Migosi SDA Church (Sued through its Registered Trustees) & another v Obande (Civil Appeal E191 of 2023) [2025] KEHC 5266 (KLR) (28 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5266 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E191 OF 2023

AM MUTETI, J

APRIL 28, 2025

BETWEEN

MIGOSI SDA CHURCH (SUED THROUGH ITS REGISTERED TRUSTEES) ..... 1ST APPELLANT

BOARD OF MANAGEMENT MIGOSI SDA PRIMARY SCHOOL ..... 2ND APPELLANT

AND

MESHACK OCHIENG OBANDE ..... RESPONDENT

(Being an appeal from the Judgments and decree of the Honorable R.O Oanda (Esq) SPM on the 18th October 2023 in WINAM SPMCC No. E080 of 2021)

JUDGMENT

Introduction

1. This is an appeal against the decision of the Learned Honorable Magistrate Robert Mobisa Oanda in Winam PMCC No. E080 /2021 on both liability and quantum.

2. The appellant and respondent are both dissatisfied with the judgment thus before the court now is an appeal and a Cross-appeal.

3. The matter arises out of an accident that occurred on 18/2/2021 involving motor vehicle registration No. KCN 090Ta school bus and the plaintiff.

4. The plaintiff was a pedestrian near Kasagam Flyover area off Kisumu-Nairobi Highway when according to him the driver of the motor vehicle KCN 090T lost control and veered off onto the pedestrian lane and knocked him while he was lawfully going about his business.

5. The trial court upon hearing the matter arrived at the following finding:-

a. Liability 90:10 in favour of the plaintiff.

b. General damages Kshs. 1,000,000 less 10% liability of Kshs.1,000,000 grand total of Kshs. 900,000

c. Costs of the suit.

6. The appellant has raised the following grounds of appeal in his memorandum of appeal dated the 13th November 2023:-

i. The Learned Trial Magistrate erred in law and in fact in apportioning liability against the Appellants while there was no evidence at all of the Appellants' negligence.

ii. The learned Trial Magistrate erred in law and in fact in apportioning 10% liability against the Respondent who on the facts and findings was crossing the road at a dual carriage.

iii. The Learned Trial Magistrate erred in law and in fact in failing to consider the evidence before him carefully, fully, and thus failed to realize that the Respondent did not establish any negligence against the Appellants.

iv. The Learned Trial Magistrate erred in law and fact in making the award of general damages in the said judgment that was manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the Respondent.

v. The learned Trial Magistrate erred in law and fact in entering judgment for general damages without considering the applicable principles as established by precedent that comparable injuries ought to attract comparable damages and by so doing reached a figure of damages that is inordinately high, arbitrary and totally unsupportable by any authority or precedent.

vi. The Learned Trial Magistrate totally ignored and/or paid lip service to the Appellant's submissions and authorities therein cited.

7. The court shall proceed to determine the Appeal and Cross-appeal

Appellant's Case

8. The appellant's case is that the respondent was to blame for their occurrence of the accident.

9. The appellant maintains that the respondent was negligent in the manner he crossed the road.

10. The appellant called DW1 Collins Otieno who was the driver of the motor vehicle at the time of the accident as witness.

11. The driver adopted his written statement dated the 23/ 7/2021 and went further to add that despite the occurrence of the accident he was never charged with any traffic offence.

12. According to DW1 the respondent was crossing at a point where there was no zebra crossing and that the road is the dual carriage road.

13. The witness stated "..... A pedestrian suddenly ran across the road from the right side to the left side. The motor vehicle was in the inner lane, hooted but the pedestrian kept running and passed the motor vehicle towards my side. I applied brakes, I swerved to my extreme left but could not completely go off the road as there was two matatus packed at the stage on the left side. The pedestrian ended up hitting himself on my motor vehicle in the middle of the bonnet. The impact thrifts the pedestrian into the middle of the road."

14. Further, the witness statement reads that he was at a speed of 30 to 40 Kilometers per hour.

15. It is on the strength of those facts that the appellant contends that the learned honorable magistrate erred in finding the appellant to blame for the accident at 90%.

16. The appellant has urged this court to re-evaluate the evidence in line with the decision of the Court of Appeal in Simon Taveta Vs Mercy Mutitu Njeru (2014) eKLR CACA No. 26 of 2013 where the court stated:-

> " As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in Selle -vs- Associated Motor Boat Co. [1968] EA 123, thus:
>
> "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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)".

This court further stated in Jabane – vs- Olenja [1986] KLR 661

> " More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870."

17. The appellant has urged this court to find that considering the totality of the facts presented by the appellant's witness as well as those of the respondent the respondent was wholly to blame for the occurrence of the accident.

18. The appellant has cited the following authorities to support his case that the respondent should be held 100 percent liable for the accident:-

    i. Patrick Mutie Kimau & Another Vs. Judy Wambui Ndurumo [1997] eKLR CACA No. 254 of 1996 where the court of Appeal set out The provisions of the Highway Code as follows:-

> " 6. Before you cross the road, stop at the kerb, look right, look left and right again. Do not cross until the road is clear; Then cross at the right angles keeping a careful look out all the time. If there is a refuge stop On it and look again. On one way traffic road, stop and look towards oncoming traffic before you cross.
>
> 7. do not cross unless you have a clear view of the road both ways. Take extra care near stationary vehicles or other obstruction, and whenever your view is limited.

ii. Joseph Mutuvi Kamori Vs. Mercy Wahaki Mugo [2006] eKLR *CA No. 693 of 2002*.

iii. David Mwangi Kariuki & Another Vs. Stephen Mwangi & Another [2017] eKLR Nakuru HCCA No. 5 of 2015.

19. The appellant urged the court to consider that the respondent was crossing a busy highway and that he failed to take the necessary precaution while crossing the road.

20. Further the appellant submitted that a pedestrian on a Highway owes other highway users the duty to move with due care and follow the provisions of the Highway code.

21. According to the appellant the respondent's act of crossing the road while running exposed him to danger of being hit by the vehicles on the road.

22. The appellant has thus urged this court to find that the respondent was 100% to blame for the accident.

23. On quantum the appellant urged this court to take into account the injuries as particularized by the respondent in his plaint.

24. the appellant has however invited the court to consider that the missing teeth are not captured in the discharge summary. According to him since the discharge summary captured the injuries as observed at the earliest opportunity it was possible that the teeth may have been lost long after the accident.

25. The appellant further contends that the trial magistrate did not analyse the medical evidence comprised in the treatment notes and medical reports before concluding that the respondents sustained multiple injuries.

26. The appellant also took issue with the lower court failure to take into account the authorities cited by both parties in arriving at the quantum of damages.

27. The appellant has thus urged this court to consider comparable awards by other courts for similar injuries and set aside the award for the sum of Kenyan shillings 1,000,000 in general damages and substitute it with an award of Kshs.600,000 since in the appellant's view the sum of Kenyan shillings 1,000,000 was excessive in the circumstances.

Respondents Case

28. The plaintiff (respondent) testified this matter as PW1. On 18th May 2022 and in his evidence he stated that prior to the accident he used to be a painter but as at the time of giving evidence he had ceased working.

29. The plaintiff adopted the full text of his statement dated 7/6/2021 as his evidence in chief.

30. The plaintiff also produced documents which included;-

a. A demand later.

b. Medical report by Dr.Okombo.

c. Police abstract.

d. P-3 form.

e. Discharge summary from Russia Hospital.

f. Copy of the records of motor vehicle registration number KCN 090T.

31. He went further to testify that he had "not healed well from the accident. My left leg is not yet fully healed. I had a fracture. I never used crutches before the accident. I do experience pain in the rib area. I can't do the painting work I used to do before."

32. The plaintiff/ respondent Upon cross-examination testified that at the point of impact there was no zebra crossing the motor vehicle lost control and hit him.

33. The respondent went on to state that: " I was on the right side facing Kisumu and I wanted to cross the road. The road is a dual carriage way. I was standing in the divider in the middle of the road. This was at 4:00 PM and the road is usually busy."

34. On re-examination he maintained that he was keen when crossing the road. He went further to deny that he was running to cross the road.

35. The respondent also called PW2 No. 71788 P.C Simeon Biwott whose role was to produce the police abstract. The police abstract indicated that the matter was still under investigation.

36. PW3 a witness for the respondent was a Clinical officer at Ahero Sub County Hospital and he listed the injuries suffered by the respondent as follows:-

    a. Cat wound on the forehead stitched.

    b. Neck pains.

    c. Lost the upper and lower teeth.

    d. Backache.

    e. Chest pain

    f. Wound on both arms.

    g. Fracture of the left tibia bones.

    h. Bruises on the knee joint.

    i. Pop on the left leg.

37. The clinical officer classified the injuries suffered as grievous harm.

38. The respondent blamed the appellant for the accident and went on to contend that the driver of the motor vehicle was negligent in the manner he drove.

39. The respondent in is dissatisfied with the apportionment meant of liability as well as the quantum of damages awarded thus his cross appeal.

40. According to the respondent if indeed the appellant's driver was driving at 30 to 40 kilometers per hour as alleged in his testimony he would have been able to avoid hitting respondent.

41. The respondent maintains that the appellant's driver would have been able to stop the vehicle without serving and the fact that he was unable to do so should be evidence enough to demonstrate that he was negligent in the manner he drove.

42. The respondent's submission is that since the appellant admitted having seen the plaintiff crossing the road, he was precluded from denying liability for the accident because if he was driving at a speed of 30 kilometers per hour it would have been possible for him to stop the vehicle and avoid hitting the respondent.

43. The respondent further contended that the suggestion by the appellant that the respondent hit himself on the vehicle was bizarre and should be dismissed.

44. Further the respondent maintained that the appellant was contradictory in his evidence since at some point, he stated that the respondent was not crossing the road only later to turn around and claim that indeed the respondent was crossing the road at the time.

45. The respondent has thus urged this court to find that his version of events leading to the occurrence of the accident was more credible and that the appeal by the appellant on liability should be dismissed.

46. On quantum the respondents submitted that the nature of injuries particularized by the respondents witnesses PW3 and PW 4 Dr. Siper Ryan Peter Otieno should have attracted a higher figure in damages.

47. This court has however noted that although PW 3 talked about the respondent having lost teeth, PW4 at page 10 of the typed proceedings testified that there was no indication of loss of teeth in the discharge summary.

48. PW4 however corroborated PW3's evidence on the fracture suffered.

49. The respondent further urged this court to consider the report by Dr Tobias Otieno produced as DEXH 1 which showed that there was loss of teeth and disability assessed at 30%.

50. They said Dr Tobias estimated the cost of a surgery to improve the disability by 10% at Kshs. 150,000.

51. According to the respondent a reasonable sum of damages would have been Kshs. 1,300,000 . The respondent in support of the figure cited the following cases:-

    i. Peston Limited & Another Vs. Samuel Itonye Kagoko [2022] eKLR in which the court awarded Kshs. 800,000 for a fracture of the femur.

    ii. Anthony Nyamwenya Vs. Dorcas Gessare Mounde [2022] eKLR Where the plaintiff lost 6 teeth and was awarded Kshs 600,000.

    iii. Kweri Peter & 2 Others Vs. Ann Wanjiku Maina [2017] eKLR where the Plaintiff out of skeletal injuries and loss of two teeth was awarded Kshs. 600,000.

52. On the strength of the authorities cited by the respondent counsel pleaded that the sum of Kshs. 1,000,000 Awarded by the lower court was inordinately low and this court should vary the same to Kshs. 1.3 million.

53. The respondent also made a case for an award for cost of future medical expenses. In the respondents view the lower court was wrong in finding that the sum was not pleaded and consequently could not be awarded.

54. The respondent's argument is that the prayer for cost of fracture medical expenses is tenable where the plaintiff is able to establish that he is likely to incur that expenditure in the future. It falls in the realm of general damages. It need not be pleaded like special damages.

55. The respondent aged this code to consider the decision of the Court of Appeal in Tracom Limited& Another Vs. Hassan Mohammed Adan (2009) eKLR where the court of Appeal held:-

> " ..... He readily agreed that they claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Limited Vs. Gituma (2004) 1 EA 91 this court stated:-

> " And his regards future medication (physiotherapy) The law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, The need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the does conteniolate as arising naturally from infringement of a person's legal right should be pleaded:"
>
> "..... We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require"

56. The respondent therefore contents that the presentation before court of medical reports touching on future medical expenses would be sufficient for purposes of the court awarding the cost of future medical expenses.

57. In the respondents view the lower court erred in failing to award the respondent the figure for cost of future medical expenses. The respondent referred the court to a host of other authorities which the court has duly considered.

58. The respondent also prayed for an award in the nature of damages for loss of future earning capacity which he estimated at a figure of Kshs.1,000,000.

59. They respondent argued that a claim for loss of future earning capacity is in the nature of general damages and its need not be specifically pleaded.

60. All that one needs to prove according to the respondent is that there was loss of amenities as a result of the injuries sustained and that the injuries suffered are likely to affect his ability to earn an income for self and family as was discussed in Mumias Sugar Company Ltd Vs Francis Wanalo (2007) eKLR and Jason Nyoike Kariuki Vs. Simon Cheruiyot Ngéno & Another (2006) eKLR where Justice M. Koome (as she then was) quoted From the locus classicus Court of Appeal Case of Butter Vs Butter (1984) KLR 225 where it was held:-

> " A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labor market or work as well paid as before the accident are lessened by his injury....
>
> The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as age. The qualifications of the claimant, his remaining length of working life, his disabilities and previous service."

61. The responded argued that the injury has confined him to constant medical care and use of a wheelchair.

62. The respondent further submitted that he was assessed and found to have suffered a disability he will have to live with for life.

63. On the strength of those submissions the respondent urged this court to dismiss the Appeal by the appellant and enter a judgment in favor of the respondent. In line with this closed appeal in the following terms:-

    a. Liability 100%.

    b. General damages

i. Pain and suffering Kshs.1.3 million.

ii. Loss of earnings capacity Kshs. 1 million.

c. Cost of future medical expenses Kshs.150,000.

Grand total = 2,450,000.

d. Costs and interests of the appeal.

Analysis And Determination.

64. The duty of this court is a first appellate court is well captured in the case of Selle Vs Associated Motor Boat Ltd [1968] EA 123 thus:-

> " 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)".

65. This court has carefully perused the record of appeal and internalized the evidence contained in the witness statements of PW1 and DW1 which basically summarized the circumstances under which the accident occurred.

66. It is an undeniable fact that the respondent was a pedestrian and was hit while attempting to cross the highway.

67. It is also an uncontested fact from the evidence that it is the motor vehicle of the appellant that was involved in the accident with the respondent.

68. I have carefully evaluated the versions presented by the witnesses of the respondent(plaintiff) and the appellants sole witness DW1.

69. On liability this court takes into account the fact that the respondent was crossing the highway at a point where there was no zebra crossing according to the respondents own testimony.

70. It is thus important to highlight here that the respondent assumed a high duty of care as he ventured to cross the road. The road being a dual carriage road is itself a quiet signal to all road users that it is a busy road and the presence of motor vehicles thereon is almost guaranteed and that those who take it upon themselves to cross highways at undesignated pedestrian crossing must be extra careful for it is potentially dangerous to do so.

71. However, that fact alone does not lessen the burden on the drivers on the highway to always bear in mind that the pedestrians also have a right to use the road and the fact that there is no zebra crossing should never be taken as a license to drive at dangerously high speed without due regard for the road users.

72. It is the duty of every road user whether a pedestrian or driver to ensure that unnecessary accidents are avoided by pedestrians making sure that where pedestrian crossings are provided, the same are put

to use and drivers must also remain cautious that as they approach major towns the possibility of encountering pedestrians crossing the road is high.

73. In this court's view the severity of injuries sustained by the respondent and the point of impact on the vehicle point to the fact that the respondent was right ahead of the motor vehicle and that is precisely why he landed on the bonnet.

74. The appellant's driver admittedly swerved to avoid the accident thus an indication that he must have seen the respondent at close quarter and could therefore not completely avoid hitting him.

75. In my considered view, both parties were at fault taking into account the totality of the facts.

76. I am constrained to find that since the respondent dangerously thrust himself onto the road from the evidence the liability apportioned to him should in the circumstances have been greater than 10%. I accordingly in line with the authorities cited in support of the appeal adjust the same to 30% thus the decision of this court on liability is 70:30 in favour of the respondent.

77. On quantum the principles that guide the courts are well settled in the case of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini & A.M.M Lubia & Another [1982-88] 1 KAR 777 at page 730 Kneller, J.A held;-

> " 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. See Ilango v. Manyoka [1961] EA 705 709, 713; Lukenya Ranching and Farming Co-operatives Society Lt v. Kavoloto [1970] EA, 414 418, 419."

78. The appellant in his appeal maintains that the damages as awarded by the trial court were excessive and that the lower court did not properly evaluate the medical evidence is tendered on the injuries.

79. The respondent on the other hand has contended that the sum awarded is inordinately low in view of the injuries and that the court erred in failing to make award for cost for future medical expenses and the loss of earning capacity.

80 On the strength of the diametrically opposed views on the issue of damages this court is inclined to interfere with the award even though it is an exercise of discretionary power by the trial court.

81. This court has independently noted that the medical evidence presented by the respondents on the nature of injuries is inconsistent.

82. The evidence of the PW3 does not capture the loss of two teeth by the respondent. That clearly was a latter inclusion which this court cannot take into account in determining the damages to award.

83. In view of the evidence tendered in the lower court this court makes the following order considering the authorities cited:-

    a. Liability 70:30 in favour of the plaintiff/ respondent.

    b. General damages –

        i. Pain and suffering 900,000

ii. Loss of earning capacity 300,000

Less 30% 1,200,000

360,000

Kshs. 840,000

iii. Future medical expenses 150,000

Grand total = 990,000

c. Costs of the Appeal to the respondent plus interest at court rates.

84. The period during which the respondent remained immobilized he definitely could not engage in any meaningful economic activity thus the figure for loss of earning capacity.

85. The cost of future medical expenses are as per the estimate provided for by the doctor.

Order

86. The appeal is allowed hereby allowed and the respondent shall receive the total sum of Kshs. 990,000 plus costs and interests at court rates the date of judgment in the Lower court.

87. It so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Baraza for the Appellant

Owuor for the Respondent