

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E1228 OF 2024

HARON OBAIGWA OMWENGA

APPELLANT

VERSUS

VIRGINIA WAITHERA WANYEE

RESPONDENT

***(Being an appeal from the judgment of Hon. E. Riany
(PM) delivered on 24 October 2024 in Milimani CMCC No.
E593 of 2024)***

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court where he sued the Respondent for damages arising out of a road traffic accident that occurred on 11th December 2023 along Wanyee Road.
2. The Appellant's case was that he was, on the material day, a pillion passenger on motorcycle registration KMGG 247H when a collision occurred between the said motorcycle and the Respondent's motor vehicle registration KDD 363E resulting in injuries to the Appellant.
3. The Appellant alleged that the accident was caused solely by the negligence of the Respondent's motor vehicle.

4. The Respondent denied liability and contended that the motorcycle struck her vehicle from behind. Ownership of the motor vehicle was admitted, but the identity and conduct of the motorcycle rider remained unresolved.
5. At trial, the Appellant testified as PW1 and called a police officer (PW2). The Respondent testified in her defence. The motorcycle rider was never identified nor called as a witness.
6. At the close of the case, the Trial Magistrate found that the Respondent was negligent for making a turn without due care. The court also found that the Appellant contributed to the accident by boarding a motorcycle whose rider was unlicensed and uninsured and, for failing to wear a helmet as required by statute.
7. Liability was apportioned equally at 50:50 and on quantum, the trial court found that the Appellant sustained minor soft tissue injuries, namely; blunt injury to the face, bruises on the back, blunt injury to the right upper limb and dislocation of the right middle phalangeal bone.
8. The trial court awarded Kshs. 100,000/= as general damages, subject to 50% contribution, resulting an award of Kshs. 50,000/=. Special damages of Kshs. 550/= were awarded for a motor vehicle search. The claim for medical report fees was declined for want of strict proof. Each party was ordered to bear its own costs.

The Appeal

9. Aggrieved by the said decision, the Appellant filed the instant appeal challenging the findings on liability and quantum, contending that the Trial Magistrate erred by apportioning liability at 50:50; improperly evaluating the evidence of PW1 and PW2; understating the nature and severity of the injuries and declining to award special damages allegedly proved.
10. The Respondent opposed the appeal and urged the Court to uphold the trial court's findings in their entirety.

Issues for Determination

11. Having considered the record and submissions, I find that the issues for determination are: -
- a) Whether the Learned Trial Magistrate erred in apportioning liability at 50:50.***
 - b) Whether the trial court erred in its evaluation of the evidence of PW1 and PW2.***
 - c) Whether the trial court erred in assessing the nature and severity of the Appellant's injuries and the quantum of general damages.***
 - d) Whether the trial court erred in declining to award certain special damages.***

Analysis and Determination

Liability

12. It is settled law that the burden of proof lies upon the party who alleges. Sections 107-109 of the Evidence Act provide that he who asserts must prove.

13. The Appellant alleged that the Respondent's vehicle "lost control" and caused the accident. There was however no eyewitness testimony to support this assertion. Most importantly, the rider of the motorcycle who was the most material witness, was neither identified nor called to testify.
14. PW2 admitted that he did not visit the scene of the accident, did not interview witnesses, and did not produce an investigation report. In ***Evans Otieno Nyakwama vs. Cleophas Bwana Ongaro*** [2015] eKLR, the Court held that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.
15. I find that the trial court was therefore entitled to conclude that exclusive negligence had not been established against the Respondent.
16. Furthermore, Section 103B(1) of the Traffic Act requires a motorcycle passenger to wear a helmet and reflective jacket. The Appellant produced no helmet, no reflector jacket, and no photographic evidence, yet he sustained facial injuries inconsistent with helmet use. In ***United Millers Ltd & Another vs. John Mangoro Njogu*** [2016] eKLR, it was held that the claimant must have had full knowledge of the nature and extent of the risk he ran and impliedly agreed to incur it.
- 17.** My finding is that the trial court made the correct finding on contributory negligence and the apportionment of liability at 50:50 cannot be faulted.

Evidence of PW1 and PW2

18. I note that the Appellant's evidence was riddled with contradictions as while he claimed to have worn protective gear, he offered no proof of the same and while he alleged grievous injuries, both medical reports described mild soft tissue injuries. He further claimed mechanical defect on the Respondent's vehicle, yet PW2 confirmed that the vehicle was inspected, found to be roadworthy, and released to the Respondent.
19. PW2 conceded that he relied entirely on the Appellant's narration and had been paid by the Appellant to attend court. I also note that the police abstract was generated before investigations were undertaken.
20. This Court finds no basis for interfering with the trial court's rejection of unreliable and uncorroborated testimony as the assessment of credibility is primarily the domain of the trial court.

Quantum of General Damages

21. It is trite that an appellate court will only interfere with an award of damages if it is shown that the trial court applied wrong principles or arrived at an inordinately high or low award. (See ***Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5***).
22. A perusal of both medical reports reveals that the Appellant was described as being in "generally good" or "fair general" condition with mild soft tissue injuries. The trial

court expressly rejected authorities relied upon by the Appellant involving fractures and permanent disability as incomparable.

23. Guided by comparable awards and inflationary trends, I find that the award of Kshs. 100,000/=, subject to contribution, was reasonable and proportionate.

Special Damages

24. It is trite law that special damages must be specifically pleaded and strictly proved. In ***Hahn vs. Singh [1985] KLR 716***, the Court of Appeal held that special damages must not only be specifically claimed but also strictly proved.

25. In the instant case, the Appellant pleaded Kshs. 5,000/= for medical report fees but produced a receipt for Kshs. 3,000/=, a contradiction that was not explained. I however find that the trial court erred in rejecting the claim as unproven as it ought to have awarded Kshs. 3,000 shown in the receipt. The award of Kshs. 550/= for the motor vehicle search was properly made as it was pleaded and proved.

Merit of the Appeal

26. It is trite that an appellate court will not interfere with findings of fact unless they are based on no evidence, misapprehension of evidence, or wrong principles of law.

27. This Court is satisfied that the Trial Magistrate properly evaluated the evidence, applied the Evidence Act and Traffic Act correctly, and arrived at a balanced and just

determination save for the finding on special damages in respect to the medical report fees.

28. The appeal is, in substance, an invitation to re-litigate factual issues already determined on sound evidentiary footing. No misdirection, error, or miscarriage of justice has been demonstrated save as stated in paragraphs 26 and 27 hereinabove.

Disposition

29. For the foregoing reasons, I find that the apportionment of liability at 50:50 was justified. The assessment of evidence and credibility by the trial court was proper. The award of general damages was reasonable and commensurate with the injuries proved. I however find that the rejection of the special damages was not in accordance with the law.

30. Consequently, I make the following final orders: -

a) The appeal is allowed in part, only in respect to the award of Kshs. 3,000 for the medical report.

b) The Appellant is awarded half of the Costs of the appeal which I hereby assess at Kshs. 15,000.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2026.

HON W. A. OKWANY
JUDGE

In the presence of
Sagwa for Appellant
No appearance for Respondent
Abdirzak - Court Assistant

ORIGINAL