



**Huyo v Charles Ochumba Owoko t/a Pendeza Building and Construction & another
(Civil Appeal E120 of 2021) [2024] KEHC 897 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E120 OF 2021
MS SHARIFF, J
JANUARY 31, 2024**

BETWEEN

WILLIAM ADERA HUYO APPELLANT

AND

**CHARLES OCHUMBA OWOKO T/A PENDEZA BUILDING AND
CONSTRUCTION 1ST RESPONDENT**

SILVESTER OLUOCH 2ND RESPONDENT

*(Being an ____ appeal from the judgment and decree of Hon M. Shimenga
(SRM) delivered on 9/9/2021 in Kisumu CMCC NO. 626 of 2017)*

JUDGMENT

Background And Facts

1. William Adera Huyo (Appellant) sued the Respondents for tortious negligence and claimed for damages for injuries suffered as a result of a road accident. The circumstances surrounding the accident were that on or about the 21st of December 2016 the Appellant was travelling as a pillion passenger on a motorcycle KMDA 137L when the 1st Respondent's motor vehicle registration KBU 976J then driven by the 2nd Respondent collided with the motor cycle.
2. In response the 1st and 2nd Respondents filed a joint statement of defence generally denying causing the accident, and without prejudice averring that if at all an accident occurred it was wholly due to negligence of the Appellant for failing to take safety precautions.
3. In support of his case at the lower court the Appellant called three witnesses. PW1 a Clinician from Kisumu County Referral Hospital produced a P3 form. He stated that the Appellant had sustained injuries to the chest and right ankle. He classified the degree of injuries as harm. Additionally, he stated



that the Appellant had suffered fractures of the 1st, 2nd, 3rd and 5th metatarsal necks as per Dr. Kouko's medical chits.

4. PW2 Geoffrey Ndiema a traffic police officer attached to Kondele Police Station on his part testified on behalf of the Investigating Officer who he said had since been transferred. It was his testimony that the Investigating Officer Moses Mugendi visited the accident scene and confirmed that the accident had occurred resulting in injuries to the rider and pillion passenger. He produced the police abstract as PEXH 4. Upon cross examination he averred that he could not tell who was to blame for the accident.
5. PW3 the Appellant himself was next on the witness stand. He stated that on the 21/12/2016 he was headed home aboard a motorbike. That on reaching the junction next to Golden Elites School the motorcycle stopped to give way to traffic, at which point the Respondent's lorry rammmed into the motorcycle on the left side of the road. It was his further testimony that in the aftermath of the accident the 2nd Respondent fled the scene of accident and had to be brought back by other motorcycle riders. Due to the injuries suffered, he testified that he went to Aga Khan hospital where he was treated and released, after which he went to JOOTRH where X-ray was done. It was his testimony that he had sustained injuries on the right ankle, a T5 vertebral compression and fractures of the 1st, 2nd, 3rd and 5th metatarsals. He placed the blame for the accident squarely at the foot of the 2nd Respondent being the driver of the lorry for over speeding and recklessness. He equally held the 1st Respondent vicariously liable as the owner of the lorry.
6. In support of their case the Respondents called 1 witness DW1 Sylvester Oluoch (the 2nd Respondent). He stated that on the fateful day he was driving at 15km/hr from Golden Elites towards Saphire School. It was his further testimony that at the Golden Elite School junction the motorcycle came at a high speed and rammmed into his fuel tank. He blamed the motor cyclist for failing to give way and not wearing a helmet and reflector jacket. In response to allegations that he fled the accident scene he stated that it wasn't true as he stood 1 metre away from the scene of accident.
7. After due consideration of the pleadings, evidence and submissions the Learned Magistrate rendered judgment on the 9th of September 2021 finding the Respondents 80% liable and the Appellant 20% liable. She equally awarded general damages of Kshs.600,000/=.

The Appeal

8. Aggrieved by this judgment the Appellants have now proffered this Appeal on the following grounds;-
 - i. That the learned magistrate erred in finding him 20% liable despite lack of evidence to warrant such a finding.
 - ii. The learned magistrate ignored the evidence on liability and employed the wrong principle in finding him 20% liable.
 - iii. The learned magistrate erred in law in awarding inordinately low general damages of Kshs.600,000/= for pain and suffering.
 - iv. The learned magistrate erred in law when she misapprehended the proceedings before her thereby deciding the case purely on conjecture and speculation as opposed to the evidence before her.
9. On the strength of these grounds the Appellant called for the award on liability and quantum to be set aside.



10. On the 22/5/2023 when the matter came up for directions it was agreed that it should be disposed of by way of written submissions. A look at the record indeed shows that both parties have filed submissions.

Appellant's Submissions

11. In his submissions dated 20th April 2023 the Appellant contended that the learned magistrate erred in consolidating KISUMU CMCC NO. 627 of 2017 with KISUMU CMCC NO. 626 of 2017 for purposes of liability yet all that was agreed upon was adoption of witness evidence. It was his submission that being a pillion passenger there was no way he could bear the same liability as the rider. He relied on the cases of Janet Kathambi Vs Charity Kanja Njiru [2021]eKLR and James Gikonyo Mwangi vs DM (suing through his mother and next friend)(2016)eKLR where the common thread was that a pillion passenger could not be held liable for an accident since they are not in control of the motorcycle.
12. With regard to quantum the Appellant submitted that the award of Kshs.600,000/= was not comparable to the injuries suffered. It was his contention that the magistrate considered irrelevant factors thereby arriving at an inordinately low figure. On this the Appellant relied on the case of Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55, where it was held that an appellate court could interfere with damages of the trial court if satisfied that there was misapprehension of facts.
13. It was his further contention that despite going for a second medical examination the Respondent never filed a report meaning his evidence of the injuries remained uncontroverted. He urged this court to be guided by the cases of; Hussein Abdi Hashi vs Hassan Noor [2004]Eklr where the court enhanced an award of Kshs.250,000/= to Kshs.800,000/= for similar injuries back in 2004, Njora Samuel vs Richard Nyang'au Orechi [2018]eKLR where the court upheld an award of Kshs.500,000/= for fracture of a single metatarsal and Grace Wamue vs Wicks Mwethi Njenga [2020]eKLR where Kshs.500,000/= was awarded for blunt chest injuries, blunt injury to the left lower limb and fracture of 3rd and 4th metatarsals.
14. On the strength of these submissions, the Appellant urged the court to allow the appeal.

Respondents' Submissions

15. In regard to liability the Respondents submitted that by failing to avail sketch maps the Appellant had not met the evidentiary threshold set by Sections 107, 109 and 112 of the *Evidence Act*. It was their contention that the two varying versions of how the accident occurred could only be settled by production of sketch maps.
16. As for the issue of apportionment of 20% liability to the Appellant it was their contention that the Appellant impliedly consented to the breach of traffic rules by the rider hence, he could not be absolved from blame.
17. With respect to quantum the Respondents urged this court to uphold the Kshs.600,000/= awarded by the trial magistrate, based on the theory of comparable injuries attracting comparable awards as enunciated by the case of Jabane vs Olenya (1989)KLR 1. They equally cited the case of Samuel Munyanzi Mugendo vs Wycliffe Omboto (2021) eKLR in which Kshs.800,000/= was awarded for more serious injuries.



Analysis And Determination

18. After careful analysis of the record of appeal and the submissions the following issues arise for determination:
- Whether the magistrate erred in apportioning 20% liability to the Appellant.
 - Whether the award of Kshs.600,000/= as damages was inordinately low.
19. Before delving into the issues, it is important to reiterate this court's duty being the first appellate court, which is to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, giving due allowance to the fact that that it did not see the witnesses testifying. (see the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123).

Whether the magistrate erred in apportioning 20% liability to the Appellant

20. It is the Appellant's contention that liability could not be extended to him as he was not in control of the motorcycle at the time of the accident. Additionally, he avers that at no point was it agreed that liability in the sister file (Kisumu CMCC NO. 627 of 2017) would apply to Kisumu CMCC NO. 626 of 2017 which is the subject of this appeal. The Respondents on his part avers that the Appellant consented to breach of traffic rules hence the trial magistrate was right in apportioning 20% liability to him.
21. In apportioning 20% liability to the Appellant the learned magistrate stated as follow:
- ‘This being a sister file with Kisumu CMCC NO. 627 of 2017 I shall adopt the decision on liability. Liability be and is hereby apportioned at the ratio of 80:20 in favour of the Plaintiff against the Defendants jointly and severally.’
22. I have extensively perused the proceedings in both Kisumu CMCC 626 and 627 of 2017. At no point is it indicated that liability in the latter would apply to the former. Additionally, there is no consent filed and there is no record by the magistrate's hand that parties had agreed on apportionment of liability. To this end I do find that there was no factual basis for apportionment of 20% liability to the Appellant herein.
23. Moreover, it is not in dispute that the Appellant herein was a pillion passenger. To my mind in the absence of direct evidence of causation it is inconceivable how the Appellant as a pillion passenger would have caused the accident. Going by the evidence tendered by the Respondents in the lower court there is no indication as to the degree of control exercised by the Appellant over the motorcycle. In the Court of Appeal case of *Rosemary Mwasya vs Steve Tito Mwasya & 2 Others* (2018) eKLR. The court stated as follows:
- “Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the Appellant drove/managed and or controlled the accident vehicle prior to the accident.”
24. I have re-evaluated the evidence of PW2 P.C Geoffrey Ndiema and I find that he was categorical that the traffic file was still under investigations and no charges had been preferred against either the 2nd Respondent or the rider. In light of this finding the accident is assumed to have occurred due to the negligence of both the 2nd Respondent and the rider, wherefore liability attaches to them equally at 50%.



Whether the award of Kshs.600,000/= as damages was inordinately low

25. On quantum, the appellate court in interfering with the discretion of the trial court in awarding damages, is guided by the Court of Appeal decision in *But vs Khan* (1982 – 88) KAR 1 which set the parameters as follows: -
- “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material” respect. And arrived at a figure which was either inordinately high or low.”
26. In awarding damages, the Court of Appeal in *Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR held that:-
- “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.”
27. According to the P3 form and x-ray imaging report by Dr. Kouko the Appellant sustained the following injuries:
1. Bruised ankle joint
 2. Fracture of the 1st, 2nd, 3rd and 5th Metatarsal neck.
28. PW1 the Clinician in his testimony confirmed the injuries. The above injuries have not been disputed by the Respondents. In arriving at the award of Kshs.600,000/= as general damages, the trial Magistrate considered the case laws relied upon by the Appellant and the Respondent which the parties have also relied on in this appeal. The Appellant submitted that in the cases of; *Hussein Abdi Hashi vs Hassan Noor* [2004] eKLR the appeal court enhanced Kshs.250,000/= to Kshs.800,000/= for comparable injuries, *Njora Samuel vs Richard Nyang’au* [2018] Eklr Kshs.500,000/= was awarded for fracture of one metatarsal, *Grace Wamue vs Wicks Mweithi Njenga* [2020]eKLR Kshs.500,000/= was awarded for blunt chest injury, blunt injury to the left lower limb, swollen left tender foot and fracture of the 3rd and 4th metatarsal.
29. I have taken time to consider the injuries sustained by the plaintiffs in the aforementioned cited cases. In the *Hussein Abdi Hashi* case (supra) the Plaintiff sustained a fracture of the Lateral mallelus and fractures to the 2nd to 5th metatarsals. This to my mind are more severe injuries than the ones suffered by the Appellant herein. In the *Njora Samuel* case (supra) the plaintiff sustained a fracture to a single metatarsal. Which was less severe than the injuries in this case. Finally, in the *Grace Wamue* case the Plaintiff sustained the injuries as listed in the preceding paragraph and Kshs.500,000/= was awarded in the year 2020.
30. Regarding the case relied upon by the Respondents *Samuel Munyanzi Mugendo* (supra) the Plaintiff suffered fracture of the right patella and 2nd, 3rd, 4th and 5th metatarsal and Kshs.800,000/= was awarded. These are also more severe injuries.
31. Looking at the case of *John Mwangi Kiiru v Salome Njeri Mwangi* [2019] eKLR in which the court upheld an award of Kshs.600,000/= for almost the same injuries suffered by the Appellant herein, it is my humble view that the learned trial Magistrate correctly exercised his discretion in assessment of



the damages. The award was not excessive; neither was it based on wrong principles; The court did not take into account irrelevant factors nor did it leave out any relevant factor. The Kshs.600,000/= was not inordinately low or high as to be a wholly erroneous estimation of damages.

32. Accordingly, this court makes the following orders:

- i) Judgement on liability is set aside and liability is hereby entered against the Respondents jointly and severally at 50% and against the rider at 50%.
- ii) The trial court's award of Kshs.600,000/= is upheld.
- iii. Each party to bear it's own costs.

DATED, DELIVERED AND SIGNED AT KISUMU THIS 31ST DAY OF JANUARY, 2024.

MWANAISHA. S. SHARIFF

JUDGE

