



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E080 OF 2024

CEREALS GROWERS ASSOCIATION.....

....APPELLANT

VERSUS

ANTONY MUCHUI KINYINGA.....

RESPONDENT

(Being an appeal from the Judgement and decree of Hon. E.M.Ayuka (PM) delivered on 16th May,2024 in Tigania Civil Suit No. E115 of 2022)

JUDGEMENT

1. Antony Muchui Kinyinga the respondent in this appeal was the plaintiff in Tigania CMCC No. 115 of 2022. He instituted the suit against Cereals Growers Association, the appellant, for special and general damages for injuries sustained due to a road traffic accident said to have occurred on 18th October,2022 along the Makandi-Mbeu-Kagaene Road. He claimed that he was riding his Motor cycle Registration No. KMFW 452A Captain when the Appellant's authorized rider negligently rode Motor Cycle Registration No. KMEW 835S

Yamaha that it collided with his said motor cycle, and as a result injuring him.

2. The Appellant denied the Respondent's case vide its statement of defence dated 10th January, 2023. In the alternative, it pleaded that if the accident occurred which was denied then the same was occasioned and or substantially contributed to by the negligence of the Respondent.
3. The trial court found in the respondent's favour and awarded him a sum of Kshs. 682,840/=.
4. The appellant being dissatisfied with the judgment of the trial court has filed the instant appeal raising the following grounds of appeal: -
 - a) That the Learned Trial Magistrate erred in Law and fact by finding the defendant 100% liable for the accident.
 - b) That the Learned Trial Magistrate erred in Law and fact in failing to attach due weight to Appellant's submissions on the main suit.

- c) That the Learned Trial Magistrate erred in Law and fact in failing to consider the questions asked by defence during cross examination.
- d) That the Learned Trial Magistrate erred in Law and fact by delivering a judgement that was lopsided and biased in favour of the Respondent.
- e) That the Learned Trial Magistrate erred in Law and fact and as a result arrived at a wrong decision to the prejudice of the Appellant.

5. The Appellant thus prayed that the Appeal be allowed, lower court's judgement be set aside and the Respondent to bear the costs of the Appeal.

6. The Appeal was canvassed through written submissions.

Appellant's Submissions

7. The Appellant submitted that the trial court erred in finding it 100% liable for the accident for reasons that the Respondent failed to establish negligence against it and that he was the one who encroached on its rightful lane; the Respondent's witness, one Jefferson Mweteri testimony contradicted the

respondent's testimony; the police officer's testimony buttressed the fact that it was the Respondent who caused the accident. In support of its submissions, the Appellant relied on the cases of **Treadsetters Tyres Ltd vs John Wekesa Wepukhulu (2010) eKLR** for the proposition that the burden of proof falls on the plaintiff to establish each element of tort and MORGAN -V- SIM (1857) 11, MOO P.C. 307 referred to in the case of CHARLESWORTH & PERCY ON NEGLIGENCE P.392 where the court held that a party seeking compensation for damage bears the burden of proof to show that the loss is attributed to the negligence of the opposite party.

8. On quantum, the Appellant argued that the trial magistrate failed to consider its submissions and as a result awarded damages that were excessive and erroneous. The Appellant relying on the case of **BK Suing Thro' His Mother and Next friend EM v Wilson Gitari Mburugu [2020] eKLR** where the court awarded general damages of Ksh.400,000/= to a plaintiff aged 5 ½ years who had sustained soft tissue injury to the thorax, abdomen as well as on his upper and

lower limbs; severe injuries to the maxilla and mandible resulting to loss of five (5) teeth with cut on the lip, submitted that a sum of Ksh.400,000/= would suffice.

9. On costs of the Appeal, the Appellant submitted that costs follow the event and prayed that the costs of this Appeal be borne by the Respondent.

Respondent's Submissions

10. On liability, the Respondent submitted that the evidence on record showed that the accident occurred on his lane hence the reasons both motor cycle rested on the said lane. He therefore urged to court to uphold the trial court's finding on liability.
11. With respect to quantum, the Respondent argued that the trial court took into account the principles of assessing general damages and awarded a proper award. In buttressing his submissions, the Respondent cited the cases of **Ahmed Mzee Famau t/a Najaa Coach Ltd & another vs Veronica Muiya aka Veronica Ngui Muiya (2017) eKLR** where the plaintiff sustained a fracture of the right

mandible, deep cut on the left forearm, blunt object injury to the right ear and blunt object injury to the chest. The court affirmed an award of Kshs. 500,000.00 and **Were v RMA (Suing Through His Father and Next Friend JAK - Deceased) [2024] KEHC 16568 (KLR)** where the plaintiff sustained Head injuries with cut wound and loss of consciousness, Injuries to the neck, mouth and teeth, chest, back with bruises, L knee with bruises, L ankle joint with a cut wound, and the court upheld an award of Kshs. 500,000.00 as general damages.

12. The respondent thus urged this court to dismiss the Appeal with costs.

Analysis & Determination

13. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that

it did not see witnesses testifying and therefore give due allowance for that.

14. In **Gitobu Imanyara & 2 others v Attorney General** [2016] e KLR, the Court of Appeal stated that;

“[A]n 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 allowances in this respect”

15. In **Peters v Sunday Post Ltd** [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it

is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

16. Similarly, in **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates** [2013] e KLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

17. With the above in mind, I will now proceed to determine the Appeal.
18. Having read and considered the submissions by the parties and the authorities relied upon, the issues for determination are: -

- a) Whether the trial court erred in holding the appellant 100% liable for the accident.
- b) Whether the quantum for general damages awarded by the trial court was manifestly excessive.

Issue No.1

19. It is trite that he who alleges must prove. The authors of **Charlesworth and Percy on negligence, 9th Edition at page 387** stated that; -

"In an action for negligence as in every other action, the burden of proof falls upon the Plaintiff alleging it, to establish each element of the tort. Hence it is for the Plaintiff to adduce evidence of the acts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded two questions arise (i) Whether on the evidence, negligence may be reasonably inferred and (ii) Whether assuming it

may be reasonably inferred, negligence is in fact inferred. "

20. Turning to the evidence on record, it is clear there is no contest that the accident occurred. What is contested is who was to blame for the accident.
21. In order to address the issue of liability, it is important to look at the evidence of PW1, PW 2, PW3 and DW1. DW2 did not tender any evidence that would affect my determination on liability.
22. PW1, Corporal Mohammed Wato, testified that the accident involved two motor cycles. He said the respondent was riding Motor Cycle Registration No. KMFW 452 A Captain, from Makandi to Kagaene Market and upon reaching the location of the accident at a feeder road on a bent corner, he collided with Samuel Mugure who was riding Motor Cycle Registration No. KMEW 835 S Yamaha heading towards Mbeu-Makandi. He said both Motor Cycles fell on the right side as one faces Makandi- Mbeu feeder road. He said Samuel Mugure failed to keep to his lane and give way as

the road was narrow and bent and as a result the accident occurred. He confirmed the accident occurred on the Respondent's lane according to the sketch plans and blamed the Appellant's rider for the accident.

23. In cross examination, he said the matter is still pending under investigations but as per the view of the road and the statement recorded, Samuel Mugure was to be charged.
24. PW2, was the Respondent herein. He adopted his witness statement dated 13th December, 2022 as his evidence in chief. In that statement, he stated that on the material date he was riding his aforesaid motor cycle from Makandi to Kagaene and upon approaching Kagaene Market at a corner, he collided with the motor cycle registration number KMEW 835 S Yamaha which was being ridden on his lane. He said the rider was on phone and that in an attempt to avoid the collision, he swerved to the extreme left, but the motorcycle still collided with his.
25. On cross-examination, he disputed that he was over speeding or overloaded, stating that he was carrying only

one pillion passenger. He also denied encroaching into the appellant's lane and asserted that it was the appellant's rider who encroached into his lane.

26. PW3, Jefferson Mweteri, adopted his witness statement dated 27th February, 2023 as his evidence in chief. In that statement, he said that on the material date he was walking along the roadside from Makandi towards Kagaene on the left side. He saw the respondent's motorcycle being ridden at a moderate speed and the appellant's said motorcycle in the opposite lane, being ridden at high speed and swerving into the respondent's lane causing a collision. He stated that after the collision, both motorcycles fell on the left side of the road. He blamed the appellant's rider for over speeding and riding in the wrong lane.
27. On cross-examination, he stated that the respondent was carrying two pillion passengers and reiterated that both motorcycles fell on the left side of the road.
28. DW1 testified that he was riding the appellant's aforementioned motorcycle on the left lane towards General Makandi when the accident occurred. He said the impact

threw them to the right side of the road. He stated he was riding at about 20 km/h, while the respondent was over speeding downhill with pillion passengers, which caused him to lose control. He further blamed the respondent for the accident, denied using his phone at the time and stated that he had never been charged for the accident. He added that the respondent's injuries would have been minimal if he had worn protective gear.

29. In view of the foregoing, I find that the appellant's rider, DW1, was primarily liable for the accident. DW1 stated that he lost control due to the respondent's actions but the evidence of PW1, PW2, and PW3 shows that DW1 rode in the wrong lane. Although PW3 stated that the motorcycles fell on the left side while the others said they fell on the right, the preponderance of credible evidence establishes that the appellant rider's negligence caused the collision. The respondent's action of carrying pillion passengers, did not materially contribute to the accident. Accordingly, the trial court rightly found the Appellant was to solely liable for the accident.

Issue No.2

30. It is imperative to note that an appellate court would not easily interfere with the trial courts' discretion on this issue unless it found that the trial court applied wrong principles in arriving at the finding. As stated by the Court of Appeal in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

“.... 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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

31. The same Court in **Odinga Jackton Ouma vs Moureen Achieng Odera [2016] Eklr** stated that- ***“comparable injuries should attract comparable awards”***
32. The Respondent pleaded that he sustained the following injuries: -
- i. Swollen and painful jaw.
 - ii. Fracture of the mandible, anteriorly.
 - iii. Tender anterior chest wall.
 - iv. Swollen and tender right leg.
33. Dr. John Macharia who examined the Respondent confirmed he sustained the above injuries. He noted that the soft tissue injuries had healed. and classified the degree of injury as harm.
34. I have considered the authorities relied upon by both parties in this Appeal and find that they are comparable in terms of the injuries sustained. I have also perused the trial court’s judgement and I note it took into account the passage of time and prevailing inflationary trends, and on that basis, its award for general damages cannot be said to be manifestly excessive.

35. I thus find no reason to interfere with the trial court's award of general damages of Kshs. 650,000 for pain, suffering and loss of amenities. I will also not disturb the special damages award as it was not challenged. I uphold the same.

36. The upshot of the above is that this appeal lacks merit. Accordingly, it is dismissed with costs to the Respondent.

37. It is so ordered.

Dated, signed and delivered at Meru this 7th day of May, 2026.

HESTON M. NYAGA

JUDGE