

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. E023 OF 2020

VINCENT MUHINI.....APPELLANT

VERSUS

FLORENCE CHEROP CHEPKWONY.....RESPONDENT

*(Being an appeal from judgement and decree of the Hon. E.Soita (RM) in Molo
CMCC case No. 145 of 2019 delivered on 23rd November, 2020)*

JUDGMENT

1. The background of this matter is that the Appellant herein sued the Respondent before the trial court vide a Complaint dated 21st May, 2019 where he sought judgment against the Respondent for:
 - a) **Special damages of Kshs 23,590.**
 - b) **General damages**
 - c) **Costs and interest.**
2. The claim was that on or about the 26th December, 2018, the Appellant was standing off the road at Wakarimu area along Nakuru-Eldoret Road when the Respondent by herself, her agents, driver and or servant controlled the subject motor vehicle registration number KCL 410X in such a negligent and/ or careless manner that the same lost control veered off the road and hit t him occasioning him serious bodily injuries to wit;
 - **Fracture of the Right tibia.**
 - **Cut wounds on the cervical region leading to soft tissue injuries.**
 - **Bunt injury to the head leading to soft tissue injuries.**
3. The Appellant wholly blamed the accident on the negligence of the Respondent's driver. The particulars of negligence pleaded included driving at

manifestly excessive speed, driving without due care and attention to other road users, failing to observe traffic rules and failing to brake, slow down , stop or swerve to avoid the accident and generally contributing to the accident.

4. In her defence dated 3rd September, 2019, the Respondent denied the entire claim and in particular, she denied that such accident happened or that she was the registered owner of the subject motor vehicle.
5. On without prejudice basis, she pleaded that the Appellant herein was to blame for the accident for; failing to keep to the pedestrian walk, failing to have regard to other road users, failing to walk with due care and attention, failing to move and avoid the accident, walking carelessly and dangerously on the road, entering the road without observing the kerb drill and crossing the road when it was unsafe to do so.
6. After hearing both parties, the trial court found that there were significant contradictions in the evidence by the Appellant (PW1) and his witness (PW2) concerning how and when the accident occurred. Specifically, that the PW1 did not mention that the accident occurred at night or that there was a second person involved, while the Police Officer (PW2) testified that the accident happened at 8:30 pm as the Appellant was crossing the road.
7. Based on that analysis, the trial Court concluded that, due to the contradictions and the Appellant's failure to disclose pivotal issues, it could not deduce the evidence properly to place liability on any party on a balance of probability.
8. Consequently, the trial court dismissed the entire suit with costs on the grounds that the Appellant had not proved his case to the required standard.
9. Aggrieved by that decision, the Appellant lodged this Appeal by a Memorandum of Appeal dated 17th December, 2020, raising the following grounds; -

1) The Honourable trial magistrate erred in law and fact in evaluation of evidence adduced hence arrived at a wrong

conclusion that there was a contradiction in the plaintiff's evidence when there wasn't any material contradiction.

- 2) The learned trial magistrate erred in law and fact in dismissing the appellant's suit when the appellant had proved his case on a balance of probabilities as required by Law.*
- 3) The learned trial magistrate erred in law and fact in failing to apportion liability appropriately even after holding that the court cannot deduce the evidence properly to place liability to any party on a balance of probability.*
- 4) The learned trial magistrate erred in law and fact in not considering evidence adduced in totality hence arrived at a wrong conclusion dismissing the appellant's case contrary to overwhelming evidence on record proving this case to the required standard.*
- 5) The learned trial magistrate considered irrelevant facts leading to a wrong conclusion.*
- 6) The learned trial magistrate erred in law and fact in assessing general damages that were too low to be deemed adequate compensation for the appellant.*

9. He therefore prayed that: -

- 1) The trial magistrate's finding dismissing the appellant's case be set aside.*
- 2) The respondent be held 100% to blame and or be held culpable to the extent this court may find appropriate.*
- 3) The appellant be awarded damages commensurate to injuries sustained and current awards.*
- 4) The cost of this appeal and those of the lower court be awarded to the*

appellant with interest from the date of judgment in the lower court.

10. Though directions were taken by both parties before this Court on 23rd October, 2024 in regard to filing submissions as a way of canvassing the appeal, only the Appellant complied.

Appellant's Submissions

11. On liability, it was submitted that the trial magistrate erred in dismissing the suit based on a perceived contradiction in the Appellant's evidence concerning the accident's time and the number of people involved. Pointing that the Appellant stated during cross-examination that the accident occurred at about 8:00 pm and that two people were injured, it was submitted that the difference between the 8:00 pm time given by PW1 and the 8:30 pm time noted by the police officer (PW2) was minor and likely due to the police reporting time.
12. The Appellant further submitted that the trial court ignored the Appellant's consistent testimony that he was off the road when hit, and failed to consider the evidence in totality.
13. He argued that the conflicting evidence from the Police Officer (PW2) that the Appellant was crossing the road was based on information given by the Respondent's driver (DW2), which was recorded in the Occurrence Book (OB), and was therefore a fabricated story by the driver to escape liability.
14. The Appellant asserted that during hearing, PW2 confirmed that the Respondent's driver was to blame because he hit him on the left side of the road. He argued that since the driver's statement was taken when the Appellant had been taken to the hospital, the court should have treated the OB information with caution.
15. In conclusion, the Appellant submitted that based on the ample and credible evidence, the case was proved on a balance of probabilities, and the Respondent should be held 100% to blame. To support his argument, the

Appellant cited several cases including ***Rentco East Africa Limited v Dominic Mutua Ngonzi [2021] eKLR*** which held that an appellate court should not interfere with a trial judge's apportionment of liability save in exceptional cases where there is an error in principle or the apportionment is manifestly erroneous, or if the finding is based on no evidence or a wrong principle.

16. Citing ***Selle & Another -vs- Associated Motor Boat Co. Ltd & Another (1968) EA 123*** case, the Appellant urged this Court to evaluate and re-examine the evidence on record a fresh to reach its own finding, while acknowledging it did not have the opportunity to hear or see the parties testify. He urged the Court to find the trial court's conclusion was erroneous.
17. On Quantum, the Appellant relied on the case of ***Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR***, where the court held that an appellate court will not disturb an award of general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate, or if the judge proceeded on wrong principles or misapprehended the evidence.
18. In this case, the Appellant submitted that the trial court's assessment of general damages at Kshs. 350,000/= was inordinately low and not commensurate with the injuries sustained. Reciting the injuries sustained by the Appellant, he submitted that the most appropriate award of general damages is the sum of Kshs. 850,000/=.
19. To support the proposed award, he cited the case of ***Vincent Mbogholi versus Harrison Tunje Chilyalya [2017]eEKL***R, where the High Court awarded Kshs. 500,000/= for similar injuries and the case of ***Daneva Heavy Trucks & another v Chrispine Otieno [2022] eKLR***, where the High Court awarded Kshs. 800,000/= for a fracture of the pelvis and fractures of the Tibia and fibula.

20. Based on the cited authorities, the Appellant urged this Court to allow the proposed award of Kshs. 850,000/=, putting into consideration the seriousness of their injuries and high inflation. In addition, he prayed for the award of special damages of Kshs. 23,590/= which were pleaded and proved.
21. In conclusion, the Appellant urged the Court to allow the appeal, set aside the trial magistrate's judgment, hold the Respondent 100% liable and award damages commensurate with the injuries.

Analysis and Determination

22. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced before the trial court in order to arrive at its own independent conclusion, taking into account that it did not have the advantage of seeing and hearing the witnesses as they testify. See *Selle vs. Associated Motor Boat Company Ltd [1968] EA 123*.
23. From the Memorandum of Appeal and the submissions filed, it is apparent that the broad issues for determination are on both liability and quantum.
24. With regard to liability, the Appellant (PW 1) testified that on 26th December, 2018, he was walking on the left side of the Nakuru- Eldoret highway, heading toward Salgaa. He was walking on the pedestrian walkway way near Nakuru Teachers College when motor vehicle, registration number KCL 410 X, came from behind and struck him. He blamed the driver entirely for hitting him off the road.
25. His evidence was that after the impact, the driver stopped the vehicle approximately 50 to 60 meters ahead. He also confirmed that two people were injured, and the police came to the scene and took them to hospital.
26. The police officer P.C Obadiah Amani (PW 2) of Rongai sub-county under Salgaa police post, testified that he personally did not visit the scene but based on the Occurrence Book (OB) and the Police

Abstract(Pexh-3), the accident occurred on 26th December, 2018, at around 8:30 PM and involved motor vehicle KCL 410 X.

27. It was his evidence that according to the OB, which he says was based on information received from the driver, the Appellant herein, was crossing the road from the left to the right side, when the motor vehicle, (matatu) ferrying passengers, swerved and hit the Appellant from the front left side off the road.
28. PW2 stated that though the Police Abstract did not show who was to blame, the driver is to blame as he hit the Appellant on the left side of the road. In addition, PW2 noted that skid marks suggested the vehicle was speeding, though he had no sketch plan.
29. DW 1 - Martin Omase, who was driving the shuttle, confirmed that indeed the accident occurred on 26th December, 2018, at around 8:30 PM while he was ferrying passengers from Nairobi to Kapsabet.
30. He told the trial court that he was approaching Nakuru Teachers College, while driving at 60 KPH when he saw two people besides the road. They had stopped and were facing the road. The two people abruptly started crossing the road from the left to the right side and at that moment, he applied emergency brakes, causing the vehicle to skid.
31. However, that the first person was knocked by the left head lamp. He told the court that he tried to avoid them and swerved to the left, but the accident was sudden. He blamed the pedestrian for crossing the road abruptly.
32. Upon analysing the evidence tendered, the trial court dismissed the suit on the basis that there were significant contradictions in the Appellant's testimony and that of his witness (PW2) as the two disagreed on key facts, such as the accident occurring at night (8:30 PM) and the Appellant's conduct, that is whether he was walking on the pedestrian way or crossing

the road.

33. In regard to the time when the accident occurred, this Court notes that during cross examination, the Appellant herein informed the Court that the accident occurred at around 8.00 pm and also that he was injured together with another pedestrian. Though the Police Officer stated that it occurred at 8:30 pm, that was within range and hence such was not a material contradiction. The trial court therefore erred in holding that the Appellant failed to indicate the time of the accident.
34. On how the accident occurred, the trial Court stated that it could not determine who was to blame for the accident because while the Appellant alleged to have been walking along the road, his witness informed the Court that he was trying to cross the road.
35. This Court notes that the only eye witnesses in this case were the Appellant and the driver. The Police officer(PW2) was not the investigating officer. He did not visit the scene of the accident either, and therefore, his testimony was based on the OB and the Police Abstract. He admitted during cross examination, that the information recorded on the OB was obtained from the driver of the subject motor vehicle.
36. While the Appellant herein stated that he was walking off the road on the pedestrian path, the driver confirmed that indeed he saw him standing off the road but he abruptly tried crossing the road causing his vehicle to hit him. There was no independent eye witness to this accident.
37. The evidence before the trial court was that the vehicle skidded for 50-60 meters, a fact that the driver (DW1) confirmed. The Police Officer opined that for a vehicle to have skidded for such a distance, it could have been because the driver was on high speed.
38. In addition, the police officer stated that though it was alleged that the pedestrian was trying to cross the road from the left to the right side, the

point of impact was on the left side of the road. On further examination, he stated that the accident occurred off the road. He thus blamed the driver for hitting the pedestrian on the back on the left side.

39. From that evidence, it is clear that there was no doubt that the accident did occur. What was not clear was the evidence as to who was to blame between the pedestrian and the driver. In those circumstances and this being a civil case where burden of proof is on a balance of probabilities, then liability ought to have been shared equally between the driver and the pedestrian. The trial court therefore erred in dismissing the Appellant's claim.

40. As regards quantum, both parties had made rival submissions on the same before the trial Court should the Appellant succeed on liability. On his part, the Appellant had proposed a sum of Kshs. 850,000 as general damages in both the trial court case and this Appeal. The Respondent on the other hand proposed the sum of Kshs 200,000 as general damages.

41. In its judgement, the trial court proceeded to assess the damages he would have awarded if the Appellant had succeeded on liability and as follows:-

- General damages.....Kshs. 350,000
- Special damages.....Kshs. 23,590.

42. It is settled law that an award of general damages is discretionary and that the Appellate court should be slow to interfere with such discretion. Indeed, the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)* held: -

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of

damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that: ‘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 at a figure which was either inordinately high or low.’ This is the principle enunciated in Rook v Rairrie [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that: “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 at a figure which was either inordinately high or low.”

57. On general damages, it settled that comparable injuries attract comparable awards. From the judgment, the trial court did state the basis upon which it arrived at the award of Kshs. 350,000 for the injuries sustained herein and no caselaw was cited either.
58. This Court has perused the record and noted that the Appellant sustained ;

fracture of the right tibia, cut wound of the cervical region and blunt injury to the head, both leading to soft tissue injuries. The case law cited in this appeal was the same one that the Appellant used before the trial court in support of his proposal for damages at Kshs, 850,000/=.

59. On his part, Respondent had relied on the case of ***Damaris Ombati v Moses Mogoko Levis & another [2019] eKLR*** where high Court substituted an award of Ksh.800,000 with Kshs. 300,000/=.
60. In the case of ***Jones Makori Mokaya v Beatrice Moraa Ogoro [2019] KEHC 4684 (KLR)***, the plaintiff that had sustained open fracture of the right tibia bone, deep cut wound on the forehead and stab wound on the left leg was awarded Kshs 3,000,000. However, on Appeal the amount was reduced to Kshs 600,000.
61. In ***Ochieng v Ogwang (Civil Appeal E151 of 2023) [2024] KEHC 3526***, the plaintiff who had sustained a sub-condylar tibia fracture and soft tissue injuries to the chest, wrist and knees was awarded Kshs 700,000, which was upheld upon Appeal.
62. Further in ***Andande v Esolio (Civil Appeal 190 of 2020) [2025] KEHC 14422 (KLR)***, a plaintiff who had sustained fractures of the right femur and right fibula/tibia was awarded Kshs 1,000,000 which was upheld on Appeal. These were more serious injuries than in the present case.
63. In ***Wabomba v Wanyama (Civil Appeal No. E007 of 2021) [2024] KEHC 2191 (KLR)*** the Respondent sustained soft tissue injuries, psychological trauma and fractures of the right tibia and fibula and was awarded Kshs. 800,000/= general damages, which on appeal, R.E. Ougo J found the trial court's award excessive and substituted it with an award of Kshs. 500,000/=.
64. In light of the foregoing and noting that the Appellant herein suffered

fracture of the tibia bone with several soft tissue injuries, and further taking inflation into account, this Court substitutes the award of Kshs. 350,000/- with an award of Kshs. 550,000.

65. On special damages, the Appellant had specifically pleaded Kshs. 23,590 and proved as follows:-

- Receipt of Kshs 10,000/= issued by Dr. Obed Omuyoma for the medical-legal report .
- Receipts of Kshs 10,320, Kshs. 220, Kshs 2,100, Kshs. 100, Kshs. 100 and Kshs. 200 all issued by Rift Valley PGH Nakuru.
- Invoice for Kshs. 550 paid to NTSA for the search of the subject motor vehicle.

66. There was no objection raised on the prayer for special damages. The sum is strictly proved and therefore allowed.

67. In conclusion, the trial Court's judgement delivered on 23rd November, 2020 be and is hereby set aside and substituted with judgment in favour of the Appellant as against the Respondent in the following terms:-

68. the Appeal is disposed of in the following terms: -

- 1. Liability at the ratio of 50: 50 between the parties.**
- 2. General damages of Kshs. 550,000, less 50% contributory negligence= Kshs. 275,000.**
- 3. Special damages of Kshs 23,590.**
- 4. The Appellant is awarded costs of the suit before the trial court and this Appeal together with interest at Court rates.**

Dated, signed and delivered at Nakuru this 1st Day of December, 2025.

PATRICIA GICHOHI
JUDGE

In the presence of:

Ms Kirui h/b for Mr. Mboga Appellant

Mr. Kabita for Respondent

Kamau , Court Assistant

ORIGINAL