



REPUBLIC OF KENYA



**George v Bosire & another (Civil Appeal 113 of 2021)
[2024] KEHC 406 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 113 OF 2021
PN GICHOHI, J
JANUARY 25, 2024**

BETWEEN

KAIRU GEORGE APPELLANT

AND

ESTHER NYANDUKO BOSIRE 1ST RESPONDENT

EDWIN OMARI MONGERI 2ND RESPONDENT

(Being an appeal from the judgment and decree of D. Mikoyan (Chief Magistrate) in Ogembo Chief Magistrate's Court Civil Case No. 127 of 2016 delivered on 20/09/2021)

JUDGMENT

1. The background of this Appeal is that the Appellant (Kairu George) was the 1st Defendant in Ogembo CMCC NO. 127 of 2016; Esther Nyanduko Bosire vs. Kairu George & Edwin Omari Mongeri. In her Complaint amended on 04/07/2017, the 1st Respondent (Esther Nyanduko Bosire) sued the Appellant as the owner of motor vehicle registration number KAZ 673K while the 2nd Respondent (Edwin Omari Mongeri) was sued as the owner of motor vehicle registration number KCA 109Q.
2. The 1st Respondent pleaded on 12/07/2015, she was a passenger aboard motor vehicle registration number KAZ 673K along the Kisii- Kilgoris road when the two (2) motor vehicles were involved in an accident with a tractor registration number KHMA 006C.
3. 1st Respondent pleaded that following the accident, she sustained a fracture of the left clavicle, multiple fractures of the pelvis bone (unstable pelvic), contusion on the neck, and brachial plexus (nerve) injury leading to weakening of the upper extremities. She averred that her permanent disability was assessed at 45%. She blamed the accident on the negligence of the Appellant and the 2nd Respondent. In the resulting circumstances, the Plaintiff sought general damages, special damages of Kshs. 218,100/=, costs and interest.



4. The Appellant filed his defence and denied the claim. There was no defence by the 2nd Respondent and he did not participate in the proceedings.
5. In its judgment dated 20/09/2021, the trial court found the Appellant and 2nd Respondent 100% jointly and severally liable for the accident. The 1st Respondent was then awarded general damages of Kshs. 1,500,000.00, special damages of Kshs. 218,160.00, costs and interest from the date of judgment.
6. Aggrieved by the judgment, the Appellant filed a Memorandum of Appeal dated 30/09/2021 on eleven (11) grounds which can be summarised as follows:-
 - a. The learned trial magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence adduced or applicable law.
 - b. The learned trial magistrate erred in law and in fact in failing to attach due weight to the Appellant's evidence, submissions and authorities attached thereto.
 - c. The learned trial magistrate erred in law and in fact in assessing and awarding general and special damages yet the Respondent had not proved her case.
 - d. The learned trial magistrate erred in law and in fact in apportioning liability at 100% against the Defendants jointly and severally despite overwhelming evidence that the 2nd Respondent was entirely to blame for the accident.
 - e. The learned trial magistrate erred in fact and in law by injudiciously, arbitrarily and exorbitantly awarding the Respondent Kshs. 1,500,000/= as general damages which connotes an erroneous estimate contrary to the applicable principles of assessing damages
7. The Appellant therefore prayed that the Appeal be allowed by setting aside the decision of the trial court and substituting it with an order that the suit be dismissed with costs. In the alternative, the Appellant prayed that the award on general damages be re-assessed downwards. He further prayed for costs of the Appeal and of the trial.
8. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 10/01/2023 and filed on 23/02/2023. He submitted that based on the evidence of PW2 and DW1, he was not liable in negligence since his car was stationary parked about three (3) meters away from the road at a stage. For that reason, he submitted that the 1st Respondent failed to prove her case on a balance of probabilities. He added that it was only just for equal apportionment of liability between the Respondents.
9. On the award on quantum, the Appellant cited several authorities among them *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR and *Harun Muyoma Boge v Daniel Otieno Agulo* [2015] eKLR to contend that the award of general damages was manifestly and inordinately high. He therefore urged this Court to award a sum of Kshs. 300,000/= which he termed wholly and sufficient.
10. On costs, the Appellant urged this court to be guided by the dictates of Section 27 of the *Civil Procedure Act* and award him costs for being successful in the Appeal and in the suit at trial.
11. The 1st Respondent's submissions are dated 25/01/2023 and filed on the same day. On liability, the 1st Respondent submitted that her evidence was unshaken that the Appellant's vehicle was parked in the middle of the road, not designated for stationery vehicles, and therefore, the Appellant was liable for the accident.



12. On quantum, the 1st Respondent submitted that based on the injuries she had sustained, the assessment of permanent incapacity at 45% by Dr. Ezekiel Ogando Zoga and several cases as cited in her submissions, the award on general damages was proper and comparable with recent awards on comparable injuries. She therefore urged this Court to uphold the award on general and special damages and proceed to dismiss the Appeal with costs.
13. This being a first appeal, this court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. [*Selle vs. Associated Motor Boat Company Ltd* [1968] EA 123.
14. The 1st Respondent's case was presented by her as PW1 and No. 787486 PC Daniel Misebe (PW2) on behalf of the Investigating Officer. Their evidence was that this accident occurred on 12/07/2015 at about 11.10 am along the Kisii-Kilgoris road. It involved a *matatu* registration number KAZ 673K , a grader registration number KHMA 006C and tipper registration number KCA 109Q.
15. The 1st Respondent's evidence was that on the material date, she was a passenger in the *matatu*. The *matatu* stopped at the bridge at Ogembo stage to allow the passengers to alight in the middle of the road. The tipper was joining the main road from the feeder road when the oncoming grader from Mogonga direction hit the *matatu*. She blamed the driver of the *matatu* for the accident.
16. However, according to PC Daniel Misebe (PW2) who testified on behalf of the investigating officer PC Boniface Githinji, the *matatu* was parked at Ogembo stage when the grader rammed into the *matatu* killing one Samson Matayo and Isabella Samson. The driver of the grader was charged in TR Case No. 62 of 2018 for careless driving.
17. The evidence on record is that the 1st Respondent (PW1) was seriously injured following the accident. She went unconscious. She was treated at Kisii Level 5 Hospital and then transferred to Tenwek Hospital. She had sustained injuries to her hand, bladder, a fracture on her left hip, a dislocation of the left and right-hand shoulders, a cut on her right breast that was stitched up to her armpit and a piece of metal pierced through her private parts. PW1 was treated for two (2) weeks. She stated that metal implants were installed in her body to heal the fractures that she had sustained.
18. She was examined by Dr. Ogando Zoga on 04/11/2015 and he established that she had suffered a weakened right arm and was unable to bear weight. She was in poor general condition, unable to support herself and that her right limb was weak due to the injury of the nerve at the branchial plexinus.
19. The doctor opined that the 1st Respondent suffered severe injuries with her pelvis likely to heal with some deformity. That the right hand was unlikely to recover due to a nerve injury and the clavicle fracture would heal with time. He assessed degree of permanent disability at 45%.
20. On the other hand, the Appellant called three(3) witnesses for his case. These were PC Bonface Githinji (DW1) and who was the investigating officer in this case, Omanga (DW2) being the driver of motor vehicle registration number KAZ 673K and Josphat Karanga (DW3) who was the turnboy.
21. DW1's testimony was that the tipper joined the main road without due care. The grader then swerved to avoid hitting it but ended up hitting the *matatu* which landed into a dumping site. Consequently, the driver of motor vehicle registration number KCA 109Q tipper was charged in Kisii TR No. 26 of 2016 with the offence of causing death and careless driving. He was however acquitted.
22. As a result of the accident, some passengers passed on while others were injured. The tipper was intercepted at Itumbe Police Station as it escaped from the scene. DW1's evidence was that motor



vehicle registration number KAZ 673K was not to blame as it was standing approximately 2 -7 meters off the road and at a designated stage.

23. DW2's evidence was that on the fateful day at 1030 hours at the Ogembo stage, he had parked the said motor vehicle awaiting passengers to board. He was three (3) metres off the road. He suddenly noticed the grader that knocked their vehicle. As a result of the accident, lives were lost and others injured. He blamed the grader for causing the accident.
24. DW3 testified that on that fateful day at noon, he was with the driver of motor vehicle registration number KCA 109Q one Eric. After delivering sand, they proceeded back to Ogembo towards Kisii. On reaching Ogembo stage, the driver slowed down. Shortly before they could proceed with their journey, he heard a loud bang from behind. He peeped through the window and saw that a grader had rammed into a *matatu* standing at the stage picking passengers. As a result of the accident two (2) people died while others were injured.
25. On reaching Itembe, they were intercepted by police officers who accused them for causing the accident. For fear of their lives, they escaped to Kiumbo Police Post for safety. They were detained before being taken to the traffic police officers at Ogembo.

Determination

26. Having evaluated the evidence on record, the undisputed facts are that this accident occurred on the material date, at Ogembo stage along the Kisii – Kilgoris road and involved the *matatu* registration numbers KAZ 673K, grader KHMA 006C and tipper KCA 109Q. The 1st Respondent (PW1) was a passenger the *matatu* registration number KAZ 673K driven by DW2 and heading to Kisii. DW3 was the turnboy of motor vehicle registration number KCA 109Q who was heading to Ogembo towards Kisii.
27. At around 1110 hours, the *matatu* stopped around the Ogembo stage to either pick or drop passengers. The grader which was oncoming then hit the *matatu* on its left side. The impact caused the said *matatu* to land into a ditch as a result of which lives were lost while others who included PW1, were seriously injured.
28. Following the accident, the driver of the grader was charged with two (2) counts of careless driving in Kisii TR. 62 of 2018. Meanwhile, the tipper intercepted at Itumbe Police Station as it escaped from the scene. The tipper's driver was charged in Kisii TR No. 26 of 2016 with the offence of causing death and careless driving. He was subsequently acquitted of the charges.
29. PW1's evidence was that the *matatu* stopped in the middle of the road and was hit by the tipper. She thus blamed the driver of the tipper for causing the accident.
30. Police officers PW2, DW1 and DW2 testified that the tipper was joining the main road from the feeder road while the grader was coming from Mogonga. The *matatu* was parked at Ogembo stage 2 – 7 metres off the road which was a designated stage, when the grader rammed into the *matatu*. PW2 and DW2 blamed the driver of the grader for causing the accident while DW1 blamed the driver of the tipper for causing the accident.
31. On the other hand, DW3 testified that they heard a loud bang from behind on Ogembo stage. He peeped through the window and saw that a grader had rammed into a *matatu* standing at the stage.
32. It is clear from the evidence herein that there are contradictory versions on who caused the accident. The police officers who testified in this case did not assist the court either. They blamed different drivers for causing the accident which makes their evidence on the cause of the accident unreliable.



33. It is a fact that the accident occurred at Ogembo stage and that the 2nd Respondent's driver rammed into the Appellant's vehicle (*matatu*) at the stage, the evidence herein does not absolve the Appellant's vehicle from contribution to this accident. The circumstances herein do not however justify liability on the Appellant and 2nd Respondent at 100% . On that, the trial court fell into error. This Court therefore interferes with apportionment herein by substituting it with a finding that the Appellant and 2nd Respondent share liability equally at the ratio of 50: 50. There is no liability on the 1st Respondent who was only a passenger with no control in the manner the accident vehicles herein were driven.
34. On quantum, it now settled law that in determining whether to interfere with trial court's discretion, the Court has to bear in mind the following principles on assessment of damages:
- i. Damages should not be inordinately too high or too low.
 - ii. Damages are meant to compensate a party for the loss suffered and should be commensurate to the injuries sustained.
 - iii. Past decisions should be taken as mere guides and each case depends on its own facts.
 - iv. Element of inflation should be taken into account when comparing such past awards.
35. In the submissions before the trial court, this case, counsel for the Appellant had proposed that factoring inflation, a sum of Kshs. 200,000/= would suffice as general damages. In support, counsel relied on the case of *Simon Mutisya Kavii v Kigutu Mwangi* [2013] eKLR where the plaintiff was awarded Kshs.200,000/= for communicated fractures of tibia and fibula with sphere friction bur on the left thigh and shortening of the leg.
36. On the other hand, Counsel for the 1st Respondent proposed an award of Kshs. 2,500,000/=. In the case of *James Guthirwa Ngugi vs. Multiple Hauliers & another* [2015] eKLR relied on by the 1st Respondent, the plaintiff therein had sustained compound comminuted fracture of the right tibia and of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological /re-fracture of the right leg. He also sustained residual injuries being:- re-fracture of the right leg, many sinuses on the right leg with pus, bone exposure, chronic bone infection and dead bone, restriction in walking, difficult in walking, restriction in mobility of the fore arm, difficulties in squatting, weakness of the left upper limb, he could not carry or lift heavy objects, walk with aid of clutches, and had restriction of movement of the left limb. High Court awarded him Kshs. 1,500,000/= as general damages for pain and suffering.
37. The 1st Respondent also relied on the case of *Hellen Atieno Oduor vs. S.S. Mehta & Sons Limited & Muthitu Nanua* [2015] eKLR where the plaintiff was awarded Kshs. 1,500,000/= for fracture of the right tibia and fibula, multiple fracture of the ribs , on the right side of the chest (3rd, 4th, 5th, 6th, 7th and 8th), chest injury and hemothorax, blunt abdominal trauma, fracture of the right scapula and had surgical scars on the right knees anteriorly and right ankle joint medially.
38. In its judgment, the trial court considered the proposals by the parties and while making a finding that the injuries in *Simon Mutisya Kavii* (*supra*) were not comparable , he relied on the case *James Guthirwa Ngugi* and *Hellen Atieno Oduor* (*supra*) to award the 1st Respondent a similar award while stating:-
- “On assessment of quantum, it is this court's finding that the plaintiff suffered severe injuries which healed with deformity assessed at 45% in contrast to Dr. Kahuthu's medical report



which suggests none. The plaintiff, up to the time of trial was still using crutches and walked with a limp...”

39. This Court notes that even in this Appeal, the Appellant relies on authorities that are not comparable to the injuries sustained by the 1st Respondent in this case except for the case of *Francis Ndungu Wambui & 2 others* (*supra*) where the Respondent had sustained soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more 30 minutes after the accident. The doctor also noted due to the severity of the fracture he is at risk of secondary stress fractures on the same site. High Court upheld the trial court’s award of Kshs. 1,000,000/=.
40. This Court is satisfied that the trial court considered severity of the injuries sustained by the 1st Respondent against comparable decisions as delineated therein where the courts similarly awarded the said sum. This is an indication that the trial court was well guided by facts , law and principles to be taken into account when he arrived at an award of Kshs. 1,500,000/= and therefore, there is no reason to call for interference by this Court.
41. In regard to the award on special damages, the 1st Respondent pleaded a total of Kshs. 218, 100/= and its judgment, the trial court held:-
- “On special damages, plaintiff pleaded for Kshs. 218,100 and in support produced receipts for Kshs. 223,500/=Special damages awarded at Kshs. 218,100/= and not subjected to liability.”
42. From the court record, this Court finds no reason to disturb that finding.
43. In conclusion, this Court makes the following orders:-
1. The trial court’s judgment on liability is hereby set aside and substituted with judgment that liability be shared between the Appellant and the 2nd Respondent at ratio of 50:50 .
 2. The trial court’s award on both general damages and special damages is hereby upheld.
 3. The Appellant is awarded half the costs of appeal.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 25TH DAY JANUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

Mr. Maina for 1st Respondent

N/A for 2nd Respondent

Lauren Njiru/ Aphline , Court Assistant

