Maalim v Wanyonyi (Civil Appeal 45 of 2023)
[2025] KEHC 9083 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9083 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 45 OF 2023

MS SHARIFF, J

JUNE 27, 2025

BETWEEN

ABDIRAHIM ADAN MAALIM ..... APPELLANT

AND

JOHN KUNDU WANYONYI ..... RESPONDENT

(Being as appeal from the Judgement/Decree of Hon. Tom M. Olando-PM, delivered on 30th March 2023, in Chief Magistrate's Court at Bungoma CMCC No. 165 of 2022)

JUDGMENT

1. This appeal arises from the judgement/decree of Hon. Tom M. Olando (P.M.) dated 30th March 2023, delivered in Bungoma CMCC No. 165 of 2022, where he entered judgement in favour of the Respondent and awarded him Kshs. 400,000/- as general damages and Kshs. 26,000/- as special damages less 50% contributory negligence. The total award thus stood at Kshs. 226,000/- plus costs and interest.

2. The Respondent herein had filed a claim on the basis that on 31st October 2020, he was lawfully riding a Motorcycle registration number KMEY 365G along Hospital Road at Dawameds area Bungoma, when the Respondent, his agent, driver and/or servant carelessly and negligently controlled and/or managed Motor Vehicle registration number KCR 439K make Suzuki Swift and caused the same to lose control and hit the Respondent herein causing him to suffer/sustain severe injury and suffered loss and damages. The Respondent particularized the Appellant's negligence and also the injuries suffered. The injuries suffered included blunt injury to the occipital region of the head, blunt injury to the chest and avulsion wound to the right knee.

3. The Appellant filed his statement of defence, where he denied all the particulars pleaded by the Respondent in his plaint. Further, in the alternative he stated that if an accident did occur, the same was caused by the Respondent's negligence which the particularized in the said statement of defence.

4. After the trial, the Court held that due to lack of an independent witness and the same being a case of the word of the Respondent versus that of the Appellant liability was apportioned at 50:50 as against both parties. The trial Court proceeded to make an award of Kshs. 400,000/- under general damages, Kshs. 26,000/- under special damages plus costs and interest of the suit from the date of its judgement.

5. The Appellant being dissatisfied with the said judgement did file this appeal and raised the following grounds of appeal;

    a. That the trial Magistrate erred in law and fact as he did, on evaluation of liability.

    b. That the trial Magistrate erred in law and fact as he did by basing his decision on irrelevant matters and failing to consider the evidence on record.

    c. That the trial Magistrate erred in law and fact as he did on the assessment of quantum.

    d. That the trial Magistrate erred in failing to follow and uphold legal parameters and binding precedents on assessment of general damages in similar circumstances.

6. This is an Appeal seeking to set aside the decision of the trial Court on quantum. The Appellant seeks that the appeal be allowed and judgment on quantum of the lower Court be set aside in its entirety, a re-assessment of quantum of general damages, the costs of the appeal and of the Court below, as well as such further or other orders the Honourable Court may find fit to issue.

7. The Respondent being equally dissatisfied with the Court's judgment and decree, filed a Cross Appeal on 26th May 2023, seeking that the cross appeal be allowed, the trial Court's judgment on Liability set aside and costs of the appeal. The cross-appeal is premised on three grounds, namely:

    a. The trial magistrate erred in law and fact in apportioning liability 50:50 which was against the evidence adduced.

    b. The trial magistrate erred in law and fact to apportion liability at 50:50 when the Appellant did not file counter-claim.

    c. The trial magistrate erred in law and fact that the Appellant's failure to produce inspection report then the negligence lies squarely on the Appellant.

8. As follow up to the Appeal and Cross Appeal, the Appellant's counsel alleged to have filed his submissions on 17th March 2025 dated in support of his appeal and opposing the cross appeal, but the same is not on record. On the other hand, the Respondent filed theirs dated 14th March 2025 on 19th March 2025, in support of the cross appeal and opposing the appeal.

Respondent's Submissions

9. On the issue of liability, the Respondent submitted that it established its case on liability vide its two witnesses and as per the filed pleadings squarely blamed the Appellant for the accident. He submitted that if the testimony of the Appellant was true, that he was hit from the front he ought to have availed an inspection report to prove the same. The Respondent further submits that the Appellant is to blame wholly for the accident as per his availed evidence thus this Court ought to apportion liability at 100% against the Appellant.

Analysis and Determination

10. 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 firsthand.

11. The duty of the first appellate Court was settled long ago in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the Court, held as follows;-

> " ... 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

12. Having said this, I have carefully considered this Appeal and the Cross Appeal in its entirety and the two key issues that emerge for my determination are;

    I. Whether the trial magistrate erred in the finding on liability.

    II. Whether the trial magistrate erred in arriving at his decision on quantum of damages.

13. Thus, as I address the issues here under, for ease of following, the cross appeal and the submissions therein will be taken as the response to the Appellant's appeal;

Whether the learned trial magistrate erred in her finding on liability.

14. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya outlines the burden of proof as follows;

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

15. It then follows that, the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

16. It must be recalled that the duty to discharge the burden of proof in respect of negligence rests with the Plaintiff. In Henderson v Harry E. Jenkins {1969} 3 A.E.R. 756, the Court reasoned that:

> " In an action for negligence, the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving Judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not satisfied the plaintiff action fails." (See also Veronica Kanorio Sabari v Chinese Technical Team for Kenya & 2 others HCCC No. 376 of 1989 Henry Mwobobia v Muthaira Karauri & Another HCCC No. 104 of 1991)
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> "The onus is on the plaintiff to prove this case on the legal standard necessary. In a civil case the standard is on a balance of probability."

17. As discerned above, the cross-appeal, is on re-assessment, re-evaluation and determination on whether the trial Court erred in apportioning liability, simply put, it is a re-evaluation of who was to blame for the accident. The scope and extent of the fundamental legal principles on this subject are settled. In

the cases of Nandwa v Kenya Kazi Ltd [1988] KLR 488 and Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR the Court on this issue held that:

> " In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides same answer adequate to displace that inference."

18. It is now necessary, in light of these principles, to reassess the evidence presented before the trial Court. The evidence on record clearly establishes that an accident occurred on 31ST October 2020, involving the Respondent, who was riding his Motorcycle registration number KMEY 365G make TVS and the Appellant's Motor Vehicle, Registration Number KCR 439K make Suzuki Swift. Consequently, the respondent sustained bodily injuries.

19. The Respondent testifying as PW1 told the Court that on the date of the accident he was lawfully riding his Motorcycle along hospital road while carrying a pillion passenger when the appellant, who was coming from the opposite direction, recklessly, in a zig zag manner and in a high speed, overtook other vehicles, lost control of his vehicle and collided with the Appellant who was on his rightful left lane. According to him, the accident occurred at Dawamed Hospital while he was heading to Kanduyi at 2 p.m. and his speed was 40 Km/hour.

20. PW3 PCW Jackline Ochieng testified that an accident did occur on 31st October 2020, at 1.20 p.m. along Dawamed area involving the appellant's motor vehicle registration number KCR 439K make Suzuki Swift and the respondent's motor cycle KMEY 365G make TVS and the same was reported at Bungoma Police station. She testified that one PC Lokidnyang was the was the investigating officer. She said that her role was solely to produce a Police Abstract, which she did produce as PEXH 5, which indicated that the accident was still under investigations.

21. The Appellant testified as DW1 and told the Court that on day of the accident he was driving along hospital road and a speeding Motorcycle belonging to the Respondent herein hit his vehicle. He told the Court that his vehicle was damaged but he did not avail any inspection report and that he was aware that on that day two people got injured. According to him, the Motorcycle rider was oncoming at a high speed in a zigzag manner but he did not stop and he swerved to the left and applied emergency brakes. He told the Court that he drove his Motor Vehicle in a careful manner and not at a high speed as alleged. He insisted that he was on the left side of the road and is not aware if anyone witnessed the accident. He told the Court that he flashed his lights before swerving to the left but the Motorcycle rider still managed to hit his Motor Vehicle. He mentioned that an inspection was done on his Motor Vehicle.

22. In rendering its decision on liability, the trial Court held as follows:

> " The Plaintiff testified that he was riding the Motorcycle when the Defendant's driver lost control of the Motor Vehicle and hit him while he was on his side of the road.
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> The Defendant testified and stated that the Plaintiff was riding at a high speed and he lost control and hit the vehicle on the side of the vehicle.
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> In this case, it is the word of the Plaintiff against that of the Defendant. There was no independent eye witness and as such, I apportion liability equally between the two parties. 50% against the Defendant and 50% against the Plaintiff."

23. Was the trial Court right in arriving at this decision? In the case of where 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 circumstances, 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."

24. In my appraisal of the evidence, PW3, produced a police abstract. However, the abstract did not apportion blame to any party as the investigations were still ongoing. PW3 told the Court that she was not the investigating officer in this matter and failed to avail before the Court the police file and sketch maps of the scene.

25. The above evidence of the parties gives two possible scenarios of how the accident occurred. Both parties asserted that the other was driving at a high speed in a zigzag manner and each of them blamed the other for causing the accident. The respondent did not adduce any evidence to prove that he was licensed to ride a motor cycle. On the other hand the appellant failed to produce the inspection report for his vehicle despite his testimony the his vehicle had been inspected after the accident.

26. Guided by the principles already discussed earlier in this decision, it is the duty of the Plaintiff, now Respondent, to prove negligence on the part of the Defendant, the Appellant herein. Based on the evidence presented, it is clear that the Respondent was a Motorcycle rider who was injured as a result of the collision.

27. The Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR held:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...'"

28. In this instance both the appellant and the respondent owed each other and other road users a duty of care. I do find that in gthe absence of the police file which would have contained the sketch maps, it is easy to ascertain with any measure of certainty the whom of the two is culpable for causing the accident. Given that road traffic accidents do not ordinarily happen on their own, with the exception of instances of force majeure. I am satisfied that both the Appellant and the Respondent contributed to the accident and were therefore rightly held equally liable by the learned trial magistrate. I place reliance on the pronouncement of the Court of Appeal decision in the case of Stephen Obure Onkanga

v Njuca Consolidated Limited (2013) eKLR whereat, when faced with a similar facts, the Court of Appeal rendered itself as hereunder:-

> " Accordingly, in the instant appeal, as there was no concrete evidence to distinguish between the blameworthiness or otherwise of the Appellant or the Respondent, both should be held equally to blame."

Whether the trial magistrate erred in arriving at his decision on quantum of damages.

29. On quantum, the approach of the Courts to such a situation like in the instant appeal is exemplified by the case of Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja *CA No. 2 of 1986* KLR 730 wherein Nyarangi J.A stated that:

> " an appellate Court does not interfere with quantum of damages simply because in its opinion the damages awarded is excessive, it only interferes if there is evidence. That the damages have been assessed on wrong grounds or are unreasonable."

30. It is imperative to note that the Appellant herein impugns the quantum on general damages and not liability.

31. According to PW2, Dr. Charles Andai, the Respondent herein sustained blunt injuries to the head, chest and a wound to the knee. Vide his medical report dated 20th May 2022, which he produced in Court as PEXH 9(a), the Respondent sustained moderate serious soft tissue injuries and the wound had healed but with slight complications. Due to the partially stiff and limp while walking he gave 5% disability.

32. In his grounds of appeal, the Appellant contends that the general damages awarded were excessive. In his trial Court he urged the Court to make an award of Kshs. 250,000/-. On the other hand, the Respondent urged this Court to uphold the award as made by the trial Court noting that the same was within the limits set out in decided cases and also within the limits of the Kenyan economy.

33. I wish to state at the outset that the award of general damages is always at the discretion of the trial Court. However, this discretion must be exercised judiciously and in accordance with the law. The mandate of an appellate Court to interfere with damages awarded by a trial Court is limited; it is confined to specific circumstances which include that the award was either inordinately high or low, such that it reflects an erroneous estimate of the damage suffered; or if the trial Court took into account irrelevant factors, omitted relevant ones, or applied incorrect legal principles in arriving at the award.

34. I have reviewed the authorities provided by both parties to the trial Court in support of their respective proposals on quantum as submitted in the subordinate court. I find that the injuries sustained by the Plaintiffs in those authorities were different and not as severe than the injuries sustained by the Respondent in this case.

35. Recent awards by superior courts on soft tissue injuries range from Kshs. 100,000 to Kshs. 300,000/-. Like, in the case of Jyoti Structures Limited & another v Truphena Chepkoech Too & another [2020] eKLR, the High Court awarded Kshs. 125,000/= to a person who had sustained blunt injuries to the head, neck, chest, back, and both thighs. It also made a similar award for a second person who had sustained bruises on the parietal scalp, blunt injury to the chest, and deep cut wounds on the right forearm and right hand and also, In Ogaro & another v Olang' (Civil Appeal 122 of 2019) [2022] KEHC 15465 (KLR), the High Court awarded 150,000/= to a party who had sustained tenderness to the head, neck, thorax, and abdomen as well as swelling in the upper and lower limbs. In yet another case of Ochola v Owuor (Civil Appeal E039 of 2022) [2024] KEHC 7689 (KLR), the High Court

awarded Kshs. 150,000/= to a party who had sustained soft tissue injuries of the right shoulder joint and both knee joint.

36. I have considered the injuries sustained by the Respondent and the assessed 5% permanent disability and I do note that the injuries are largely soft tissue ones. Regard being had to awards in comparable cases, and the rate of inflation, I find an award of Kshs. 400,000/- is reasonable for compensation for injuries suffered by the Respondent/claimant.

37. The Appellant was not aggrieved by the award of Kshs. 26,000/- for special damages and costs awarded to the respondent by the trial Court so I have no reason to interfere with the same.

Conclusion

38. The upshot of the above findings, is that I find the Appellant's appeal on quantum fails and so is the respondent's cross-appeal on liability.

39. Each party shall bear their own costs of the appeal.

40. This file is hereby marked as closed.

Orders accordingly.

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

M.S.SHARIFF

JUDGE

In the presence of:

Ms Ngome For The Appellant

N/a By Wattangah & Co For The Respondent

Peter Court Assistant