REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E118 OF 2023

KUMAR SUDI…….APPELLANT

VERSUS

MAURICE MANDE MASINDE……RESPONDENT

JUDGMENT

(Appeal from the Judgment dated 6/06/2023 delivered in Eldoret CMCC No. 964 of 2019 by Hon. C. Menya-PM)

1. This Appeal arises from the Judgment delivered in the said Magistrate's Court suit in which the Respondent (as the Plaintiff) instituted a claim against the Appellant (as Defendant) seeking compensation for injuries he suffered as a result of a road/traffic accident. The Judgment was in favour of the Respondent and the Appeal is stated to be against the trial Court's decision on both liability and quantum.

2. The Judgment was in the following terms:

Liability	100%
General damages	Kshs 1,000,000/-
Special damages	Kshs 12,400/-
Total	**Kshs 1,012,400/-**

3. In his Plaint filed at the Magistrate's Court, dated 30/09/2019 through **Messrs Lusinde Khayo & Co. Advocates**, the Respondent pleaded that he was a rider of the motor-cycle registration number **KMDC 853H** along the Eldoret-Webuye Road when, the Appellant's motor vehicle registration **KCA 876B**, was so negligently driven, controlled and/or managed causing it hit the Respondent thereby occasioning him severe injuries, loss and damage. The Respondent listed several particulars of negligence against the Appellant's driver, and prayed for general damages and special damages of Kshs 12,400/-, costs and interest.

4. The Appellant, in response, filed the Statement of Defence dated 25/11/2019 through **Messrs G. K. Okara & Co. Advocates**, wherein he denied, ***inter alia***, occurrence of the accident and the particulars of negligence and liability alleged.

5. The case then proceeded to trial in which the Respondent (Plaintiff) called 5 witnesses while the Appellant did not call any. The Respondent had by this time changed Advocates and was now being represented by **Messrs Onyinkwa & Co**.

6. **PW1** was **Dr. Paul Rono**. He produced radiology/x-ray documents indicating that the Respondent suffered a fracture of the pelvis. He also produced a receipt.

7. **PW2** was **Dr. Joseph Sokobe**. He produced the Respondent's Medical Report dated 30/08/2019, treatment notes, P3 Form, and receipts. He, too, confirmed that the Respondent suffered a fracture.

8. **PW3** was **William Nyambare** from the Uasin Gishu Hospital. He produced the Respondent's Prescription and a receipt. He, too, confirmed that the Respondent suffered a fracture.

9. **PW4** was **Police Constable Sitty Mohammed** from the **Eldoret Police Station**. He confirmed occurrence of the accident and also that the rider suffered injuries. He stated that Investigating Officer was a different Police Officer and stated that the motor vehicle was being driven from Webuye to join a feeder road and in the process hit the motor-cycle that was facing Webuye direction Statement. He testified further that the motor vehicle was blamed for causing the accident as it was joining a feeder road yet it was supposed to give way. He produced the Police Abstract. In cross-examination, he agreed that besides not being the Investigating Officer, he also did not visit the scene, he did not produce the police file or sketch map. He stated further that the rider, in his Statement in the Police file, stated that he was wearing a helmet. He also opined that the rider had a licence. He was however unable to confirm whether anybody was charged in Court for causing the accident.

10. **PW5** was the Respondent (Plaintiff). He blamed the motor vehicle (lorry) for joining the road abruptly as it approached from a feeder road. He testified that there is a junction at the area where the accident occurred but the lorry just turned to the right. He insisted that he had the right of way. He then reiterated the injuries he suffered and produced his documents. In cross-examination, he stated that his driving licence is with the police and that his motor-

cycle was insured. Regarding the speed he was moving at, he stated that it was 25 km/per hour, and added that the lorry joined the road through the wrong side.

11. As aforesaid, after the hearing, the trial Court entered Judgment in favour of the Respondent (Plaintiff) as set out above. Dissatisfied with the Judgment, the Appellant filed this appeal by way of the Memorandum of Appeal dated 13/03/2024, premised on the following 5 grounds:

i) **That the Learned Magistrate erred in law and fact in holding the Appellant 100% liable for negligence without taking into account the evidence on record.**

ii) **The Learned trial Magistrate erred in law and fact by failing to take into account the evidence on record arriving at a wrong decision.**

iii) **The Learned trial Magistrate erred in law and fact by adopting and/or applying the wrong principles in making a determination on the general damages payable to the Respondent and thereby reading an award that was excessive.**

iv) **The Learned trial Magistrate erred in law and fact in awarding damages which were manifestly excessive in the circumstances.**

v) **The Learned trial Magistrate erred in law and fact by failing to consider the Submissions by the Appellant.**

12. The Appeal was then canvassed by way of written Submissions. The Appellants' Submissions is dated 13/03/2024, while the Respondent's is dated 4/01/2025.

Appellant's Submissions

13. Counsel for the Appellant, on the issue of liability, faulted the trial Court for entering Judgment against the Appellant when neither the testimonies nor the evidence adduced pointed towards such blame. He urged that the **PW4**, the Police Officer, did not clearly explain the circumstances surrounding the occurrence of the accident as he was not the Investigating Officer, neither did he avail the Police file or sketch maps to show the point of impact. He thus termed the testimony as hearsay. He also pointed out that the Police Abstract indicates that the case is still pending under investigations, that the Appellant's driver was never charged with any traffic offence, and that faulted for finding that the Police Officer, who never visited the scene, confirmed the facts leading to the Appellant's driver's blameworthiness. He contended that the fact that the Appellant's driver did not testify did not absolve the Respondent (Plaintiff) from discharging his burden of proof as required

under **Section 107** and **108** of the **Evidence Act**. On quantum, Counsel submitted that the Medical Reports showed that the Respondent had healed well and faulted the Court for awarding an excessive amount in general damages, and for relying on precedents that related to cases where injuries were much more serious and thus not comparable. He pointed out that in the instant case, the Respondent was never even admitted in hospital. He thus proposed that the award of Kshs 1,000,000/- be reduced to about Kshs 200,000/- and Kshs 300,000/-. He cited several authorities on the issues raised.

Respondent's Submissions

14. The Respondent's Counsel, on the issue of liability, insisted that the testimony before Court demonstrated that the Respondent had the right of way and the Appellant's driver thus ought to have given way but instead, turned from his left to right side to join a feeder road on the Respondent's lane. On quantum, he basically refuted the claim that the award of general damages was excessive. He then urged that this Appeal is indicated to be against a Judgment delivered on 16/06/2023 but the copy of the Judgment and Decree on record indicates that the same was delivered on 16/08/2023. He thus contended this discrepancy and the failure to amend it renders the Appeal fatally defective.

Determination

15. The duty of an appellate Court has been reiterated in a plethora of cases, including, for instance in the case of **Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212**, in which the Court of Appeal guided in the following terms:

> **"On a first Appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

16. In this case, the award for special damages has not been chalenged. In view thereof, the issues that arise for determination are evidently the following;

i) **Whether the Appeal is fatally defective for reason that the Memorandum of Appeal cites an erroneous date of the Judgment appealed against.**

ii) **Whether the trial Court erred in finding the Respondent 100% liable for causing the accident.**

iii) **Whether the trial Court's award in general damages was inordinately high or excessive.**

17. In respect to the first issue, the Respondent's Counsel has correctly pointed out that while this Appeal is indicated to be against a Judgment delivered on 16/06/2023, the copy of the Judgment and Decree on record indicates that the same was delivered on 16/08/2023. According to Counsel therefore, this discrepancy and the failure to amend it renders the Appeal fatally defective.

18. Since I have the benefit of having the trial Court's file before me, I have perused the handwritten record and it appears that the Judgment was delivered on 16/16/2023 as captured in the Memorandum of Appeal. This fact seems to be also supported by the chronology of events before and after delivery of the Judgment. I may not be certain but it seems to me that the date of 16/08/2023 indicated in the Judgment may have been error and the date indicated in the Memorandum is in fact correct. Since I am not however fully certain about this fact, and since the issue was never raised early enough by the Respondent, preferably to be determined as a Preliminary Objection, I do not find it just to strike out the Appeal at this late stage.

19. Regarding the second issue, the extent of the mandate of an Appellate Court when called upon to review a finding of fact by a trial Court is well-settled. It is that an appellate Court will only interfere with the conclusions and findings of a trial Court if the same was not supported by evidence or was premised on wrong principles of law. In re-affirming this principle, the Court of Appeal, in the case of **Mwangi V. Wambugu (1984) KLR 453**, held as follows:

> **"A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

20. In this case, the Respondent's case was that he was riding his motor-cycle in Eldoret from the direction of Eldoret-Webuye, while the Appellant's motor-vehicle was being driven in the opposite direction, namely, Webuye-Eldoret. While testifying as **PW5**, his version of how the accident occurred was all along that the Appellant's driver abruptly turned from his left side to the right side to join a feeder road on the Respondent's lane. He thus contended that he had the right of way and the Appellant's driver ought to have therefore him given way, but instead, joined the road from the wrong side. The Traffic Police Officer who testified as **PW4** agreed with or supported this version given by the Respondent. The Appellant, on his part, did not call any witness. Under these circumstances, there being no other version presented before the Court, and the Appellant not having presented any conflicting or contrary explanation of how the accident may have occurred, I find no good reason to fault the trial Magistrate for accepting the account given by the Respondent.

21. Although I agree that the mere fact that a Defendant does not call a witness of his own does not absolve a Plaintiff of his duty to prove his case, in this instance, the Appellant, apart from making general statements and merely attempting to casting doubts, has not in any way demonstrated that the Plaintiff did not prove his case on a balance of probabilities. It cannot be alleged that the version given by the Respondent is so incredible or illogical or too contradictory that it cannot at all be believed. On the contrary, the same is quite plausible given the other surrounding circumstances on record. For instance, the evidence given by the Traffic Police in support of the Respondent's version, although he was not the Investigating Officer and he also did not produce the sketch map or the Police file, cannot just be trashed or dismissed without good reason. According to the Officer, the information he gave is what is contained in the Police file, and it has not been demonstrated that this was not the case, or that he lied to Court. It has also not been demonstrated that he is not from the Police Station that issued the Police Abstract. The Appellant, if he had any doubts about the credibility of **PW4**, had the option of applying for Summons to the Officer-in-Charge of the subject Police Station, or his representative to attend Court and either deny or confirm, or just comment on the veracity, accuracy, or truthfulness of the information given by **PW4**, which option he never invoked or exercised.

22. The fact that the Appellant's driver was not charged, or that the Police Abstract did not attribute blame, cannot therefore by themselves be deemed as proof that the Appellant's driver was blameless. It is not lost on this Court that the attribution of blame in a Police Abstract, just as is the decision to charge an offender in Court, is a matter that can be reliant on various other factors, and not necessarily always only on culpability. For these reasons, I

decline to interfere with the trial Magistrate's attribution of liability against the Appellant at 100%.

23. On the issue of quantum, the limits within which an Appellate Court can interfere is also well-known. In respect thereto, the Court of Appeal, in the case of **Kemfro Africa Limited t/a "Meru Express Services" [1976] & Another V. Lubia & Another (No. 2) [1987] KLR**, held that:

> *"***…. The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it must be satisfied that either that 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 damage."**

24. The Court of Appeal reiterated the above principle in the case of **Dilip Asal v Herma Muge & another [2001] eKLR [2001] KLR**, as follows:

> **"…… Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."**

25. An appellate Court will not therefore disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. For the appellate Court to interfere, it must be shown that the trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was unsupported.

26. On the mode of assessing damages, the Court of Appeal in the case of **Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR** stated that *"**comparable injuries should attract comparable awards".*** Similarly, in ***Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR*** the Court of Appeal observed that:

> "**The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."**

27. From the above, it is clear that in awarding damages, some degree of uniformity must be sought depending on the facts and the best guide would be to consider recent awards on comparable injuries.

28. In this case, the Appellants' complaint is that the award of general damages at the sum of Kshs 1,000,000/- was excessive and inordinately high. I note that the Respondent relied on the Medical Report dated 30/08/2019 prepared by **Dr. J. Sokobe** who basically described the injuries suffered by the Respondent as multiple blunt injuries with the main injury being a fracture of the left acetabulum. No permanent disability was indicated.

29. At the trial Court, the Respondent (Plaintiff) had proposed an award of Kshs 1,500,000/- in general damages, while the Appellant (Defendant) had proposed Kshs 1,300,000/-.

30. To establish comparable awards, I have perused various relatively recent authorities in which the injuries suffered were similar or close to those suffered herein, including fracture of the skull or other similar head injuries. I have for instance, picked out the following:

a) **A.K. Ndun'gu J**, in the case of **Joseph Nyaboke Nyanchari v Stanley Nyabuto Mose [2021] KEHC 1529 (KLR)**, on appeal, reduced an award of Kshs 1,551,580/- to Kshs 650,000/-.

b) **M. Kasango J**, in the case of **George Njenga & another v Daniel Wachira Mwangi [2017] KEHC 8195 (KLR)**, on appeal, upheld an award of Kshs 800,000/-.

c) **F. Amin J**, in the case of **Samuel Ndungu v MK (Minor suing through next friend BNA) [2021] KEHC 9192 (KLR)**, on appeal, upheld an award of Kshs 650,000/-.

d) **A.K. Ndun'gu J**, in the case of **Kenya Nut Industries Limited v Alexander Mwangi Mwai [2020] KEHC 9137 (KLR)**, on appeal, upheld an award of Kshs 800,000/-.

e) **R. Mwongo J**, in the case of **Wycliffe Omurwa Masanta v Easy Coach Limited & another [2019] KEHC 1691 (KLR)**, on appeal, upheld an award of Kshs 500,000/- made by the lower Court.

31. From the foregoing, I find that most awards for injuries comparable to those in issue herein range in the region of between Kshs 400,000/- and Kshs 800,000/-, of course each depending on the severity thereof. While the prevailing status of our currency and economy have to be taken into account in awarding damages, astronomical awards must also be avoided. The Court must therefore ensure that awards result in fair compensation.

32. In light of the comparable awards and the principles referred to, I find the sum of Kshs 1,000,000/- for general damages awarded by the trial Magistrate to be considerably high and substantially excessive to amount to an error in principle, which justifies interference by this Court. Accordingly, I set aside the award of Kshs 1,000,000/- and substitute it with one for Kshs 650,000/-.

Final Orders

33. The upshot of my findings above is that this Appeal partially succeeds, and only to the extent that the award of Kshs 1,000,000/- under the head of general damages is reduced to Kshs 650,000/-.

34. Accordingly, the final particulars and computation of the Judgment shall be as follows:

Liability	100% against the Appellant
General damages	Kshs 650,000.00
Special damages	Kshs 12,400.00
Total	**Kshs 662,400.00**
Plus costs and interest	

35. Since the Appeal has only partially succeeded, each party shall bear his own costs of thereof.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 13TH DAY OF FEBRUARY 2026

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Ms. Gati for Ms. Okara for the Appellant

Ms. Chebet h/b for Ms. Okara for the Appellant

Court Assistant: Brian Kimathi