



REPUBLIC OF KENYA



KENYA LAW
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**Musembi v Al-Kamar Trading Company Limited (Civil Appeal
071 of 2024) [2025] KEHC 12158 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 12158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 071 OF 2024
F WANGARI, J
MARCH 27, 2025**

BETWEEN

GEORGE KIOKO MUSEMBI APPELLANT

AND

AL-KAMAR TRADING COMPANY LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. L.K. Sindani, Principal
Magistrate delivered on 22/02/2024 in Mombasa CMCC No. E032 of 2023)*

JUDGMENT

1. The Appellant who was the Plaintiff in the lower court filed this appeal on both liability and quantum through the Memorandum of Appeal dated 18/03/2024 having been dissatisfied with the above mentioned judgment.
2. The Appellant filed the Plaint dated 17/01/2021 claiming damages for an accident that occurred on 28/12/2018 involving Motor Vehicle Registration Number KCR 736S Actros owned and driven by the driver of the Defendant/ Respondent, and the Plaintiff/ Appellant was riding his bicycle along Malindi-Mombasa road at Makuti area.
3. It was pleaded that the Plaintiff was lawfully and carefully riding his bicycle when the Defendant's driver carelessly drove his motor vehicle and hit the Plaintiff's bicycle from behind, resulting to serious injuries sustained by the Plaintiff.
4. The Plaintiff set forth particulars of negligence by the Defendant. The Plaintiff pleaded Kshs. 60,000/= as Special Damages and injuries future medical costs as follows:
 - a. Fracture of the condyle of the right humerus bone rendering a 7% permanent disability.
 - b. Future medical expenses and an annual estimated costs of Kshs 20,000/= being joint bone care and physiotherapy sessions.



5. The Respondent entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaintiff.

Evidence

6. The Trial Court heard the Plaintiff and his witnesses. The Defendant did not tender any evidence. The court proceeded to render judgement on 22/02/2024. In the Judgement, the Court found liability on 50:50 basis, Kshs. 500,000/= in General Damages for pain and suffering, special damages of Kshs. 22,000/= and future medical expenses at Kshs 600,000. Claim for diminishing earning capacity was dismissed.
7. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.
8. The Appellant case was that he was riding his bicycle when he was hit from behind by the Defendant's driver thus causing him to sustain injuries. He lost consciousness and were it not for the bodaboda riders who went after the vehicle, the driver was fleeing from the scene of accident. He came to while at Jocham hospital where he was admitted for treatment. On cross examination, he said he saw the vehicle behind him but the driver did not hoot. He reiterated that he was careful and on the watch. He said he was still under pain treatment though he had no documentation in support.
9. His witness, Cpl. Felix Mumo, a Traffic Police Officer gave evidence that the Plaintiff was involved in a hit and run accident. It was not possible to tell who was on the wrong as the vehicle that hit him was unknown at the time. He produced the Police Abstract as an exhibit. He had no sketch plans nor the police file with him.
10. Dr. Darius Wambua Kiema produced the Medical Report dated 09/11/2020 where he said that upon examining the Plaintiff, he had 7% disability as a result of the right humerus bone fracture. He required future medical costs for pain killers and physiotherapy at Kshs. 20,000 per year. He also charged Kshs. 2,000/= for the medical report and Kshs. 5,000/= for court's attendance. The defence did not call any witness. The defence medical report was produced by consent.
11. This court directed that the appeal be disposed of by way of written submissions and both parties complied by filing of rival submissions.

The Appellants' Submissions.

12. The Appellants submitted and reiterated that the court erred in finding that the was 50% liable for the accident. He submitted that the Defendant had a duty of care to the Plaintiff hence 100% liable for the accident. The Plaintiff was the only eye witness who testified, thus under section 107 of the [Evidence Act](#), he proved what he alleged. It was submitted that it was the responsibility of the Defendant to rebut the allegations of negligence against it, and that was not done. He submitted that the decision on liability be set aside and find the Defendant wholly liable for the accident.
13. On the award of general damages, the trial court was faulted for awarding damages that were inordinately low for the injuries sustained. He relied on the case of Philip Mwago v Lilia Njeri Thuo Nairobi HCCA No. 6 of 2023 where Kshs. 700,000/= was proposed as general damages for the injuries sustained.
14. The Appellant further submitted that the 7% permanent injury affected the earning capacity as this diminished his future productivity as a teacher at Nyali School. A global award of Kshs. 450,000/=



was proposed. He relied on the case of *Mumias Sugar Co. Ltd v Francis Wanalo*, Civil Appeal No. 19 Of 2023. He prayed for interest and costs of the appeal.

15. On the part of the Respondent, it was submitted that the trial court based on the evidence adduced was right granting of the Kshs. 500,000/= as general damages. The award was reasonable and justified.
16. The Respondent faulted the trial court for awarding Kshs 600,000/= as future medical expenses yet only Kshs. 20,000/= was pleaded. Kshs. 56,000/= was pleaded for medical treatment as per para. 10 of the Plaintiff. The court was further faulted for awarding Kshs. 5,000 for court's attendance yet it was not led and not proven. Kshs. 20,000/= ought to have been awarded as future medical expenses and Kshs. 17,000/= as special damages.
17. On diminished earning capacity. It was submitted that the Appellant failed to provide any evidence that his chances of gaining employment in the future have been diminished as a result of the injury. Reliance was placed on the case of *Nzuki Isaac Muveke v Francis Njogu Njehia* [2021] eKLR.
18. On liability, it was submitted that the evidence of the Plaintiff was not corroborated by the police abstract nor the police officer. The police officer did not blame the Defendant for the accident as he said he did not know who was to blame for the accident. The driver was not charged with a traffic offence.
19. The Respondent submitted that the Appellant had failed to prove his case as per the standard of proof. Reliance was placed on the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & ano.* [2014] eKLR inter alia. The appeal was said to lack merits hence ought to be dismissed with costs to the Respondent.

Analysis

20. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
21. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
22. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”



Liability

23. The Appellant urge this court to find that the trial court erred in finding him 50% liable because the Respondent was to wholly blame for the accident. He proposes that the Judgement of the trial court be set aside and the Plaintiff's suit therein be allowed with costs. On the other hand, the Respondent's case is that the judgement of the lower court was correct on both quantum and liability and should not be disturbed.
24. I have perused the Record of Appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal. I am asked to established whether the trial court erred in finding, on a balance of probabilities that the Appellant was wholly liable for the accident.
25. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:
- “ As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
26. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. Further, in *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:
- “ As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
27. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:
- “ In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
28. It is settled that the standard of proof on civil cases is on a preponderance of probabilities. In reevaluating the evidence, I note that both parties admit that there was an occurrence of the accident. The Plaintiff stated that it was the defendant's driver who negligently drove his motor vehicle and hit the Plaintiff's bicycle resulting to injuries sustained by the Plaintiff.
29. Even though the police officer was not the investigating office in the traffic case, he testified that the accident was a hit and run case hence it was not possible to tell who was to blame. The Plaintiff testified that it was the boda boda riders who went after the Defendant's vehicle and managed to stop it.



30. I have perused through the judgement of the trial court where it was found that the Plaintiff was 50% liable the accident. The trial court found both parties to blame as the traffic police officer had no party to blame. There was no independent eye witness.
31. The issue is whether this court should interfere with the trial court's findings. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In *Khambi & Another vs. Mahithi and Another* [1968] EA 70, it was held that:
- “It is well settled that where a Trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge”
32. Stemming from the stated finding of the Learned Magistrate, I find that there is reason to interfere with the trial court's finding on liability. The traffic police officer said they had nobody to blame because the accident was a hit and run, and the details of the vehicle involved in the accident was not known at the time.
33. The Defendant's driver is said to have driven off the scene of accident instead of reporting the accident to the nearest police station. I find that the evidence by the Plaintiff is a probability of more likely than not, the true reflection of what happened at the scene of accident. I find the liability at 100% as against the Respondent, and set aside the earlier judgment on liability.

Quantum

34. The Appellant submitted that an award of Kshs. 700,000/- would be adequate compensation while the Respondent submitted that the trial court correctly assessed general damages for pain and suffering as commensurate compensation in the circumstances of this case at Kshs. 500,000/=.
35. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -
- “The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.”
36. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
37. Having taken into consideration the cases relied on by the parties, the nature of injuries sustained, I find no reason to interfere with the award of Kshs. 500,000/= in General Damages would in my view be adequate compensation based comparable authorities cited by the parties. The appeal on General Damages is thus unmerited and is hereby dismissed.
38. On special damages, I find no ground to interfere with the same as they were proved. On future medical expenses, the trial court considered the evidence of the doctor that the Appellant would require pain



medication and physiotherapy expenses of about Kshs. 20,000 per year. She applied a multiplicand of 30 years.

39. Considering that the Plaintiff was said to have a lifetime post traumatic pains especially when working and during cold weather, and that there was post traumatic deformity, arthritis and stiffness of the right elbow, I find that the award was justifiable.
40. On diminished earning capacity, it was not proved how the injuries sustained would affect the earning capacity of the Plaintiff in the future. I do concur with the findings of the trial court in dismissing the claim.
41. On costs, I consider that the appeal is partially successful. I hereby exercise the discretion of the court and order that each party shall do bear its own costs.

Determination

42. In the upshot, I make the following orders: -
 - a. The Appeal is partially successful as hereunder;
 - i. Judgment on liability is hereby set aside and substituted with judgment on liability at 100% against the Respondent.
 - ii. Judgment on general damages, special damages, future medical expenses and diminishing future earnings is upheld.
 - b. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 27TH DAY OF MARCH, 2025.

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F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Kareji Advocate h/b for Onkoba Advocate for the Respondent

M/S Salwa, Court Assistant

