



REPUBLIC OF KENYA



**Lumumba v Mzerera (Civil Appeal E130 of 2024)
[2025] KEHC 12073 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 12073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E130 OF 2024**

F WANGARI, J

MAY 30, 2025

BETWEEN

AGREY MUKABI LUMUMBA APPELLANT

AND

FAITH AMANI MZERERA RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. J. Nyariki
RM, delivered on 30/04/2024 in Mombasa CMCC No. E1860 of 2019)*

JUDGMENT

1. The Plaintiff dated 23/10/2019 claimed damages for an accident that occurred on 28/03/2015 involving Motor Vehicle Registration Number KCA 311B owned and driven by the driver of the Defendant/ Appellant while the Plaintiff/ Respondent was a lawful fare paying passenger in the vehicle. The suit was filed out of time with leave of court as per the court order dated 15/08/2019 pursuant to the Originating Summons dated 26/06/2019.
2. It was pleaded that the Defendant's driver carelessly drove his motor vehicle causing it to crash in a self-involving accident. The Plaintiff suffered fracture of the left pubic ramii and severe lacerations on the left upper arm. The Plaintiff also pleaded Kshs. 271,272/= as Special Damages.
3. The Respondent entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaintiff. He also prayed that the suit be dismissed for being time barred under the Limitation of Action Act.
4. The Trial Court heard the Plaintiff's case. The Defence did not adduce any evidence and it closed its case. The Court found 100% liability against the Defendant. Kshs. 550,000/= was awarded as general damages and Kshs. 271,272/= as special damages.



5. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal based on grounds that the suit was time barred and the Plaintiff failed to proof negligence on a balance of probabilities.
6. The appeal was canvassed by way of written submissions. Both parties complied by filing their rival submissions which I have considered.

Analysis

7. 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.
8. In the cases of *Peters v 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...”
9. Upon considering the pleadings filed and the evidence on record, the issues for determination are;
 - a. Whether the suit was time barred
 - b. Whether the appeal has merits
10. On the first issue, it is a fact that the suit was filed 3 years after the cause of action arose. The Respondent moved the court through the Originating Summons as stated herein above, and the court having been satisfied that the reasons given for failing to file suit within time having had merits, allowed the application.
11. The trial court exercised its discretion and issued the orders allowing the suit to be filed out of time. The Defendant subjected himself to the proceeding of the court. Even though it was pleaded in the Statement of Defence that the suit was time barred, I find that the same had been overtaken by events, and so is the appeal on that ground. I find no reason to interfere with the said discretion of the court in allowing the suit to be filed out of time.
12. On the second issue, the Appellant appealed on liability and quantum. On liability, the Plaintiff testified that she was asleep in the vehicle and she only woke up in hospital after the vehicle she was travelling in was involved in an accident. She blamed the driver for the negligence in driving the vehicle.
13. On the other hand, the Appellant stated that the Respondent had not proved negligence on the part of the driver as she was asleep when the accident happened. The Respondent being a passenger did not contribute to the causation of the accident. The burden of proof shift to the Appellant who ought to have discharged himself from liability. The Appellant did not call any evidence in support of its case.
14. In *Shaneebal Limited v County Government of Machakos* (2018) eKLR, while relying on the case of *Trust Bank Ltd v Paramount Universal Bank Ltd & 2 others* Nairobi (Milimani) HCCS No 1243 of 2001, Odunga J (as he then was) held as follows

“It is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing so the party fails to substantiate its pleadings



and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

15. The Respondent’s case remains uncontroverted and is therefore unchallenged. I find no fault in the trial court finding the Appellant 100% liable for the accident.
16. The Appellant did not submit on the award of damages. Only the Respondent who submitted on the award of both general and special damages. It was submitted that the award of Kshs. 550,000/= was not excessive and was correctly assessed as general damages for pain and suffering which was commensurate compensation in the circumstances.
17. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd v Meru Express Service v. 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.”
18. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. I find no reason to disturb the award. The Appellant did not submit on the special damages. Special damages must be pleaded and proved.
19. The Respondent pleaded special damages of Kshs. 271, 272/=. From the submissions, the Respondent prays for Kshs. 273,272/= as special damages. nothing stopped the Respondent to include all the special damages in the pleadings. The award shall remain as awarded based on the documents filed in support of the claim.
20. On costs, the appeal having had no merits, I hereby exercise the discretion of the court and award costs to the Respondent.

Determination

21. In the upshot, I make the following orders: -
 - a. The Appeal lacks merits and is hereby dismissed.
 - b. Costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 30TH DAY OF MAY, 2025.

F. WANGARI

JUDGE

In the presence of;

Mr. Kioko Advocate for the Appellant

N/A by the Respondent

M/S Norah, Court Assistant

