



## **J U D G M E N T**

### **A. Introduction**

1. This Appeal arises from the judgment/decree of **Honourable E.K TOO (SPM)** delivered on the 29<sup>th</sup> day of March 2023 where he found the Appellants 100% liable for the road traffic accident, which occurred on 10.11.2017 near Shell Petrol Station along Mwiki Road and proceeded to award the respondent a sum of **Ksh.600,000/=** as General damages, **Kshs.2,750/=** as Special damages plus costs and interest of the suit.
2. The Appellant being dissatisfied by the trial courts finding on liability and quantum did file their memorandum of Appeal dated 14<sup>th</sup> April 2023 raising six (6) grounds of appeal namely: -
  - a) ***That the learned trial magistrate erred in law and fact in finding the Appellants 100% liable or to blame for the accident when the respondent had failed to discharge the burden of proof placed on him as a matter of law***
  - b) ***That the learned magistrate erred in law and in fact as the evidence adduced did***

***not support any negligence on the part of the Appellants.***

***c) That the learned magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him.***

***d) That the learned magistrate erred in law and fact in failing to consider and appreciate the submissions and judicial authorities submitted by the Appellants***

***e) That the learned magistrate erred in law and fact in awarding a sum of Kshs.600,000.00 as General damages for soft tissue injuries which was inordinately high taking into account the evidence placed before him and the judicial authorities submitted by the Appellants***

***f) That the learned trial Magistrate erred in his assessment of damages awarded to the respondent as the same was based on wrong principles and the amount arrived at was inordinately high and injustice would be occasioned.***

**3.** The Appellant herein prayed that the Appeal be allowed and the judgment of the trial court be set aside and the suit be dismissed with costs.

### **B. Facts of the case**

4. The respondent filed the primary suit, where he averred the 1<sup>st</sup> Appellant was the registered owner of Motor vehicle registration Number **KCJ 651C-Subaru (hereinafter referred to as the suit motor vehicle)** and that the 2<sup>nd</sup> Appellant was the 1<sup>st</sup> Appellants driver and/or in the alternative the beneficial owner of the said motor vehicle. That on 10.11.2017 he was lawfully walking off the road, at Shell petrol station- Mwiki, when the 2<sup>nd</sup> Appellant negligently and/or carelessly drove, controlled the suit motor vehicle that he caused the same to veer off the road, into the pavement, thereby knocking him down and as a result he sustained severe bodily injury. The respondent thus prayed that the Appellant's be found jointly liable for causing the accident and be ordered to compensate him accordingly.
5. The Appellant upon being served filed their statement of defence, where they denied in toto all the averments made by the respondent in his plaint and in the alternative stated that if the said accident did occur, the same was caused solely and or substantially by the respondent negligence, which was particularized and put the respondent to strict proof to

the contrary. The Appellant's thus prayed that the primary suit be dismissed with costs.

6. At trial, the respondent testified that he was standing by the road side with his colleagues, when the suit motor vehicle veered off the road and knocked him down thereby causing him to suffer severe injury and had to be rushed to hospital for treatment. All his supporting documents were produced by consent and at the close of the respondent's case, the Appellants opted not to call and witness in support of their case and closed their case.
7. In his judgment the learned trial magistrate did find that the respondent evidence was unchallenged and thus found the Appellant's 100% liable for the accident. On quantum the learned magistrate found that the plaintiff had sustained soft tissue injuries and after considering several precedents proceeded to award the respondent general damages of ***Kshs.600,000/=*** and special damages for ***Kshs.2,750/=***. He was also awarded costs and interest of the suit.

### **C. Analysis & Determination**

8. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. **See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.**

9. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the civil procedure Act a court of first

appeal can appreciate the entire evidence and come to a different conclusion. See **Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316**

- 10.** I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. The issue that arise is whether the respondent discharged the burden of proof and secondly is whether the trial court corrected assessed quantum ultimately awarded to the respondent.
- 11.** On apportionment of blame, it is trite law, that the appellate court will not interfere with the trial courts finding on the same unless it is shown that the trial Magistrate has come to a manifestly wrong decision or based his apportionment on wrong principles. See **Vyas Industries v Diocese of Meru [1976] KECA 18 (KLR)** **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142** and **Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981.**
- 12.** At trial the Appellants did not call any witness to rebut the respondent's case and with due respect cannot dispute his version of events through written

submission's, unless on a point of law. Since the Appellants failed to call any witness the Respondents evidence was remained uncontroverted and thus proved.

14. In **Motrex Knitwear Vs Gopitex Knit wear Mills Ltd Nairobi (Millimani) HCCC NO 834 OF 2002** Lessit J citing the case of **Autar Singh Bahra & Another Vs Raju Govindji, HCCC NO 548 OF 1998** where it was appreciated that;

***“Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff case stands unchallenged but also that the claims made by the defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail.”***

15. As regards quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001[2004] eKLR 55** set out circumstances under which an appellant 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 in the first instance. The appellate court can justifiably interfere with quantum of damage’s 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 factors or 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.”***

- 13.** Similarly, in **Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini Vs A.M Lubia & Olive Lubia (1982-88) 1KAR 727** Kneller JA at page 730 held that:-

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an***

***irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”***

- 14.** The respondent pleaded that he suffered bodily injury including; head injury, bruises to the dorsum of the right arm, bruises on both knees’, swelling of the right knee and blood loss. After the accident he became unconscious and found himself at St Joseph Hospital, where he was admitted and later referred to Nairobi west hospital to have his head injury scanned and for further treatment
- 15.** It is the Appellants contention that the respondent did suffer soft tissue injury, which fact was also confirmed by their doctor (Dr P.M. Wambugu) and thus the quantum awarded of ***Ksh.600,000/=*** was excessive in the circumstance. They relied on ***Micheal Odiwuor Obonyo Vs Clarice Odera Ogunde (2021) Eklr, Edward Mutevu Maithya & another Vs Edwin Nyaweya (2022) eKLR and Losangi Insurance Brokers Limited & Another Vs Josephat Achesa Chumbali (2022) eKLR*** to press their case.

- 16.** In support of quantum award the Respondents urged the court not to interfere with the same as the award also included the aspect of diminished earning capacity which had been pleaded and considered by the trial court. Reliance was placed in the case of **Mwaura Muiruri Vs Suera Flowers & another (2014) eKLR** to support this argument.
- 17.** The respondent also urged the court to consider other similar injury judgments submitted including; **Civil Appeal No. 250 of 2011, James Mutungi Vs David Muasya Ndeleva (2015) Eklr, Kisii High Court Civil Case No 198 of 2002- Charles Maati Onyancha Vs Ndugu Transport Company Ltd & Motors Limited & Another Vs Harun Ngethe Wanjiru (2021) eKLR,** where awards averaging **Kshs.500,000/=** was granted for similar injuries.
- 18.** In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant and comparable injuries should attract comparable awards See, **Kim Pho Choo V Camden & Islington Area Health Authority (1979) I, Aller 332 cited in the case of Nancy Oseko V Board of Governors**

**Masai Girls' High School [2011] eKLR and Odinga Jacktone Ouma Vs Moureen Achieng Odera (2016) eKLR**

- 19.** I have carefully considered all the pleadings filed, and evidence tendered in court especially on the issue of injuries sustained by the appellant. It is clear he suffered soft tissue injury which was confirmed by the treatment notes from St Francis community hospital and Nairobi west Hospital where he sort further treatment. The Appellant indeed proved that was injured and therefore entitled to adequate compensation.
- 20.** The question which then arise if the award of general damages of **Kshs.600,000/=** was adequate and/or if the same was excessive under the circumstance. I do find that given the inflationary rates as comparable awards awarded for soft tissue injuries this award was inordinately high and thus the trial magistrate obviously did not exercise his discretion judiciously and erred in principle thus justifying interference by the appellate court.
- 21.** Looking at comparable injury awards such as **Justine Nyamweya Ochoki & Another Vs Jumaa Karisa**

**Kipingwa (2020)eklr, Ndungu Dennis Vs Ann Wangari Ndirangu & Another (2018) Eklr and FM ( Minor suing through Mother and next friend MWM ) Vs JNM (2020)Eklr** for similar injuries the awards ranged between **Kshs.100,000/=** to **Kshs.150,000/=**. Though the respondent further tried to justify the decretal sum by stating that it included the aspect of lost diminished earning capacity, though the same was pleaded, it was not proved by the evidence adduced and cannot be considered when awarding damages suffered.

#### **D. Disposition**

- 22.** I do find that this Appeal is partially succeeds on the issue of quantum and do set aside the award of general damages of **kshs.600,000/=** issued by the trial court in its judgment dated 29<sup>th</sup> March 2023 issued in **Millimani CMCC No E4629 of 2020** and substitute the same with an award of **Kshs.150,000/=**. All other aspects of the said judgment will remain the same.
- 23.** The respondent will have half costs of this Appeal assessed at **Kshs.100,000/=** all inclusive
- 24.** It is so ordered.

**Dated, signed and delivered** in open court at **MARSABIT**  
this **19<sup>th</sup>** day of **JANUARY, 2026.**

**FRANCIS RAYOLA OLEL**  
**JUDGE**

Delivered on the virtual platform, Team this **19<sup>th</sup>** day of  
**JANUARY 2026.**

**In the presence of;**

- ..... **1<sup>st</sup> Appellant**
- ..... **2<sup>nd</sup> Appellant**
- ..... **Respondent**
- ..... **Court assistant**