



REPUBLIC OF KENYA



KENYA LAW
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**Noreen v Beatha (Civil Appeal E924 of 2022)
[2025] KEHC 1373 (KLR) (Civ) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E924 OF 2022

REA OUGO, J

FEBRUARY 27, 2025

BETWEEN

MIRINGU WANGARI NOREEN APPELLANT

AND

DUSABE BEATHA RESPONDENT

*(Being an appeal from the judgment and decree of the Hon A.N.
Makau (PM) delivered on 11/10/2022 in CMCC NO.E8866 of 2021)*

JUDGMENT

1. The respondent filed a suit at the subordinate court alleging that he sustained injuries on December 24, 2020 following a road traffic accident. He alleged that he was a pillion passenger and at the Outering road at DT Dobie, the defendant drove carelessly, thereby losing control and causing its vehicle, KBT 563Y, to collide with the motorcycle. As a result, the respondent broke upper three teeth and had bruises on the left leg and foot.
2. The appellant denied the occurrence of the accident and pleaded that if the same did occur, it was attributed to the respondent's negligence.
3. At the end of the hearing, the trial magistrate found the appellant 100% liable. He awarded the respondent Kshs 550,000 and Kshs 45,550/- as general and special damages respectively.
4. Aggrieved by the trial court's finding, the appellant is challenging the judgment on the following grounds:
 1. That the learned magistrate erred in law and in fact in holding that the appellant was in any way liable for the accident giving rise to the claim by the respondent.



2. That the learned magistrate erred in law and in fact in holding and finding that the respondent had proved to the required standard that the appellant wholly contributed to the accident giving rise to the subject suit.
 3. That the learned magistrate erred in law and in fact and finding that the appellant was wholly to blame when the evidence tendered was so clear that the accident was solely caused by the unknown motorcycle and the respondent and hence liability ought to have been apportioned.
 4. That the learned magistrate erred in law and in fact in not considering the injuries sustained by the plaintiff could not have warranted an award of Kshs 550,000/-.
 5. That the learned magistrate erred in law and in fact in awarding general damages of Kshs 550,000/- which was excessive for the injuries sustained and without considering both the medical reports so as to arrive at a fair amount.
6. That the learned magistrate erred in law and in fact in not considering the appellants' evidence on record and submissions together with the authorities cited.
 5. The appellant sought to have the appeal allowed, the court to evaluate the evidence on record or finding of the lower Court on liability and hold that the appellant was not in any way liable for the accident giving rise to the suit and the lower courts finding on liability and quantum be set aside.
 6. On liability, the appellant submitted that Pw1 produced the police abstract and testified that he had not seen the Occurrence Book entry to know the circumstances that led to the accident. The evidence of a hit-and-run could mean the motorcycle did not stop after the accident and the rider was to blame.
 7. The appellant also faulted Pw2 for giving conflicting evidence on how the accident occurred. On the one hand, she stated she did not see how the accident occurred but proceeded to state how the accident occurred. Dw1, in her testimony, stated that she intended to join the main road from a service lane and flagged down vehicles to let her pass. As she was about to join the road, the motorcycle, which was overlapping hit her front number plate. The Appellant blamed the rider for the accident as he rode negligently. She relied on Civil Appeal E009 of 2021 Samuel Munyanzi Mugendo v Wickliffe Omboto [2021] eKLR where the court held:

"I am obviously not persuaded by the argument that because the police abstract did not apportion liability then both parties must be found equally liable. This is because causation is an issue of fact which must be proved through evidence. It cannot be presumed. It is my finding that the respondent proved negligence against the appellant on a balance of probabilities and in the absence of evidence to attribute contributory negligence to the respondent I must agree with the trial magistrate's finding that the appellant was wholly to blame."
 8. The appellant also faulted the trial magistrate for awarding Kshs 550,000 as damages where the respondent sustained broken left upper three teeth and bruises on the left leg. The trial court in its judgment awarded the Respondent Kshs 550,000/- but did not state its reason for making the award. The Appellant submits that an award of Kshs. 250,000/- is sufficient compensation. In Justine Nyamweya Ochoki & Another v Prudence Anna Mwambu [2020] EKLR the Plaintiff in that case was awarded Kshs 300,000/- after she had sustained loss of upper front incisors, a deep cut on the chin, loss of upper tooth, a cut on the lips and injury on the forearm. In Alfred Khivatsi Chai & Hassan Saro v Cecilia Tabu Kitsao [2019] eKLR the plaintiff had sustained more serious injuries as the loss of teeth and was awarded Kshs 250,000/-.



9. The respondent in her submissions stated that she relied on the evidence of two witnesses. The police officer confirmed the occurrence of the accident. The appellant was on a busy road and wanted to change lanes before the accident. There was no evidence from the appellant that absolved her from contributing to the accident. On the other hand, the respondent was a pillion passenger and did not contribute to the occurrence of the accident. In *Juma Rabote* (suing as the legal representatives of the estate of Leonard Taabu Rabote (deceased)) (Civil Appeal E044 of 2022) [2023] KEHC 2909 (KLR) (22 March 2023) the court observed that a reasonable person driving a motor vehicle on a highway with due care and attention does not hit every stationary object on his way merely because the object is wrongly there. He takes reasonable steps to avoid hitting or colliding with the object.
10. On damages, the respondent urged the court to consider the case of *Jesca Kajumwa Masela v Razick Aziz Obuba* [2021] eKLR where the respondent was awarded Kshs 500,000/- for comparable injuries. The court in *SAO (Minor Suing thro next friend) MOO v Registered Trustees, Anglican Church of Kenya Maseno North Parish* [2017] eKLR awarded Kshs 600,000/-.

Analysis and Determination

11. I have considered this appeal in the light of evidence on record, submissions, and cited authorities.
12. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (See *Selle vs Associated Motor Boat Co.* [1986] EA 123).
13. No 72198 PC Nthiga Muchiri (Pw1) produced the police abstract involving KBT 563T and an unknown motorcycle. He stated that the motorcycle escaped after the accident and efforts to trace it proved futile. On cross-examination, he testified that he did not know the circumstances leading to the accident. It was a hit and run which means the motorcycle did not stop after the accident and that he was not the investigating officer.
14. Dusabe Beatha (Pw2) testified that on the material day, she was a pillion passenger and they were along Enterprise Road at DT Dobie when the vehicle driven at high speed lost control and collided with the motorcycle. She accused the appellant of failing to brake, stop, swerve or slow down to avoid the subject matter. On cross-examination, Pw2 testified that she did not see exactly what happened. However, she recalled that they were in their lane when hit by the appellant. The vehicle hit her mouth and leg and she fell and her teeth came out. As the appellant joined the road, he hit them as she did not see them.
15. Noreen Mirungi Wangari (Dw1) testified that she was heading toward DT Dobie using Lusaka Road. She was to join Enterprise Road towards the commercial street so that she could join Bunyala Road. She asked for the right of way by flagging her hands. The road was two-way and traffic was bumper to bumper. As she waited to ensure that the road was safe to join, she was hit by a motorcycle on the bottom right of the number plate. She switched off the car and found the respondent on the ground. She testified that she did not hit the respondent as she was not in motion. She blamed the rider as he was overlapping. On cross-examination, she testified that she had not completely joined the road. The rider was to give her right of way so that she could join the road as the rest had given her right of way. After the accident, there was a slight bend on her number plate at the point of impact. She further testified that the respondent was not negligent but the rider was.



16. The trial magistrate acknowledged that although the appellant blamed the rider of the motorcycle, she failed to enjoin him as a party to the suit. Therefore, the appellant was 100% to blame as the respondent did not control the motorcycle.
17. According to the police abstract and the evidence of Pw1, an accident did occur involving the appellant's vehicle and an unknown motorcycle.
18. The evidence of the appellant and respondent points to the fact that the respondent, who was a pillion passenger was not to blame for the accident. Dw1 confirmed the same in her testimony. The evidence is that the appellant wanted to join Enterprise Road. She flagged other motorists to give her right of way. According to the evidence of Pw2, they were already on Enterprise Road when the appellant knocked them. Her evidence reveals that the appellant was behind them when the accident occurred. Dw1 testified that her front licence plate had a dent as a result of the accident. On cross-examination, she testified that she had not completely joined the road when the accident occurred. She also testified that the rider had not given her right of way. Therefore, in the circumstances, the trial magistrate cannot be faulted for finding her 100% liable.
19. The only issue for determination is now on quantum. The general principle to be observed by an appellate court in deciding whether to disturb quantum of damages were set out in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia (1982-88) 1 KAR 727* and restated by the Court of Appeal in the case of *Arrow Car Ltd v Elijah Shamalla Bimomo & 2 Others (2004) eKLR* that:

“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, 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.”
20. The appellant cited the case of *Justine Nyamweya Ochoki & another vs. Prudence Anna Mwambu [2020] eKLR*, where the Respondent suffered the loss of upper front incisor tooth and soft tissue injuries and was awarded Kshs. 300,000/=. The injuries sustained by the respondent therein were less severe than those sustained by the respondent herein who lost three teeth. The cases cited by the respondent did not contain comparable injuries to those sustained by the respondent.
21. In *Coast Motorcycles Watu Credit v SJM (Minor Suing Through Father & Next Friend DMC) (Civil Appeal 053 of 2022) [2023] KEHC 24917 (KLR) (24 October 2023) (Judgment)*, the Respondent in this case lost her 2 lower teeth and the court awarded General Damages of Kshs 500,000/-. In this case, the appellant lost 3 teeth and was awarded Kshs 550,000/-. The award cannot be said to be excessive for the loss of 3 teeth.
22. Consequently, I find that the appeal lacks merit and is hereby dismissed. The respondent shall have the costs of appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2025.

R.E. OUGO

JUDGE

In the presence of:



Miss Kamau -For the Appellant

Miss Kisiangni -For the Respondent

Wilkister -C/A

