

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CIVIL APPEAL NO. E007 OF 2024

EASTCON MULTIPLES LTD.....1ST
APPELLANT

HERMAN KAROKI KIMANI.....2ND
APPELLANT

VERSUS

ALEX SINGI MWANDUKA.....
....RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment and decree that was delivered in **Mutomo Principal Magistrates Court Civil Case No. E075/2022**. The appeal is based on the following grounds in the Memorandum of Appeal dated 5/2/2024:

(1) THAT the learned trial Magistrate erred in law and fact by disregarding established legal precedent and thereby erroneously arriving at a wrong conclusion on quantum.

(2) THAT learned trial magistrate erred in law and fact when he failed to consider the applicants submissions on quantum.

(3) THAT the learned trial magistrate erred in law and in fact in not making an award which was within limits of already decided cases of similar nature.

(4) THAT the learned trial Magistrate erred in law and fact in awarding judgment for soft tissue injuries as follows; General Damages Kshs. 400,000/=, and Special damages Kshs. 5,550/= without showing how he arrived at those figures and in total disregard of the submissions of the defendant on the issue of quantum.

2. The appellant prays that the whole Judgment of the Principal Magistrate delivered on 11/1/2024 be set aside and the same be assessed afresh. That the appeal be allowed. That the appellant be awarded costs of the appeal and in the trial court.

Background

3. The respondent had filed a plaint in the magistrate's court claiming general as well as special damages plus interests in a claim based on negligence. The respondent claim was based on the facts that on 18/06/2022 he was riding a motor cycle registration number KMFX 647M within Ikutha Trading Centre near Oil Kep Petrol station when he was knocked down by a motor vehicle registration number KCW 403E which was owned by the first appellant and driven by the 2nd appellant. It was the respondent's claim that the accident occurred due to the negligence manner of driving of the said motor vehicle by the 2nd appellant. As a result of the collision, the appellant sustained serious bodily injuries.
4. He contended that the 2nd appellant was negligent as he drove the motor vehicle at a high speed in the circumstances and without due care and attention. Driving the said vehicle dangerously and negligently without regard to other motorist on the same road and particularly the plaintiff. That the 2nd appellant drove the said vehicle recklessly and in total violation of the traffic rules, drove a defective motor vehicle thereby causing the said accident.

The respondent contended that the doctrine of 'res ipsa loquitor' applied in the case.

5. That as a result of the accident, the applicant sustained serious bodily injuries involving dislocation of the left ankle joint, deep cut on the on occipital parietal aspect of the scalp with active bleeding. Bruises on the left ankle joint, swelling left ankle joint with reduced movement. Scars on occipital parietal aspect and on the left ankle joint.
6. The respondent also claimed kshs. 550/= for motor vehicle search and Kshs. 5,000/= for medical report. The appellants denied the claim and contended that it was the respondent who was negligent as he failed to have any or sufficient regard for the safety of other road users on the said road by parking without due care and attention. Failing to keep a proper look out for other vehicles that might have been on the said road. Endangering the lives of other road users in his manner of riding in total disregard for the Traffic Rules and to have due care and skill expected of a competent rider. He appellants denied that the doctrine of "res ipsa loquitor" is applicable and

denied the particulars of injuries. they prayed that the suit be dismissed with costs.

7. The respondent adduced evidence at the trial. The appellants closed their case without adducing any evidence. The learned magistrate rendered his Judgment in favor of the respondent and held as follows:

- General damages kshs. 400,000/=
- Special damages Kshs. 5,500/=
- costs

The respondents were dissatisfied with the Judgment and filed this appeal.

The Respondents Case

8. He relied on his witness statement which he adopted as his evidence. He had stated that the vehicle KCW 403E was over speeding, lost control and knocked him down from behind. He sustained severe injuries and was rushed to Ikutha Level IV Hospital where he was treated and discharged he same day. He reported the accident at Mutomo Police Station and was issued with a P3 form. He blamed he driver of the said motor vehicle for causing the accident.

9. In cross-examination he told the court that he was injured on the right leg. He further testified that he had a helmet and a reflector jacket. The driver was overtaking and did not hoot. He told the court that the leg healed but he experiences some pains. The appellant did not adduce any evidence.

Analysis and Determination

10. I have considered the Judgment of the learned Magistrate, the grounds of Appeal and the submissions. The issues that arises for determination is whether the award of general damages by the learned Magistrate was excessive. Whether the court should interfere with award of general damages by the learned magistrate. This is a first appeal and the duties of this court as a first appellate are well laid down in a line of authorities by the High Court and the Court of Appeal.

11. In **Selle -vs- Associated Motor Boat Company (1968)**

E.A 123 it was held that the court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. The court stated:

“I accept counsel for the respondent proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect.

In particular this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the

evidence of if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally. The court

should leave room for the fact that it neither saw nor heard the witnesses.”

12. This court as the first appellate court is empowered to consider both facts and law. **Section 78** of the Civil Procedure Act (Cap 21 laws of Kenya) provides that:

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a)to determine a case finally;

(b)to remand a case;

(c)to frame issues and refer them for trial;

(d)to take additional evidence or to require the evidence to be taken;

(e)to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein”

13. The issues which arise for determination are:

(1) Liability.

(2) Whether this court should interfere with award of quantum of damages.

Liability

14. The learned magistrate held that the respondent testified in court and blamed the 2nd appellant for the accident. That the defence did not adduce any evidence as they did not call any witness. That the respondent's evidence remained unchallenged. That as per the police abstract, the police blamed the driver the second respondent herein for careless driving. That on the other hand the 1st appellant was the registered owner of the motor vehicle. The learned magistrate concluded that the appellants were 100% liable.

15. The appellants had filed a statement of defence and pleaded that the respondent who was the rider of motor cycle KMFY 647M was to blame for the accident and was negligent as he had failed to take any or adequate precaution for his own safety, to heed instructions on safety precautions and failed to heed traffic rules.

However, the appellants closed their case without adducing any evidence.

16. The allegations of negligence by the appellant remained unsubstantiated. The respondent's evidence on how the accident occurred remained unchallenged. It was corroborated by the police abstract which stated that the 2nd appellant was negligent. The averments in the statements of defence remained mere statements which have no probative value for failure to call a witness to prove the allegations. The learned magistrate relied on the plaintiff's evidence and the police abstract to reach the conclusion that the appellants were 100% liable for the accident. The learned magistrate did not err in her finding as it was based on evidence. I find that the appellants were properly adjudged to be 100% liable.

Quantum of Damages

17. The appellant relies on the ground that the learned Magistrate disregarded established legal precedents and erroneously arrived at a wrong conclusion on quantum of damages. It is submitted that the learned magistrate awarded the general and special damages without showing

how she arrived at those figures and disregarded the submission by the appellants on the quantum of damages. When it comes to an appeal on quantum of damages, the law is well settled that the trial court exercises discretion in awarding the quantum of damages and an appellate court will not interfere with that exercise of discretion unless it is shown that:

- The learned Magistrate acted on wrong principles.
- The award of damages was either too low or high as to demonstrate an erroneous award of damages.

18. These principles were articulated in **Southern Engineering Co. Ltd -vs- Musinga Muhia (1985) KLR 730**. The court stated that,

“It is trite law that the measurements of the quantum of damages is a matter for the discretion of the individual Judge which of counsel has to be exercised judiciously with regard to the general conditions prevailing in the County in (Butt -vs- Khan (1982 - 1988) 1 KAR) “ it is inevitable in any system of law that there will be disparity in awards made by

different court for similar injuries since no two cases are precisely the same either in the nature of the injury or in age, circumstances or other conditions.

19. The Court of Appeal in **Mohamed Mohmond Jabane -vs- High Shine Butty Tingoi C.A No. 2 (1986) KLR Vo; 1**. The Court of Appeal stated as follows:

“The correct approach in award of damages are:

- (1) Each case depends on its own facts.**
- (2) Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic).**
- (3) Compensable injuries should attract comparable awards.**
- (4) Inflation should be taken into account.**
- (5) Loss of future earnings has to be pleaded.**
- (6) Loss of earning power is part of the general damages.”**

20. The Court of Appeal in **Kemfro Africa t/a Meru Express Services & Another -vs- A.M Lubia & Another (1982 - 88) 1 KAR 727** held as follows:

“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that, it must be satisfied that either the Judge is assessing the damages took into account an irrelevant factor or left out of account a relevant one or that shot of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

21. The appellant has challenged the award of damages on the ground that he did not demonstrate how he arrived at the quantum of damages and she did not consider the authorities which were cited in the appellants submissions. The leaned magistrate stated that,

“The plaintiff sustained soft tissue injuries which healed well. I have perused the submission from both sides. I find Kshs. 400,000/= to be reasonable compensation for general damages. The same is awarded special

damages of Kshs. 5,550/= as proven is also awarded.”

22. The learned magistrate did not indicate the injuries sustained, the authorities relied on from the submissions and how she settled at that figure. I find that the learned magistrate did not follow the principles in the above decisions of the court of Appeal. It is important for the trial magistrate to do a proper analysis by listing the injuries, the precedents relied and the reasons for arriving at the awards.

23. I find that the learned magistrate failed to consider and analyze the authorities cited by the parties and to indicate what informed the figure of Kshs. 400,000/= to be reasonable. I find this failure to consider those factors, this court has reason to interfere with the award of damages. The respondent had pleaded that he sustained the following injuries:

- (a) Left ankle joint dislocation with sharp pain.**
- (b) Deep cut wound at the occipital parietal aspect of the scalp.**
- (c) Right elbow joint pain radiative.**

- (d) **Right elbow joint bruises.**
- (e) **Left ankle joint bruises.**
- (f) **Left ankle joint swelling with reduced movement**
- (g) **Scar on the occipital parietal aspect of the scalp.**
- (h) **Scar on the left ankle joint.**

24. He relied on x-ray request treatment notes from Ikutha Level IV Hospital P3 form and medical report by Doctor Calvin M. Achieng. The P3 form indicated that the injuries were bodily harm. The medical report stated that he sustained bruises on right elbow joint, deep cut wounds to occipital parietal aspect of scalp with active bleeding, bruises, swelling and ankle joint dislocation with sharp pain. The doctor's opinion and prognosis was that he sustained soft tissue injuries classified as harm.

25. The appellant had urged the court to award Kshs. 700,000/= and relied on cases where the plaintiff had sustained similar injures. These are:

“In Mark Oluoch Oyieke & 3 Others -vs- Nyabichiku Farm & Another Nbi HCCC No. 1540 of 1998 as cited in Patrick Mudava Kweyu -vs- Pan Africa Chemical

Ltd (2016) EKI the plaintiff proposed an award of Kshs. 300,000/=...”

26. On the other hand, the respondent had urged the court to award Kshs.400,000/= based on **David Chonzi Kimani -vs- David Bwire & Another (2013) CA and Roseline O. Owo -vs- Care International in Kenya & 3 Others (2000) eKLR**. These authorities reflect a bit more severe injuries considering that the respondent suffered soft tissue injuries which were classified as harm, the award of Kshs. 400,000/= was excessive and therefore erroneous. The court has reason to interfere with the award of damages in the circumstances.

Based on the injuries sustained and the authorities cited, I find that the awards of Kshs. 200,000/= is reasonable and adequate. The special damages pleaded were proved.

Conclusion

27. The appeal has merits. The award of general damages by the learned magistrate is set aside. It is substituted with an award of Kshs. 200,000/=. The award of Kshs. 5,500/= on special damages is upheld. Each party to bear its own costs of the appeal.

Dated, signed and delivered at Kitui this **10th** day of **March**
2026

HON. LADY JUSTICE L. GITARI
JUDGE