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Kalexis Limited & another v Opondo (Civil Appeal E047 of 2025) [2025] KEHC 11514 (KLR) (Civ) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11514 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E047 OF 2025

AC MRIMA, J

JULY 31, 2025

BETWEEN

KALEXIS LIMITED .... 1ST APPELLANT

ERICK ODHIAMBO .... 2ND APPELLANT

AND

DANIEL ONYANGO OPONDO .... RESPONDENT

(Being an appeal from the judgment and decree of the Hon. H. M. Ng'ang'a (PM) in Nairobi Chief Magistrates Court Civil Suit No. 1707 of 2021 delivered on 18th December 2024)

JUDGMENT

Background:

1. Through the Plaint dated 16th February 2021, Daniel Onyango Opondo, the Respondent herein, sought compensation from Kalexis Limited and Erick Odhiambo, the 1st and 2nd Respondents herein, for injuries he sustained from a road traffic accident, he claimed, was caused by the reckless driving of the 2nd Appellant, the driver of the 1st Appellant.

2. The Appellant challenged the suit through the Statement of Defence dated 27th November 2022. Apart from denying the claim, and placing the Respondent to strict proof, they attributed the accident to the Respondent's negligence. They pleaded that the Respondent failed to take due care and attention to his safety and that he failed to observe Road User Rules and Traffic Laws.

3. Upon considering the pleadings, the evidence, the rival submissions and the relevant law, the learned trial magistrate, in his Judgement found that the Respondent had established it case on a balance of probability. He found the Appellants 100% liable for the accident. He awarded Kshs. 21,683/- as special

damages and Kshs. 1,500,000/- as general damages. The Appellants were aggrieved, hence the instant Appeal.

The Appeal:

4. Through the Memorandum of Appeal dated 14th January 2025, the Appellants expressed dissatisfaction with the trial court's findings. It urged that the entire judgment be set aside, varied or quashed on grounds as hereunder;

    1. The learned trial magistrate erred in law and fact by failing to analyse all the relevant evidence availed at the trial court on the award of liability and quantum.

    2. The learned trial magistrate erred in law and fact by failing to consider the particular circumstances surrounding the occurrence of the accident.

    3. The learned trial magistrate erred in law and fact by failing to consider pertinent issues raised by the appellant in the submissions.

    4. The learned trial magistrate erred in law and fact by failing to appreciate the appellants contentions and arguments.

    5. The learned trial magistrate erred in law and fact by failing to apply the correct legal principles when awarding liability and quantum hence arriving at an inordinately high amount.

    6. The learned trial magistrate misdirected himself by considering erroneous facts.

    7. Consequently, the decision of the learned trial magistrate constituted miscarriage of justice.

The submissions

5. In its written submissions dated 17th April 2025, the Appellant identified the issues for determination as; whether the trial court erred on liability and whether the appeal ought to be allowed andthe impugned judgment set aside.

6. To bolster the assertion that the trial court's finding on liability was erroneous, the Appellant cited the case of *Kennedy Nyangoya - v- Bash Haulers* (2016) eKLR where it was observed that a police abstract was not conclusive proof of liability. On that basis, it submitted that the police abstract produced by the police indicated that the accident was pending investigation and no one had been blamed for the accident.

7. The Appellant further submitted that the evidence that was before the trial court did not establish that there existed a duty of care that was breached as to satisfy the tort of negligence.

8. In a bid to have this court apportion liability equally, the Appellant relied on the case of *Joseph Muthuri - v- Nicholus Kibera* (2022) eKLR.

9. On the second issue, the appellant first acknowledged the fact that this court cannot interfere with the damages awarded simply because it would have awarded a different figure had it tried the case. However, it was its position that the damages awarded were inordinately high as to warrant his court's intervention. To that end, the Appellant tempered its position by citing the case of *Butt - v- Khan (*1981) KLR.

10. The Appellant submitted that the authorities relied upon by the Respondent were not comparable to its case as they were more severe.

11. The Appellant submitted that discretion on damages ought to be exercised judiciously. It drew support on the case on *Kimaru Maina - v- Boniface Onyango Aliwa* (2021) eKLR.

12. The Appellant urged that the award by the trial court be set aside and be substituted with an award of Kshs. 350,000/-. It relied on the case of *Daniel Otieno Owino - v- Elizabeth Atieno Awuor* (2020) KEHC) where the Plaintiff was awarded Kshs. 400,000/- for compound fracture of the right tibia and fibula and soft tissue injuries.

The Respondent's case:

13. The Respondent challenged the Appeal through written submissions dated 30th April 2025. He identified the issues for determination as; whether the trial court applied the correct principles in apportioning liability and, whether the amount was inordinately high.

14. It was its submission that from the witnesses' testimonies and documents produced before the trial court, the 2nd Appellant was speeding or carelessly driving in the circumstances that made him unable to bring the vehicle to a halt.

15. While citing the English case of *Miller - v- Minister of Pensions* (1947)2 ALL ER 372, it urged that, on a balance of probability, it proved its case and the learned trial magistrate did not err in apportioning liability at 100%.

16. The Respondent rejected the appellants' proposal of Kshs. 350,000/- stating that the injuries in the cases of *Samuel Kipkemoi Kirui - v- Ibrahim Shero Hussein* (2016) eKLR were not comparable.

17. In conclusion, it was its case that the learned trial magistrate did not err. It urged the appeal to be dismissed with costs.

Analysis:

18. Having carefully considered the record, the parties' respective submissions and the decisions referred to, the issues that emerge for determination are as follows: -

    i. Whether the trial court properly directed itself on apportioning liability and;

    ii. Whether it applied the correct principles on quantum.

19. This being a first appeal, the duty of this Court to re-evaluate and reconsider the evidence afresh and come up with its own conclusions. In doing so, this Court must bear in mind that it did not see witnesses and therefore give due allowance for that.

20. The Court of Appeal spoke to the foregoing in *Gitobu Imanyara & 2 others - v- Attorney General* [2016] eKLR when it observed as follows: -

> 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 allowances in this respect.

21. Similarly, in *Abok James Odera t/a A.J Odera & Associates - v- John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the duty of the first appellate court was described thus;

> …This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way…

22. With the foregoing, the focus now turns to the issues.

Liability:

23. Police Constable Jackline Naekeu was PW1. She testified that on 20th May 2020 at about 0730hrs, there was a road traffic accident involving the motor vehicle registration No. KCN 123G and pillion passenger, the Respondent herein. It was her evidence that according to investigation done by Corporal Munyao and the police abstract, the case is still pending under investigation. On cross-examination, she stated that she was not the Investigating Officer. She admitted that she knew the road where the accident had happened but was not familiar with the scene. It was her evidence that the scene was visited by the Investigating Officer and that she was only relying on information in the Police Abstract. She stated that no one was blamed.

24. The Respondent was PW3. It was his evidence that the lorry is the blame for the accident. He stated that it hit them and he was riding in the motorcycle as a passenger. He stated that he was wearing protective clothes. On cross-examination, he stated that the lorry hit them when joining the road from the left and turning to the right. He claimed that the lorry was at a high speed. The Respondent further stated that he was wearing a helmet, a yellow reflective jacket and that he was moving at a normal speed which he indicated to be below 50kph. It was his evidence that they were overtaking it and it abruptly turned right. He stated that they were close to each other. He admitted that he did not inform the rider to reduce speed.

25. On the foregoing evidence the learned trial magistrate was of the finding that since there was no evidence from the Appellants on the manner in which the accident occurred, they were negligent and wholly to blame for the accident.

26. The process of apportioning liability is strictly evidence based. It turns on section 107 of the *Evidence Act*. Therefore, for a Court to make a finding that an accident is wholly attributable to a party, such party must avail all the evidence legally required of it, to demonstrate that it is not blameworthy even in the remotest of possibilities. It will not suffice for a party to simply rely on the fact that a Defendant did not controvert the fact that there was an accident.

27. For purposes of this case, for the trial Court to have made the sweeping conclusion that the Appellant was wholly to blame, the Respondent ought to have availed more than the police abstract and the testimony that he had a reflective jacket on. He had the legal obligation to show that the rider was insured, possessed a valid rider's license and most importantly, that he was overtaking the lorry in an area designated or marked for that purpose.

28. In *William Kabogo Gitau - v- George Thuo & 2 Others* [2010] 1 KLR 526 Kimaru J. [as he then was] spoke to the foregoing by stating thus: -

> … 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 than 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."

29. Whereas this Court takes cognizance of the position that apportionment of liability is a discretion within the trial court, as was observed in *Khambi & Another - v- Mahithi & Another* [1968] EA 70, there was a manifest error in principle which must be corrected by this Court. In the case it was observed:

> ... 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.

30. Whereas the Respondent indeed established that the accident occurred, in terms of percentage, it did not ascend to a degree of 100% against the Appellants. The circumstances as were favoured apportionment of liability instead.

Quantum:

31. An appeal on quantum is a well-trodden path. It is an exercise of discretion within the trial Court. in disturbing it, an appellate court must not only know its bounds but must exercise its authority judiciously ot ensure that the award is neither too high nor too low.

32. In *Kemfro Africa Ltd - v- Meru Express Service v. A.M Lubia & Another* 1957 KLR 27 the Court of appeal spoke to the foregoing as hereunder: -

> 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 fact 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.

33. To exercise the foregoing jurisdiction, a look at the evidence as regards the extent of injuries and comparable awards will suffice.

34. Dr. Cyprianus Okoth Okere was PW2. In the medical report he produced as evidence, it indicates that the Respondent had fracture of the left fibula. As at 24th August 2020, a period of three months after occurrence of the accident, PW2 observed that the Respondent had recurrent pains on the left lower leg and difficult walking. He also observed that he had a slightly tender left upper and lower leg on deep palpation. In his conclusion, PW2 classified the injuries as grievous harm. He assessed the degree of permanent disability at 10%.

35. The evidence by Dr. Waithaka, DW1, who conducted the medical examination about three years after the accident, was to the effect that that there were no permanent disability and that the Respondent could walk without any assistance.

36. There is no doubt the Respondent suffered injuries. In the case of *Daniel Otieno Owino & Another - v- Elizabeth Atieno Awuor* the Plaintiff was awarded Kshs. 400,000/- for a compound fracture of the right tibia and fibula and soft tissue injuries. In *Kenyatta University - v- Isaac Karumbe Nyuthe* (2014)

eKLR the Court substituted the amount of Kshs. 700,000/- with Kshs. 350,000/- for fracture of the right femur and severe soft tissue injuries on the left knee joint.

37. I also have occasion to compare the foregoing decisions with the ones in *Francis Ndungu Wambui & 2 Others - v- VK (a minor suing through next friend and mother MCWK* (2019) eKLR and *Mt. Longonot Medical Services Limited & Another - v- Andason Kitonyo Kinyenza* (2017) eKLR where the court awarded Kshs 1,000,000/- for injuries sustained to the upper limbs, compound fracture of distal tibia fibula shaft and abrasions and lacerations.

38. In *Mbaka Nguru & Another v James George Rakwar* Nrb Civil Appeal No. 133 of 1998 [1998] eKLR the Court of Appeal discussed quantum of damages as hereunder;

> … The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

39. From the foregoing authorities, it is evident that the damages of Kshs. 1,500,000/- was inordinately high. It warrants this Court's intervention. There was only one fracture occasioning a disability at 10% which after three years later was no longer was there.

Disposition:

40. The appeal is merited and the following final orders hereby issue: -

    (a) The appeal be and is hereby allowed.

    (b) The judgment of the trial Court is hereby varied as follows: -

        (i) Liability is hereby apportioned in the ration of 80%:20% in favour of the Respondent.

        (ii) Damages re-assessed at Kshs. 800,000/-.

    (c) The special damages of Kshs. 21,683/- is hereby upheld.

    (d) The Respondent to bear costs of the appeal.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Asiyo, Learned Counsel for the Respondent.

Misss Ngaita, Learned Counsel for the Appellant.

Amina/Michael – Court Assistants.