



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL APPEAL NO. E 195 OF 2023

ALICE WAIRIMU MAINA.....
APPELLANT

VERSUS

JOHN KARIMI KAMAU 1ST
RESPONDENT

JANE WANGARI KAMAU.....2ND
RESPONDENT

PAUL MWAURA.....3RD
RESPONDENT

*(Being an appeal from the decree of the Small Claims Court at
Milimani (Hon. M MUTUA- PM) arising from Judgement delivered on
20/2/ 2023 in SCCCOMM NO. E659 OF 2021).*

JUDGEMENT

The pleadings before the lower court

1. The Appellant herein is challenging the learned trial magistrate's Judgement in which he dismissed the

Appellant's suit with costs to the Respondents for want of proof of the claim to the required legal standard.

2. The summary of the case before the trial court is that the Appellant sued the Respondents for general damages, special damages, the costs of the suit, interest and any other reliefs deemed fit to grant following a road traffic accident that allegedly occurred on 1/8/ 2021 in which the Appellant suffered bodily injuries. The 3rd respondent was accused of negligently or carelessly driving the 1st and 2nd Respondents' motor vehicle registration number KBB 167 X ("the vehicle") as a result of which it rammed into another motor vehicle registration number KBL 691 Q thereby causing the Appellant's injuries.
3. The Respondents filed a joint response to the claim denying liability.

The evidence

4. It would appear that the claim was, by consent, disposed of through documentary evidence filed by the parties pursuant to section 30 of the Small Claims Court Act

which allows such manner of hearing a claim lodged in that court.

Analysis and determination

5. In a brief Judgement, the learned trial magistrate noted that the Appellant as the

“owner of KBL 691 Q that caused the accident has not proved negligence on the part of the driver of KBB 167 X and her claim shall be dismissed” (sic).

6. Regarding the claim for damages, the trial court stated;

“I am not mandated to assess damages if I find the opinion that negligence was not proved and I shall rest my case at that.” (sic)

Grounds of appeal and reliefs sought

7. The Appellant’s Grounds of Appeal as stated in her Memorandum of Appeal dated 24/ 3/2023 may be condensed into two broad grounds as hereunder:

a.)That the learned trial magistrate erred in law and fact by finding that the Appellant did not establish the Respondents’ liability, against the weight of evidence.

And

b.)That the learned trial magistrate erred in law and fact in failing to assess damages awardable to the Appellant.

8. The Appellant therefore prays for the appeal to be allowed with costs; that the lower court's Judgement and all consequential orders be reviewed and that this court does grant any other reliefs it may deem necessary.

Analysis and determination

9. The parties filed written submissions *vide* the court's e-filing platform which I have perused against the record of this appeal. It is trite law that in civil appeals the appellate court can only interfere with the findings and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of **Ocean Freight Shipping Co. Ltd vs Oakdale Commodities Ltd (1997) eKLR Civil Appeal No. 198 of 1995**). The appellate court also has the duty of

analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of **Selle vs Associated Motor Boat Co. (1968) EA 123.**

10. The situation is, however, a little different with respect to an Appeal emanating from the Small Claims Court. Pursuant to **section 38(1) of the Small Claims Court Act**, such an Appeal to this court lies only on a point(s) of law.
11. The Appellant's advocates submit *inter alia* that the Respondents' liability was established on a balance of probability. Reference is made to some decisions including the **English House of Lords decision in Re H (minors) sexual abuse; standard of prof (1996) AC 563 and 505 for the Home Department vs Rehman (2003) 1 AC 153** which reiterates the standard of proof in civil cases as the preponderance of probability or the balance of probability as it is commonly known

“.....which means that the court must be satisfied that the event in question is more

likely than not to have occurred. The balance of probability standard is a flexible standard. This means that when assessing this probability, the court will assume that some things are inherently more likely than others.....”.

12. The Appellant insists that she discharged the burden of proof as she is obligated under **section 107 (1) of the Evidence Act** which provides that a claimant must prove facts proving the Respondents’ liability. With respect to the claim for general damages, the Appellant states that she suffered a fracture of the right humerus as confirmed by medical records exhibited. I have perused Dr. Cyprianus Okoth Okere’s medical-legal report on the Appellant dated 24/9/2021 which indeed corroborates the injury which was classified as grievous harm resulting in permanent incapacity of 20%. The doctor opined that metal implants fixed in the fracture site would be removed at a cost of Kshs. 150,000/=. The learned Counsel for the Appellant in their submissions before the lower court were of the view that Kshs. 800,000/= in general damages should be awarded to their client while

the Respondents' Advocates think that a sum of Ksh. 200,000/=.

Appellant's submissions before this court

13. Counsel reiterate their submissions in the lower court.

The court is told that the Motor vehicle KBB 167 X driven by the 3rd Respondent was also involved in the Accident and was the one responsible for the mishap due to negligent driving. According to Counsel, the Appellant discharged her onus of proof as required by **Section 107 (1) of the Evidence Act.**

14. It is underscored that the Standard of proof is on a balance of probability as per **Re H (minors)** sexual abuse; standard of proof **(1996) AC 563 & 505** for the **Home Department vs Rahman (2003) 1 AC 153** *supra*. The Appellant submits that she was a passenger in motor vehicle KBL 691Q which lost control and rammmed into the motor vehicle registration number KBB 167X which was carelessly driven. Her Advocates tell the court that there must be a casual link between a Defendant's negligence and injury occasioned to the Plaintiff (see the

decision in **Nairobi HCCA No. 152/2003 Statpack Industries Limited vs James Mbithi** among other decisions cited and relied upon by Counsel).

15. No submissions are made regarding quantum of damages.

Respondents' submissions

16. In their opinion, the Respondents' Advocates state that general damages of Kshs. 70,000/= ostensibly awarded by the trial court should be upheld as adequate for chest and pelvic injuries the Appellant is said to have sustained. Counsel refer to case law **HB (Minor suing through mother and next friend DKM) vs Jasper Nchonga Magari & Another (2021) eKLR & Ndung'u Dennis vs Ann Wangari Ndirangu & Another (2018) eKLR** where general damages in the sum of Kshs. 60,000/= and Kshs. 100,000/= respectively were assessed and granted to Claimants therein.

Determination

17. The Appellant's evidence through her witness statement filed with her claim is that motor vehicle registration number KBB 167X was negligently driven and as a result caused motor vehicle KBL 691 Q to lose control thereby ramming into the former vehicle and causing her the injuries complained of. The Respondents did not tender witness statements or other evidence as to the circumstances attending the accident. The Appellant's evidence is thus unchallenged.
18. It is trite law that where, as here, a party fails to rebut the evidence of the opposite party, the tendered evidence would be accepted as probative of facts in issue (see decided cases in **Daniel Toroitich Arap Moi vs Another (2024) eKLR** and **Charter House Bank Limited (Under Statutory Management) vs Frank N. Kamau (2016) eKLR** among many other cases on this situation).
19. I find in the premises that Appellant proved her claim against the Respondents on a balance of probabilities. I hold the Respondents wholly liable, jointly and severally.

20. Contrary to the Respondents' observation that the trial had assessed damages in the sum of Kshs. 70,000/= in favour of the Appellant, the record does not confirm the fact as the court has noted hereinabove.
21. The trial court declined to assess damages having found the Respondents not liable for the claim. The lower court indicated that it is precluded from doing so by the **Small Claims Court Act** after entering a negative Judgement on liability as it did.
22. This court has found the Respondents liable. Established judicial practice is to remit the file to the lower court to assess damages so that the parties are not denied their right of appeal. In the interests of justice considering the long pendency of this Appeal, however, I shall assess damages myself.
23. The Appellant suffered a single fracture of the right humerus. Metal implants were inserted on the fracture site and the implants were in *situ* as at the time of the medico-legal examination of the Appellant. A tidy sum of Kshs. 150,000/= is suggested as the cost removal of the

implants. No serious complications resulted to the Appellant, nevertheless.

24. It is trite law that general damages are assessed in the discretion of the court guided by comparable cases and also considering the incidence of inflation. The court also bears in mind that no injuries sustained in cases of tort are exactly identical but vary from one case to another. The court will be guided by these principles in determining awardable quantum of damages in the instant matter.

25. For a fracture of the left tibia and fibula; dislocation of the left hip joint; cut wounds and several soft tissue injuries, Kshs. 450,000 general damages were awarded in **Civicon Limited vs Richard Njomo Omwanicha & 2 Others (2019) eKLR. In Akamba Public Road Services vs Abdikadir Adan Galgalo (2016) eKLR** the claimant suffered a fracture of the right tibia and fibula as well as a blunt injury to the right ankle. The court granted general damages of Kshs. 500,000/=. For a similar fracture and blunt injuries that also included a

broken tooth and nose bleeding, the Claimant was awarded Kshs. 500,000/= general damages in **Tirus Mburu Chege & Another vs JKN & Another (2018) eKLR.**

26. The Appellant herein sustained a single fracture that did not result in serious complication to her health. Upon taking into all relevant factors, I grant the her Kshs. 350,000/= in general damages for pain and suffering. The special damages claim of Ksh. 5,500/= has been proven by a payment receipt and is also allowed.
27. The Appeal therefore succeeds as follows;
- (a) The lower court's Judgement on liability is set aside and substituted for this court's Judgement adjudging the Respondents 100% liable, jointly and severally.
 - (b) The Appellant is awarded general damages for pain and suffering in the sum of Kshs. 350,000/= (Kenya Shillings Three Hundred and Fifty Thousand) and special damages of Kshs.

5,500/= (Kenya Shillings Five Thousand and Five Hundred) .

(c) The costs of the Appeal and interest on the awarded sums at court rates shall be borne by the Respondents. For avoidance of doubt, interest on the general damages and special damages awards shall be computed from the date of this Judgement and the date of filing suit, respectively.

28. Judgement accordingly.

J. M NANG'EA, JUDGE.

Judgement dated, signed and delivered virtually this 5th day of March 2026 in the presence of:

The Appellant's Advocate, Mr Wanjohi for Ms Randa.

The Respondents' Advocate, Mr Morara.

The Court Assistant, Jeniffer.

J. M NANG'EA, JUDGE.