



**Oluoch v Charles Ochumba Owoko t/a Pendeza Building and Construction & another
(Civil Appeal E121 of 2021) [2024] KEHC 895 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E121 OF 2021
MS SHARIFF, J
JANUARY 31, 2024**

BETWEEN

AMOS DANCUN OCHIENG OLUOCH 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 627 Of 2017)*

JUDGMENT

Background and Facts

1. Amos Dancun Ochieng Oluoch (Appellant) sued the Respondents at the magistrates' court seeking 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 while he was riding motorcycle KMDA 137L the 2nd Respondent being the 1st Respondent's driver rammed into the motorcycle occasioning him serious injuries.
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 then it was wholly due to negligence of the Appellant, for failing to take safety precautions.
3. 3 witnesses testified in support of the Appellant's case. PW1 the Appellant himself stated that on the 21/12/2016 he was taking a client home from jua kali. That on reaching the junction at Golden Elites he stopped to check if the road was clear before branching. At this exact moment a lorry registration No. KBU 976J belonging to the 1st Respondent and being driven by the 2nd Respondent suddenly



- appeared from the Golden Elites direction and rammed into his motorcycle. This he said resulted in injuries to his chest, back, waist, head, crush of the mid shaft of the tibia and fibula, injury to the knee and fracture/dislocation of the right ankle joint.
4. The Appellant averred that the accident had rendered him unable to work to sustain his family. He placed liability for the accident at the 2nd Respondent's feet for over speeding.
 5. PW2 Philip Kilimo a Clinician at Kisumu County Referral Hospital produced a P3 form. He testified that the Appellant sustained compound fracture of the right tibia, compound fracture of the right fibula and blunt chest injuries. He classified the injuries suffered as grievous harm. It was his further testimony that the Appellant would require correction surgery at a cost of Kshs.250,000/=.
 6. PW3 PC Geoffrey Ndiema confirmed that the accident happened. He produced the police abstract, which he said showed the accident was still pending under investigation.
 7. 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 15 km/hr from Golden Elites towards Sapphire School, when at the junction heading to Golden Elites primary school the Appellant rammed into his fuel tank at high speed. He blamed the Appellant for failing to give way and for not wearing a helmet and reflector jacket. In response to allegations that he fled the accident scene he stated that it was not true as he stopped about one metre away from the scene of accident.
 8. After due consideration of the pleadings, evidence and the submissions of parties, the learned magistrate rendered judgment on the 9th of September 2021 in the following terms:
 - i. Liability 80%:20% in favour of the Appellant
 - ii. General damages Kshs 500,000/=
 - iii. Special damages Kshs 187,000/=
 - iv. Less 20% contribution Kshs 137,400/=TOTAL Kshs 549,600/=

The Appeal

9. Being aggrieved by the magistrate's finding the Appellant has now proffered this appeal on the following grounds:
 - a. That the learned magistrate erred in finding the him 20% liable in the face of overwhelming evidence against such a finding.
 - b. That the learned magistrate erred in law by completely ignoring the evidence presented thereby employing the wrong principles in finding him 20% liable.
 - c. The learned magistrate erred in law in awarding inordinately low general damages of Kshs.500,000/= for pain and suffering taking into consideration the injuries sustained.
 - d. The learned magistrate erred in law and fact by failing to consider the pleadings and evidence on the issues of future treatment and loss of earnings.
 - e. 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.



10. On the strength of the foregoing he urged this court to:
 - i. Allow the appeal with costs
 - ii. Set aside the general damages and substitute them with the correct estimate.
 - iii. Set aside the finding on liability.
 - iv. Make an award on future medical expenses, loss of earnings and earning capacity
 - v. Award him costs of the appeal.
11. On the 23/3/2023 directions were taken to the effect that the appeal be canvassed by way of written submissions.

Appellant's Submissions

12. On liability the Appellant submitted that the Respondents were 100% liable on account of the 2nd Respondent neither applying brakes, nor swerving to avoid the accident.
13. In respect of quantum he submitted that his evidence was uncontroverted. He urged this court to consider the fact that he suffered grievous harm and award damages reflecting current trends. As for the issue of special damages the court was urged to consider the produced receipts totalling Kshs.280,157.34/=.
14. Additionally, he insisted that this court awards the Kshs.250,000/= sought for future medical expenses based on the testimony of Dr. Olima.
15. In conclusion, the Appellant urged the court to grant the prayer for loss of future earnings given that he could no longer ride his motor bike.

Respondents' Submissions

16. In their submissions dated 28th June 2023 the Respondents submitted on liability and quantum. With respect to liability they urged this court to uphold the learned magistrate's finding since the Appellant had not demonstrated how the decision had been based on irrelevant issues. They urged the court to be guided by the case of *Mbogo vs Shah (1968) EA 93*, to the extent that an appellate court will not interfere with the exercise of discretion of an inferior court unless satisfied that the decision was wrong or that the trial court misdirected itself in the analysis of the evidence by either taking into consideration extraneous matters or by failing to take into account relevant facts.
17. In regard to quantum the Respondent submitted that the amount of Kshs.500,000/= awarded was sufficient, based on the authorities of *Aloise Mwangi Kahari vs Martin Mvitya & Anor (2020) eKLR* and *Daniel Otieno Owino & Anor vs Elizabeth Otieno Owuor (2020) eKLR* where Kshs 500,000/= and Kshs.400,000/= respectively were awarded for relatively similar injuries suffered by the Appellant herein.
18. In refuting the claim for loss of earnings the Respondents submitted that no evidence was led indicating he was engaged in the boda boda business. Moreover, they contended that the Appellant neither had a valid driving licence nor 'PSV' insurance. The Respondent further argued that the examining doctor did not specify the duration it would take for the Appellant to resume his normal chores. Additionally, the Respondent posits that the medical report did not indicate any permanent disability or that the Appellant had lost capacity to work.



19. In response to the claim for Kshs.4,000 as monthly costs for a helper the Respondents argued that the same was unproven, and should thus be disregarded.
20. As for special damages the Respondent submitted that only Kshs.187,000/= had been proven by way of receipts. Lastly on the claim for future medical treatment this court was urged to disregard the Kshs.250,000/= sought by the Appellant, based on the Court of Appeal case of Kimatu Mbuvi vs Augustine Munyao Kioko (2007) EA 139 where it was held that medicine is not an exact science hence expert opinions are not binding on the court, and the court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.

Analysis and Determination

21. After careful analysis of the record of appeal and the submissions the following issues arise for determination:
 - a. Whether the issue of liability was properly determined;
 - b. Whether the Trial Magistrate misdirected himself in assessment of damages.
22. 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 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 issue of liability was properly determined_

23. In apportioning 20% liability to the Appellant, the magistrate stated as follows:

“The Plaintiff should have at least called an eyewitness to corroborate his evidence on who is to blame for the accident. He did not do so. The burden of proof does not at any point shift.

It is my opinion that the Plaintiff failed to prove acts or omissions of negligence by the Defendants wholly and therefore I am unable to find the defendants 100% liable. For the above reasons, I believe he should bear some burden for the accident that occurred on that particular day. I therefore enter liability at the ratio of 80:20 in favour of the Plaintiff against the Defendants jointly and severally.”
24. The evidence of both the Appellant and the defendants it is next to impossible to appreciate the circumstances surrounding the accident. Their renditions of how the accident occurred are in conflict, with each party blaming the other; for instance, the Appellant PW1 stated that he stopped at the junction around Golden Elites and the Respondents lorry came and hit his motor cycle. DW1 on his part states that it was the Appellant who rammed into the lorry he was driving. The police officer on his part did not produce sketch maps to enable the court establish the exact circumstances of the accident. Additionally, he testified that he was not the investigating officer and that he could not ascertain who was to blame for the accident.
25. In dealing with a similar set of circumstances in which there was scanty evidence on causation the court of appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR, held that;

“There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of



care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50.”

26. Similarly, in the case of Valley Bakery Ltd & another Musyoki [2005] eKLR Kimaru J pronounced himself as follows;

“This court will resolve the contradiction apparent in the evidence adduced by the 2nd Appellant and the Respondent by apportioning liability on a 50:50 basis. The Appellants and the Respondent will therefore share the blame equally for the said accident. I therefore reverse the finding of the trial magistrate on liability and substitute the said decision with the finding of this court apportioning liability at the ratio of 50:50.”

27. Taking guidance from the above authorities, the circumstances of this case warrant apportionment of 50:50 liability. I therefore accordingly apportion liability at 50:50 between the Appellant and the Respondents jointly and severally.

Whether the Trial Magistrate misdirected himself in assessment of damages.

28. In her judgment the magistrate awarded general damages of Kshs.500,000/= and special damages of Kshs.137,400/=. In stating that the magistrate had erred in awarding inordinately low damages, the Appellant submitted that she had disregarded; the need for future surgical correction, the grievous injuries suffered and the fact that he had not fully healed.

29. In interfering with the discretion of the trial court in awarding damages, I am 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.”

30. In awarding Kshs.500,000/= the learned magistrate relied on the case of *Third Engineering Bureau China Construction Group Limited v Edwin Kinanga Atuya* [2021] eKLR in which Kshs.500,000/= was awarded for bruises on the scalp, hands and right leg, compound left tibia fracture and compound left fibula fracture in the year 2020. These injuries are comparable if not slightly more severe than those suffered by the Appellant herein. Therefore it cannot be said that the learned magistrate’s award was based on wrong principles. Accordingly, I do uphold the award of Kshs.500,000/= as general damages.

31. Turning to the issue of future medical expenses, Dr Olima’s medical report indicated that the Appellant would require surgical correction at an approximate cost of Kshs.250,000/=.

32. The Appellant submitted that future medical expenses were somewhat distinct from the general damages in that they must be specifically pleaded and proven. Indeed, there is no evidence on record controverting this amount. The Respondents merely beseeched this court in their submissions to weigh the doctor’s opinion against all the other available evidence.

33. In view of the foregoing I do find on a balance of probabilities that the claim for Kshs.250,000/= future medical expenses has been proven on a balance of probabilities.

34. With respect to loss of future earnings the Appellant argued that he could no longer engage in the boda boda business to provide for his family. The Respondents on their part stated that there was no



evidence of permanent disability or the percentage degree of disability to warrant an award for loss of future earnings.

35. In dealing with the issue of loss of future earnings and earning capacity the magistrate indeed stated that the medical report did not indicate whether the Appellant had suffered any disability or incapacitation and proceeded to deny an award under that head.
36. Damages under the head of loss of earning capacity can be classified as general damages but these have also to be proved on a balance of probability. (See Cecilia W. Mwangi & another vs Ruth W. Mwangi [1997] eKLR). In the circumstances of this case I am inclined to agree with the learned magistrate's finding. There is no evidentiary basis for the loss of future earnings. This court has no way of ascertaining the level of incapacity of the Appellant and the same is not alluded to in the medical report. I therefore find that the trial court did err in disallowing this prayer.
37. Regarding special damages the Appellant stated that he had provided proof for Kshs.280,157.34/=. The Respondent on their part urged that Kshs.187,000/= as awarded by the magistrate was proven based on the Appellant's documents. A look at the receipts indeed show that they add up to Kshs.187,000/= I shall therefore uphold the magistrate's finding on special damages.
38. Accordingly, the court makes the following orders:
 1. Liability 50:50 between the Appellant and the Respondents.
 2. General damages Kshs.500,000/=
 3. Future medical expenses Kshs.250,000/=
 4. Special damages Kshs.187,000/=
 - = Kshs.937,000/=
5. Less 50% contribution Kshs.468,500
Total Kshs. 468,500
6. Costs to the Respondent.

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

MWANAISHA. S. SHARIFF

JUDGE

