



REPUBLIC OF KENYA



Mbani v Ogalo (Civil Appeal 23 of 2020) [2024] KEHC 689 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 23 OF 2020
RE ABURILI, J
JANUARY 25, 2024**

BETWEEN

KENNEDY OCHIENG MBANI APPELLANT

AND

BOB OGUTU OGALO RESPONDENT

*(An appeal arising out of the Judgement of the Honourable P.
Olengo in the Senior Principal Magistrate's Court at Nyando
delivered on the 25th July 2019 in Nyando SPMCC No. 141 of 2015)*

JUDGMENT

Introduction

1. The respondent herein sued the appellant seeking for general and special damages for injuries sustained by the respondent following a road traffic accident that occurred on the 8th March 2014 off the road along the Ahero – Awasi road as the respondent was cycling his bicycle while carrying a passenger when he was hit by the appellant's motor vehicle registration number KBM 699C. It was the respondent's case that the accident was caused by the appellant's and/or his agent's negligence.
2. In his defence, the defendant denied liability and attributed the occurrence of the accident to the negligence of the respondent.
3. The trial magistrate in his judgement found liability in favour of the respondent on the ground that the appellant failed to rebut the respondent's averments on liability and further proceeded to award the respondent general damages of Kshs. 350,000 and proven and pleaded special damages of Kshs. 11,495.
4. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 5th May 2020 raising the following grounds of appeal:
 - a. The learned magistrate erred in law and fact in holding the appellant 100% liable for the occurrence of the accident.



- b. The learned magistrate erred in law and fact in failing to appreciate and thereby arriving at a wrong and erroneous conclusion condemning the appellant 100% liable.
 - c. The learned magistrate erred in law and fact in awarding damages in favour of the plaintiff without any legal and/or evidential justification.
 - d. The learned magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.
 - e. The learned magistrate erred in law and in fact in awarding Kshs. 350,000 as general damages without any legal and/or evidential justification.
 - f. The learned magistrate erred in law and fact in failing to appreciate as follows;
 - i. That the evidence adduced in support of the plaintiff's case was incongruous with the pleadings.
 - ii. That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining damages awarded.
 - g. The learned magistrate erred in law and fact in awarding excessive damages without regard to the defendant's submission.
 - h. The learned magistrate erred in law and fact by awarding excessive damages beyond the scope of evidence and or legal entitlement.
 - i. The learned magistrate erred in law and in fact in entering judgement in favour of the plaintiff against the defendant inspite of the plaintiff's miserable failure to establish his case more especially on damages.
5. The parties filed written submissions to canvas the appeal which submissions are summarised below.

The Appellant's Submissions

- 6. The appellant through his counsel submitted that there was no evidence tendered by the Respondent to indeed show that the 1st defendant caused of the accident as no other witnesses were called independently to prove to the contrary that indeed an accident occurred and the 1st defendant was to blame and that since there was no fault established on the part of the 1st defendant, there was no basis upon which he could be held 100%.
- 7. The appellant submitted that the court in its judgment erred as is evident at page 37 of the record of Appeal where the court refers to an accident where the Plaintiff is "lawfully riding his motor cycle on the road" which is divergent to the circumstances in the present case.
- 8. It was submitted that the trial magistrates' award of Kshs 1,000.000 was a total miscarriage of Justice as the same was excessively high based on comparable awards for similar injuries and as it was not founded on any known Law.
- 9. The appellant urged this court to substitute the judgement on Liability to 50:50 and the award on General Damages which was inordinately too high to Kshs 350,000 which was within scale for comparable injuries as per the following:



- i. *Kenya Power Lighting Company Ltd & Another v Zakayo Saitoti Naingola & Another* where the plaintiff who sustained a fracture of the left femur mid shaft and blunt injuries to the lower jaw and shoulder was awarded Kshs. 300,000 in general damages.
- ii. *Mwavita Jonathan v Silvia Onunga* (2017) eKLR, the court of appeal made an award of Kshs. 400,000 where the complaint sustained commuted fracture of the left hip, blunt chest injury, dislocation of the right knee joint, sprains at the cervical spine and other injuries.
- iii. Nairobi civil Appeal No. 147 of 2013, *Said Abdulahi & Gelido Tinna Adoo v Alice Wanjira* where the appellate court found the award by the trial court excessive and substituted an award of Kshs 600,000 with Ksh 300,000.

The Respondent's Submissions

10. On behalf of the respondent, it was submitted that the appellant did not call any witness to rebut the Respondent's evidence and thus the Respondent's testimony sufficiently shifted the onus of proof to the Appellant and that therefore in the absence of his rebuttal, he ought to be found 100% liable for the accident.
11. On quantum of damages, the respondent submitted that the Appellant had not demonstrated any ground to warrant the reduction of damages awarded by the trial court and that if anything, it was below the prevailing awards for a single fracture. Reliance was placed on the case of *Raphael Makau Lonzi & Another v Jackson Mwito Ndutu* [2017] eKLR where the court dismissed an appeal against an award of Kshs. 450,000 in respect of general damages for blunt injury to the thigh, fracture of right femur and injury to right knee.

Analysis and Determination

12. This being a first appeal, this court is under a duty to re-evaluate, re-analyse and assess the evidence and reach its own independent conclusions. This Court must, however, be aware of the fact that unlike the trial court, an appellate Court had no advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“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.”
13. In that regard, therefore, legally, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkuba v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
14. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, I find the issues for its determination are:
 1. Whether or not the judgment on liability was fair and reasonable in the circumstances of this case.



2. Whether or not the award of quantum was unjustified in the circumstances of this case so as to warrant interference by this court.

15. This court therefore dealt with the issues under the separate heads shown herein below.

On Liability

16. In *Khambi and Another v Mabithi and Another* [1968] EA 70, 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 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.”

17. That was also the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mabendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.
18. Under section 107 of the *Evidence Act*, he who alleges must prove. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein the respondent was injured.
19. The respondent testified as PW1 stating that on the 4.3.2014 as he rode his bodaboda along the Ahero – Awasi area while carrying a passenger, and as the passenger decided to alight, the respondent stopped the bicycle on the edge of the road when he was hit by the respondent’s motor vehicle, injuring the respondent as pleaded. In cross-examination, the respondent stated that he was hit from the front by the respondent’s vehicle.
20. PW2 Nicodemus Mbuse, a Clinical Officer testified and produced the respondent’s P3 form which detailed that the appellant had sustained a scar on the left cheek, tenderness on the left knee and upper arm as well as a fracture on the right and left knees. It was his testimony that the injuries were one month old at the time of the respondent’s examination.
21. PW3, No. 77156 PC William Rono testified and produced the police abstract evidencing the report of the accident. In cross-examination, he testified that he could not tell, from the abstract, as to who was to blame for the accident.
22. The appellant did not call any witness in support of his case. The plaintiff/ respondent’s case therefore remained uncontroverted and the appellant’s statement of defence remained a mere allegation. In *Janet Kaphiphe Ouma & Another v Marie Stopes International* (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 it was stated that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.



23. However, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove his case on a balance of probabilities. In the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR the court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.

(See *Kirugi and Another v Kabiya and Others* [1983] e KLR).

24. The respondent’s uncontroverted testimony was that he had stopped on the edge of the road to let his pillion passenger alight and that he was hit from the front by the appellant’s motor vehicle. This meant that the respondent’s driver could see the respondent as he hit him and took no evasive manoeuvre or that he was too distracted/negligent to note that he had gone off the road and was about to hit the respondent. Either way, it demonstrates that the appellant’s driver was driving without due care to other road users.
25. Accordingly, the respondent therefore cannot be held to have contributed to the occurrence of the material accident as being on the road in itself is not an act of negligence since a road is for all road users. I thus find that the trial court did not err when it found that the appellant was negligent and therefore solely liable for the material accident. I find no reason to interfere with the trial court’s finding on liability which I hereby uphold.

On Quantum of damages

26. Regarding the circumstances under which an appellate court will disturb the lower court’s assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself 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 wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

27. In *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini v A M Lubia & Olive Lubia*, the Court of Appeal set the principles to be considered before disturbing an award of damages as follows:

“The principles to be observed by this appellate court, in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are, that it must be satisfied that either, the judge is assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately high that it must be wholly erroneous estimate of the damages.”

28. This Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages.



The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

29. The respondent pleaded and testified that he sustained the following injuries:
- i. Injury left cheek.
 - ii. Chest injury
 - iii. Left wrist joint with dislocation.
 - iv. Left knee injury with fracture
 - v. Left knee injury with cut wound
 - vi. Fracture left leg
 - vii. Swollen knees.
30. In the discharge summary dated 25.3.2014, the injuries sustained by the respondent were described as “soft tissue injuries and fracture to the patellar,” These injuries as detailed in the discharge summary were corroborated in the P3 form produced as PEX3. Accordingly, the injuries proved by the respondent were soft tissue injuries and a fracture of the left knee.
31. The appellant erroneously submitted that the respondent was awarded quantum damages of Kshs. 1,000,000 and that the court should have awarded Kshs 350,000 as sufficient to compensate the respondent for the injuries sustained. This submission is erroneous because the award was Kshs 350,000 and not 1,000,000. I have considered the injuries sustained by the respondent and I find that the authorities cited by the appellant in his submissions are comparable.
32. I do note that the trial court awarded the respondent quantum of Kshs. 350,000 as proposed by the appellant herein which I find to be in line with the comparable injuries sustained by claimants in the cited cases by the respondent’s counsel, which I find no reason to interfere with.
33. I have perused the record and find that the special damages as pleaded were proved with production of receipts as exhibits. I thus find no reason to interfere with the same
34. In the end, I find this appeal devoid of any merit and proceed to dismiss it and uphold the judgment and decree of the trial court on both liability and quantum of damages. The respondent shall have costs of the appeal assessed at Kshs 20,000.
35. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

