



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.96 OF 2019**

**BETWEEN**

**STEPHEN CHARLES MOSONGO.....APPELLANT**

**AND**

**JACOB ABOK NYAJONG.....RESPONDENT**

*(Being an Appeal from the judgment in Oyugis Principal Magistrate's*

*PMCC No. 41 of 2019 by Hon. J.P. Nandi –Principal Magistrate).*

**JUDGMENT**

1. Stephen Charles Mosongo, the appellant herein, was the defendant in Oyugis Principal Magistrate's PMCC No. 41 of 2019. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCS 982S owned by the defendant and motor cycle registration number GKB 038P. The respondent was aboard the motor cycle registration number GKB 038P. He sustained injuries for which he sued. The learned trial magistrate delivered judgment dated 30<sup>th</sup> October, 2019. He held the appellant 100% liable and made an award of Kshs. 350, 000 in general damages in favour of the respondent.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Omay & Company advocates. He raised four grounds of appeal as follows:

- a) That the learned trial magistrate proceeded on wrong principle in assessing and awarding general damages thereby arriving at an inordinately high award.
- b) That the learned trial magistrate misdirected himself by failing to appreciate the evidence in totality thereby failing to apportion liability accordingly between the appellant and the respondent as he ought to have done as a consequence whereof he found 100% against the appellant in liability.
- c) That the judgment was against the weight of evidence.
- d) That the learned trial magistrate totally ignored the submissions of the appellant as well as the appellant's evidence and did not make use of them in arriving at his judgment.

3. The appeal was opposed by the respondent through the firm of Khan & Associates Advocates.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. Though submissions have their place in the trial process, it is important to understand the role they play without parties elevating them to the level of evidence. In the case of **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** Mwera J (as he then was) on the issue of submissions expressed himself as follows:

**Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.**

I do not need to add anything else on this issue.

6. Both parties admitted that the complained of road traffic accident occurred on the material date. They however disagreed on the manner it occurred and therefore what liability if any was to be apportioned to each party.

7. According to the respondent, it was the appellant to blame for the accident. According to the respondent (PW3) the appellant's lorry emerged from the bush and joined the road he was travelling and hit the motor cycle registration number GKB 038P from behind. He was the rider. He sustained injuries. During cross examination, the only questions that were put to him were whether he had a valid riding license and his state of recovery.

8. In the pleadings, the appellant blamed the respondent for the accident and alleged that he was drunk and was therefore the author of the accident. The appellant did not testify and did not call any witness. It is trite law that pleadings are not evidence and no finding can be based on unproved averment. In **CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J** (as he then was) expressed himself as follows:

**Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.**

9. The evidence of the respondent on how the accident occurred was uncontroverted. The learned trial magistrate was therefore justified to find the appellant 100% liable for the accident.

10. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

**...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded**

**on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.**

11. The appellant contends that the award of Kshs. 350, 000 in favour of the respondent was inordinately high. He contended that an award of Kshs. 100, 000 would have been adequate compensation.

12. The respondent sustained the following injuries:

- a) Bruises on the left elbow;
- b) Bruises on the left hand;
- c) Laceration on the left hand; and
- d) Blunt trauma to the right ankle.

13. Dr. Morebu Peter Momanyi was of the opinion that these injuries were severe and were in the process of healing.

14. I have looked at the authorities relied upon by both parties in the trial court while urging their respective positions on quantum vis-à-vis the injuries sustained by the respondent herein. I am persuaded to reduce the award in general damages. I accordingly set aside the award of Kshs. 350, 000 general damages and substitute it with an award of Kshs. 250,000. There was no issue with special damages that was raised.

15. Since the appeal has partially succeeded, the respondent will bear half the costs in court.

**DELIVERED and SIGNED at HOMA BAY this 12<sup>th</sup> day of October, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**