Kivui v Nzau (Civil Appeal 110 of 2018)
[2021] KEHC 256 (KLR) (11 November 2021) (Judgment)

Neutral citation: [2021] KEHC 256 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 110 OF 2018

MW MUIGAI, J

NOVEMBER 11, 2021

BETWEEN

JOHN KIVUI .... APPELLANT

AND

PAUL MULANDI NZAU .... RESPONDENT

(An appeal from judgement and decree of the Senior Principal Magistrate's Court of Kenya at Kangundo (Hon. D.Orimba) delivered on the 25 th day of July, 2018)

JUDGMENT

BACKGROUND

1. By a Plaint dated 29th July, 2014, on 17th July 2014, at 10 pm at Wethanga River, the Defendant's driver carelessly/negligently drove and/or controlled motor vehicle Reg KBW 951W Isuzu Lorry and suddenly reversed without due care and attention and knocked the Plaintiff who was loading sand in the said motor vehicle and he sustained serious bodily injuries.

2. The plaintiff/Respondent sought general damages for pain, suffering and loss of amenities, special damages of Kshs.9, 055/= plus costs and interest of the suit against the Appellant.

3. In his defense, the Appellant filed his statement of defense dated 5th July, 2016. The Appellant admitted that the accident occurred on 17th July, 2014. The Appellant denied particulars of negligence. According to the Appellant, the Respondent while in drunken stupor carelessly and recklessly attempted to board the suit motor vehicle which was in motion.

4. The Respondent filed a reply to the statement of defence dated 6th July, 2015 to reiterate the averments contained in the Plaint.

EVIDENCE

5. PW1, Dr. James Muoki stated that he saw the Respondent on 29th January, 2015 for purposes of preparing the report. He stated that the Respondent was treated at Kangundo for left midal ankle wound 7cm, open fracture on the left tibia and cut wounds on the right ankles. According to PW1, the Respondent complained of pain on the right leg. He was not able to walk. He was limping. There were scars on both legs. The left leg appeared deformed and tender. According to PW1, the injury were severe.

6. PW1 stated that he relied on the x-ray, P3 Form and treatment notes. He recommended for physiotherapy and treatment notes. PW1charged Kshs.3, 000/- for the report and Kshs.10, 000/- for court attendance. He produced the medical report as exhibit 1(a), receipt as 1(b) and 1(c) respectively.

7. In cross-examination by Mr.Atonga, PW1 confirmed that he examined the patient on 29th January 2015. He stated that there was typing error in the report. He confirmed that there was a left leg deformity. According to PW1, he relied on the P3 Form, treatment notes and history given by the patient. In re-examination, he stated that he examined the patient on 29th January 2015 and that there was mistake in the date.

8. PW2, No.84370 PC Osoro Michael Abel stated that on 17th July, 2014 a report was made at Kangundo Traffic Division that motor vehicle KBW 951Z Isuzu Lorry which was fetching sand at the river reversed and knocked down a pedestrian who was loading the sand. As a result of the accident, the pedestrian sustained fracture on the left ankle and bruises on the right leg. According to PW2, the investigations are pending. He stated that the information in the OB corresponds with the police abstract. He produced the OB. He stated that he was paid Kshs.5,000/- to attend court. He produced the police abstract as exhibit 2(a) and payment voucher as exhibit 2(b).

9. In cross-examination by Mr.Atonga, PW2 stated that he was not the Investigating Officer neither was he at the scene. According to PW2, the accident occurred at midnight. He stated that the driver of the motor vehicle is not indicated. The investigations are ongoing and nobody has been blamed.

10. PW3, Paul Mulandi Nzau adopted his witness statement dated 2nd July, 2015 as his evidence. He stated that it was on 17th July, 2014. The motor vehicle was No. KBW 951Z. He sustained injuries on the left leg and right. On the left leg he sustained a fracture and a wound. He stated that his right leg ankle was also injured. He produced treatment notes as exhibit 3 from Kangundo.

11. PW3 produced expenses receipt of Kshs. 4,555 as exhibit 4, P3 Form and receipt of Kshs.1, 000/- as exhibit 5(a) and 5(b), Dr. Maina report as exhibit 6. He stated that he paid Dr. James Muoki Kshs.3, 000/-. He did a motor vehicle search which he produced as exhibit 7(a) and receipt of Kshs.500/- as 7(b). He stated that the Appellant was notified vide a demand letter dated 15th January 2017. A copy of the demand and certificate of postage were produced as exhibit 8(a) and (b).

12. According to PW3, he had not fully recovered. He still had pain on his left leg. He asked for compensation for pain and suffering plus costs of the suit. He blamed the Defendant for causing the accident. According to PW3, the driver was not careful as he did not warn him before reversing.

13. In cross-examination by Mr.Atonga, PW3 stated that the accident occurred at midnight. It was not the first time that he was loading a lorry. According to PW3, he was behind the motor vehicle and did not see the driver reversing. It was not over speeding. He stated that John Kivui was the owner of the motor vehicle. He restated that he paid Kshs.1, 000 to obtain the P3 Form. He asserted that he was not drunk since he does not consume alcohol.

14. PW3 stated that he was not admitted. According to PW3, his left ankle was cut and sustained a fracture on the left leg. He stated that the motor vehicle lights were not on.

15. DW1, John Kimani Kivui, relied on his witness statement recorded on 6th February 2018. In cross-examination by Mr.Macharia, DW1 admitted to be the owner of motor vehicle No. KBW 951Z. He confirmed that Dennis was his driver. He stated that he was not aboard the motor vehicle neither did he witness the accident. He stated that he could not say anything about the accident since he was only called and informed of the accident by his driver. DW1 stated that he could only confirm motor vehicle ownership.

16. In his judgment, the Trial Magistrate found the Respondent would have been a bit careful to avoid the accident. He was also to blame for the accident. The Trial Magistrate apportioned liability at the ratio of 90:10 in favor of the Respondent.

17. On quantum, the Trial Magistrate awarded general damages of Kshs.700, 000/- less 10% (Kshs.630, 000/-) and special damages of Kshs.24, 055/-. The total award was Kshs.654, 055/- plus costs of the suit and interest.

THE APPEAL

18. In this appeal, the cited grounds are as follows :-

    (1) THAT the learned trial magistrate erred in law and in fact in failing to consider material evidence clearly demonstrating that the Respondent had not proved their claim on a balance of probabilities.

    (2) THAT the learned trial magistrate erred in law and in fact and misdirected himself by finding the Appellant 90% liable and disregarding evidence on record demonstrating that the Respondent largely contributed to the said accident.

    (3) THAT the Honorable trial court erred in law and in fact in failing to apportion a higher degree of liability on the Respondent given the facts and circumstances surrounding the accident in question.

    (4) THAT the Honorable learned trial magistrate erred in law by giving an inordinately high and manifestly excessive award unsupported by law so as to amount to an erroneous award in the circumstances of the case.

    (5) THAT the learned trial magistrate erred in law and fact by taking into account irrelevant considerations/factors while awarding general and special damages.

    (6) THE Honorable learned trial magistrate further erred in law and fact by failing to appreciate, consider and take into account the Appellant's submissions on liability and the quantum awardable.

    (7) THE Honorable learned trial magistrate erred by making a decision on liability and quantum that was erroneous, without proper basis and against the weight of evidence.

19. The Appellant urged this court to quash the award on liability and quantum in its entirety.

SUBMISSIONS

20. On behalf of the Appellant, it is submitted that none of the particulars of negligence in the Plaint were proved. Reliance is placed on the case of *Peter Kanithi Kimunya vs. Aden Guyo Haro* [2014] eKLR. It is submitted that according to DW1, the driver had informed him that the Respondent had

fallen off the lorry while trying to board it. Reliance is placed on case of *Ndeto Nzioka Isavi(Suing as Legal Representative of the Estate of Kyuma Ndeto Singi(Deceased) vs. Abednego Muiwa Juma & Another*[2019]eKLR and in *Richard Shikuku vs. Rose Namalwa Masinde sued as the Legal Representative of Cleophas Wanyongo (Deceased)*[2017]eKLR with similar facts to the instant case.

21. As to whether the general damages of Kshs.700, 000/- was inordinately high and manifestly excessive, it is submitted that an award of Kshs.250, 000/- would suffice. Reliance is placed on the cases of *Samuel Ndirangu vs. Lucy Wambui Wachira* [2013] eKLR whereto court awarded Kshs.380,000/- for fracture of the right radial ulna and dislocation of the right hip joint. In *Maselus Eric Atieno vs. United Services Limited*[2017]eKLR an award of Kshs.250,000/- was awarded for fractures of the right leg tibia/fibula bones, bruises on the right elbow joint, tenderness and swelling on the right knee, injury on the pelvic region, injury on the right thigh, injury on the right elbow joint and pain on the abdomen. According to the Appellant the award was inordinately high.

22. On behalf of the Respondent, it is submitted that the Respondent never jumped off a motor vehicle but was knocked by the Appellant's motor vehicle that was reversing as per PW2. Accordingly, PW2 evidence was corroborated by the PW3. As regards quantum, it is submitted that the award was very minimal bearing the current court awards for similar injuries. The Respondent also placed reliance on other 6 court decision. The Respondent urged this court to dismiss the appeal for lack of merit and uphold the judgement.

DETERMINATION

23. I have considered the written submissions filed on behalf of the respective parties.

24. This being the first appellate court, its duty is well expressed in *Selle vs. Associated Motor Boat Co* [1986] EA 123 where court held as follows:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

25. In this appeal the Appellant is challenging both liability and quantum awarded by the Trial Magistrate. It is not in dispute that the Appellant was the owner of motor vehicle registration number KBW 951Z and that the driver called Dennis worked for him. It is also not disputed that the Appellant was not at the scene of the accident. The accident is not disputed.

26. This being a negligence claim against Appellant, the standard of proof required is on balance of probabilities hence the two issue for determination are namely; whether the Appellant proved his case on a balance of probabilities .

27. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:-

> " Denning J, in Miller vs. Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

28. According to Kimaru J. in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 stated that:-

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

29. 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.

30. Once the Plaintiff discharges the legal burden of proof, the burden is then shifted to the Defendant to adduce evidence against the Plaintiff's claims. This burden is well captured under Sections 109 and 112 of the same Act.

31. The Court of Appeal's position in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR espouses the correct legal position that:

> " ....The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

32. It follows therefore that despite the absence of the defendant in court to testify, the burden of proof in civil case will not change.

LIABILITY

33. The court in *Khambi & Another vs. Mahithi and Another* [1968] EA 70, 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”

34. In his submission, the Appellant contends that the particulars of negligence were not proved. The particulars of offence being that the driver drove at a speed that was excessive, failed to slow down, brake, swerve and/or stop, failed to exercise due and reasonable care, drove carelessly and dangerously, failed to take proper look out and causing the accident.

35. According to the Appellant, the Respondent attempted to jump onto the suit motor vehicle but lost grip and fell hence the author of his own misfortune. According to the Respondent, the driver suddenly and abruptly reversed the suit motor vehicle without due care and attention.

36. The court has perused the court proceedings. It will be noted that PW3 oral evidence is corroborated by PW2. PW3 stated that he was behind the lorry loading sand on the suit motor vehicle. According to PW2, the report made to them was that the suit motor vehicle knocked the loader while reversing. PW2 and PW3 stated that it was at midnight when the suit motor vehicle was used for fetching sand at the river.

37. The court notes that the driver of the suit motor vehicle did not testify. According to DW1 he was informed about the accident by his driver. DW1 admitted that he did not witness the accident. It therefore means that his particulars of negligence pleaded in his defense against the Respondent remain as mere allegations. The driver who was present at the scene of the accident did not testify in court.

38. In his Plaint, the Respondent placed reliance on the doctrine of res ipsa loquitor. The Appellant denied its applicability.

39. I associate myself with the Court of Appeal decision in *Margaret Waithera Maina vs. Michael K. Kimaru* [2017] eKLR where the court invoked the doctrine of Res ipsa loquitur as follows:

> “ This is a case where the doctrine of Res Ipsa Loquitor applies. In Mukusa vs. Singa & Others (1969) E. A 442, it was held that for the doctrine to apply there must be reasonable evidence of negligence but where the thing is shown to be under the management of defendant or his servants and the accident in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care”.
>
> “It is worth noting that the driver of motor vehicle registration number KBA 917Q was not a party in this suit and therefore the enumeration of the particulars of negligence by the defendant was in vain. If the defendant's driver was not negligent as suggested then the defendant ought to have instituted 3rd party proceedings against the driver of motor vehicle registration No. KBA 917Q (See Esther Michele vs. Merahia Nduta) H.C.C.C No. 303 of 1991 in Nairobi.
>
> A perusal of the court file shows that the defendant filed some documents to initiate 3rd party proceedings but apparently abandoned the same. In the absence of such proceedings, I find the defendant 100% liable.”

40. The Court finds that the Appellant’s driver was entirely to blame for the accident. The Respondent’s evidence is plausible there being no explanation from the Appellant’s driver who did not testify in court nor were any reasons advanced for the trial court to consider.

41. The maxim 'He who alleges must prove'; has not been applied by the Appellant, it is not denied that the subject motor vehicle was involved in an accident and the Plaintiff/Respondent was injured. The Plaintiff, PW3 testified and relied on his statement. However, in cross- examination by Mr. Atonga for the Defendant, he stated that the accident occurred at midnight at the river and it was not the 1st time to load the lorry and he did not see the driver reversing. He was injured and he was not drunk he did not use alcohol. The plaintiff's version was not controverted by direct evidence on how the accident occurred. In the absence of the driver's testimony, the driver is held liable for the accident.

42. The court notes that, according to the police abstract the case was still under investigation (P.U.I). PW2 stated that no one was blamed for the accident. According to PW2, it was 4 years since the accident occurred. PW2 confirmed that he was not the investigating officer hence he did not witness the accident. It is clear that it was now the Respondent's case against the Appellant case. The matter remained pending as the driver's absence is unexplained.

43. The Appellant's driver did not testify but the court also notes that the Respondent (PW3) stated that the suit motor vehicle was not over speeding. PW3 stated that he was not drunk and does not use alcohol. The court notes that PW2 and PW3 stated that it was at midnight, in court's view the Respondent ought to have exercised some care to avoid the accident. In his oral testimony he never stated what measures he applied to avoid being hit by the suit motor vehicle.

44. The court finds that the Trial Magistrate apportionment of liability at 10% to the Respondent was reasonable in the circumstances. The challenge on liability fails.

QUANTUM

45. On quantum awarded, the Trial Magistrate found Kshs.700, 000/- to be adequate compensation. The Appellant has asked this court to interfere with the award. According to the Appellant the Respondent had completely healed and had not suffered any form of deformity.

46. The Court of Appeal in *[Catholic Diocese of Kisumu vs. Sophia Achieng Tete](https://new.kenyalaw.org)* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

47. The Court shall reconsider the evidence placed before the Trial Court in support of the claim for quantum. The particulars of injuries pleaded were; left medial ankle wound, compound fracture of the left distal tibia and cut on the right lateral ankle. Dr. James Muoki (PW1), confirmed the same injuries and when he saw the Respondent 5 months later, He added that the Respondent was not able to walk for long distance and was limping. According to PW1, the left leg appeared deformed and tender. PW1 opined in his report dated 29th January, 2015 that the Respondent sustained a fracture on his left leg and cut wounds. The doctor recommended for physiotherapy and analgesics. According to PW1, the degree of injury was grievous harm.

48. The Court notes that the medical report dated 27th June, 2017 of Dr. Maina Ruga was produced by the Respondent as Exhibit 6 without objection from the Appellant but notes that the same was not part of the list of documents filed in court. According to Dr. Maina, the Respondent suffered severe harm having sustained a compound fracture on the left tibia distal third with open wounds on the leg. In his conclusion, the doctor opined that the wounds had healed leaving scars and the fracture had healed well.

49. The Appellant contends that Dr. Maina Ruga found that the Respondent sustained a compound fracture of the left distal tibia. According to the Appellant, the doctor found no deformity on the left leg or tenderness. The Court notes that PW1examined the Respondent 6 months after the accident while Dr. Maina Ruga after 2 years. According to Dr. Maina, the Respondent walked normally. The Court's view is that there was a possibility that the Respondent's injuries had healed. However, the Court notes that Dr. Maina Ruga was not cross examined on his findings since he did not attend court unlike Dr. James Muoki who testified as PW1 and was cross examined.

50. The Court notes that both doctors describe the injuries as grievous harm. The Respondent complained about pain on the left leg. According to the treatments notes from Kangundo District Hospital, the Respondent sustained a deep cut wound on the left leg as well as a small cut on the right leg. Both doctors saw scars on the legs. Both doctors agree that the Respondent sustained a fracture but none of the doctor assessed the degree of disability on the legs.

51. According to Dr. Maina the residual pain will subside gradually. The Court notes that PW1 recommended physiotherapy and analgesics. In his witness statement, the Respondent stated that he was treated and discharged without patients' appointments although I note that the treatment notes from Kangundo District Hospital indicate that the Respondent visited the hospital on different dates.

52. Before the trial court, the Appellant proposed an award of Kshs. 250,000/- while the Respondent proposed Kshs. 1,200,000/- for general damages. The Court has considered the court decisions relied on by the Appellant. In *Samuel Ndirangu Nganga vs. Lucy Wambui Wachira* [2013] eKLR the Plaintiff sustained fracture right radial-ulna and dislocation of the right hip joint and a degree of permanent incapacity of the right radius at 2%. The Appellate court noted that the Plaintiff was not hospitalized, the permanent disability was not significant. The court reduced the award to Kshs.250, 000/-. In *Maselus Eric Atieno vs. Unitel Services Ltd* [2017] eKLR the Plaintiff sustained similar injuries to the Respondent herein but with other injuries on the elbow, abdomen, right knee, thigh and pelvic region. The court upheld an award of Kshs. 250,000/-. The court note that the Plaintiff suffered no residual or long term disability.

53. The Court's view is that majority of the decisions relied on by the Respondent established more severe injuries and different injuries to the injuries sustained by the Respondent. In *Patrick Kamunya & Another vs. Asapn Gatundu Wanjiku* [2016] eKLR the Plaintiff suffered a closed fracture of the tibia bone of the right leg and limb, lost, broken and blunt injury on the 1st and 2nd incisor teeth. The fracture was fixed with a plate and screws. The Appellate court upheld an award of Kshs.500, 000/-.

54. In the case of *Westch & Sons Ltd vs. Shepard* (1964) A.C AT P.G stated thus:

> "But money cannot renew a physical frame that has been battered and shattered. All that judges and court can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent award must be reasonable and must be assessed with moderation. Further, it is eminently desirable that so far as possible

comparable injuries should be compensated by comparable award. When all this is said it still must be that amount which is awarded are to a considerable extent conventional."

55. It follows therefore that comparable injuries attract comparable award. The Court's view is that the decision of *Maselus Eric Atieno vs. Unitel Services Ltd (supra)* establish similar injuries. Both the doctors found no long-term disability suffered by the Respondent. The Court finds that Kshs.700, 000/- was inordinately high but also the Appellant's proposal of Kshs.250, 000/- was not too low for such injuries noting that the Respondent was not admitted at the hospital and the doctors did not assess any long-term disability.

56. In assessing damages, an element of inflation should be factored in as well as the purchasing power of Kenya shilling at the time of the judgment Maselus Eric Atieno vs. Unitel Services Ltd (supra).

57. The award of Kshs. 700,000/- is set aside and substituted with an award of Kshs.400, 000/- as reasonable compensation.

58. As regards the award of Kshs.24, 055/- as special damages, the Court finds no reason to interfere with the award since the Appellant has not submitted on the award despite the challenge being one of the grounds of appeal. Section 107 of the *Evidence Act* is clear that whoever alleges a fact, must prove the fact. The Court is satisfied that the receipts were produced in support of the special damages.

59. In the result, the Trial Court's judgment on liability is upheld while the award on general damages is set aside and reduced.

DISPOSITION

60. Accordingly, the Court enters judgment as follows:

    a. General damages for Pain, Suffering and loss of amenities Kshs. 400,000/-

    b. Special damages Kshs. 24,055/-

    Less 10% liability Kshs. 424,055/-

    Total award Kshs. 381,649.5/-

61. The appeal succeeds partly on quantum only, liability remains at 90/10. The court will award half of the costs of the appeal to the Appellant. The Respondent will have full costs of the lower court.

62. The general damages shall attract interest at court rates from the date of the judgement of the lower court while special damage will attract interest from the date of filing the suit.

Judgement accordingly.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF NOVEMBER 2021. (VIRTUAL CONFERENCE)

M.W MUIGAI

JUDGE

<u>IN THE PRESENCE OF:</u>

Mr. Mathini holding brief Mr. Maluki - for the Appellant

Mr. Kilonzo - for the Respondent

Geoffrey - Court Assistant