complaint. He concluded that she suffered severe soft tissue injuries where healing was anticipated gradually. He also produced his payment voucher and a receipt of Kshs 5,000.



12. Upon cross examination, he stated that the drugs administered were pain killers only and that complete healing is anticipated for such injuries.
13. The Defence did not call any witness.

Trial Court Judgment

14. The Trial Court delivered judgment on 27.10.2022 and found as follows;
 - a. Liability apportioned at 100% in favour of the Plaintiff as against the Defendant
 - b. Damages for pain, suffering and loss of amenities awarded at Kshs 300,000
 - c. Special damages are awarded at Kshs 7150
 - d. Costs and interest to the Plaintiff

The Appeal

15. Dissatisfied by the Trial Court judgment, the Appellant filed a memorandum of appeal dated 02.11.2022 seeking to have the judgment set aside and be assessed afresh. The Appellant also sought for costs of the appeal. The same was premised on the ground that;
 - a. The learned Trial Magistrate erred in law and fact by deliberately failing to consider the submissions of the Appellant that were dated 08th July ,2022 thereby erroneously arriving at a wrong decision.
 - b. The learned Trial Magistrate erred in law and fact in awarding judgment on general damages of Kshs 300,000, Special damages of Kshs 7,150 subject to liability apportionment of 100% plus costs and interest at court rates for soft tissue injuries and in total disregard of the submissions of the defendant on the issue of quantum
 - c. That as a result of the wrong computation, the Honourable Trial Magistrate awarded the Plaintiff/Respondent an award that was too high.

Submissions

16. The Appellant filed submissions dated 15.09.2024 and submitted on quantum. It was contended that the award of Kshs 300,000 would be substituted with a sum of between Kshs 50,000 and Kshs 100,000. He also prayed for costs. Reliance was placed on the cases of Power Lighting Company Limited & Another versus Zakayo Saitoti Naingola & Another [2008] e KLR, Ndungu Dennis vs Ann Wangari Ndrangu & Another [2018] e KLR and Eva Karemi & 5 others vs Koskei Kieng & Another[2020] e KLR.
17. The Respondent filed submissions dated 20.03.2024 and submitted that the evidence produced was not controverted and that the Appellant was rightfully held liable for the accident and liability was apportioned at 100%. It was submitted that the evidence of one Dr. Mutunga was unchallenged. Further, that the Respondent was subjected to second medical examination by the Appellants doctor which report confirmed the injuries. It was submitted that the award was sufficient given the nature of injuries and the inflationary trends. Reliance was placed on the case of Shaneebal Limited vs County Government of Machakos [2018] e KLR
18. It was submitted that the award of Kshs 9,950 for special damages was pleaded and proved. The Respondent also prayed for costs of the Appeal.



Determination

19. This Court considered the Trial Court record, the submissions of the parties and the evidence of record and the issue that arises is whether the award of quantum should be tampered with and reduced as it was/is too high.
20. This being the first appeal, Section 78 of the [Civil Procedure Act](#) the Court is to re-evaluate the evidence tendered before the Trial Court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified.
21. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.
22. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:-Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
23. Special damages, liability, costs and interest are not contested. It is not contested that the Respondent sustained the following injuries;
 - a. Blunt injury right shoulder
 - b. Blunt injury left shoulder
 - c. Blunt injury to right and left pelvis
 - d. Blunt injury right leg
24. It is noted that the Respondent was subjected to 2nd Medical Report by the Appellant and there was no controversy on the injuries sustained before the Trial Court.
25. In *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in [Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997](#) held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the [Evidence Act](#) are clear that he who asserts or pleads must support the same by way of evidence.”
26. The Trial Court awarded Kshs 300,000 as damages for pain, suffering and loss of amenities. For this Court to interfere with the award the principles elucidated by the Court of Appeal in the case of Kenya



Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000; the court held thus:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”(Emphasis added)

27. In this appeal, I note that the cases cited by the Appellant were not placed before the Trial Court for consideration, did not file any submissions as per the Trial Court file yet all exhibits including medical reports are in the Court file. The Record of Appeal includes written submissions by Defendant stamped 13 /6 2022 Machakos Law Courts.

28. This court can only consider what was placed before the Trial court. There is no other ground that has been proved before this court.

29. Be that as it may the Plaintiff relied on cases on quantum ;

Catherine Wanjiru Kingori & Anor vs Gibson Gichumbi [2005] eKLR award of Ksh 300,000/- for injury on left ankle legs and chest

Francis Ochieng & Anor Alice Kajimba (2015) Ksh 350,000/- for Plaintiff who suffered multiple soft tissue injuries.

The Defendant relied on the following;

[Ogembo Tea Factory Co Ltd vs Josphath Orege HCCA 82 of 2011](#) the injuries were bruises contusions on the neck shoulders back & upper arm

Samwel Mburu N Ngaari & 4 Others vs Wangiki & Christopher Kimani Karuma 2014 eKLR the 4th plaintiff was awarded Ksh 50,000/- for soft tissue injuries

Eastern Produce Ltd vs Mamboleo Khamadi 2015 eKLR Court awarded Ksh 120,000/- for cut finger right middle finger High Court reduced award to Ksh 50,000/-

Kipkere Ltd vs Peterson Ondieki Tai 92016) eKLR the Trial Court awarded Ksh 100,000/- for deep cut wound on the left leg, chest contusion and bruises on left shoulder. The High Court reduced to Ksh 30,000/-

Neelam Mansuklal Shah & Others vs Duncan Linscott 2004 eKLR awarded Ksh 50,000/- for Plaintiffs who sustained soft tissue injuries

Odongo vs Mokaya 2004 eKLR Plaintiff awarded Ksh 50,000/- for sustaining several soft tissue injuries including loosening of the 2 teeth cut lower lip injuries on chest and lower limbs.

30. The Appellant stated that the written submissions were not considered. I have outlined cases cited by both parties and the Trial Court I it's judgment relied on cases;

Lim vs Camden HA 1980 AC 174 on the fact that law seeks to indemnify the victim for loss suffered not to punish the tortfeasor for injury caused. Dickson Ndungu vs Theresia Otieno & 4 Others 2014 eKLR for an award of Ksh 250,000/- for soft tissue injuries



which produced no complains and was reviewed to Ksh 127,500/- Inflationary trends and maintaining uniformity the award was Ksh 300,000/- general damages.

31. Each case is determined by its own peculiar facts. The cases cited some were over 10 -20 years ago and inflationary trends up surged upwards medical care costs more than what it was years ago, I find the assessment of damages reasonable in the circumstances.
32. The Trial Court reached its own decision based on separate case-law from both Plaintiff & Defendant. In the end, the Appeal does not succeed and the same is dismissed with costs to the Respondent. It is so ordered.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 9/12/2024 IN MACHAKOS HIGH COURT. (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In the presence of:

Ms Mulundu For Respondent

Kimondo Gachoka For Appellant

Geoffrey – Court Assistant

