



REPUBLIC OF KENYA



**Kiluva v Cyriaka (Civil Appeal E132 of 2021)  
[2024] KEHC 710 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 710 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E132 OF 2021**

**MW MUIGAI, J  
JANUARY 25, 2024**

**BETWEEN**

**DENNIS MUTUKU KILUVA ..... APPELLANT**

**AND**

**MURANGIRI G CYRIAKA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Hon H.Onkwani  
delivered on 4.08.2021 MAVOKO MCCC NO. 367 OF 2019)*

**JUDGMENT**

**Trial Court Record**

**Plaint**

1. Vide a Complaint filed on 10.06.2019, it was averred that the cause of action arose on 21.12.2018. The Plaintiff was lawfully travelling on Motor cycle registration number KMEB 686U along Nairobi-Mombasa and upon reaching Tusky's Supermarket Athi river road area the driver, servant and or agent of the defendant's motor vehicle registration number KBT 374M being driver carelessly, overtook the plaintiff from the right side and lost control, hitting the plaintiff hence causing the accident and the plaintiff sustained very serious injuries.
2. The following orders were sought from the trial court;
  - a. General damages
  - b. Special damages
  - c. Costs of the suit
  - d. Interest on (a), (b) and (c) at court rates



- e. Any other relief that the court may deem fit to grant

### **Defence**

3. The Defendant's filed a defence on 18.06.2020 denied the contents of the Plaint and averred that any occurrence of the accident was solely and substantially contributed to by the Plaintiff's own negligence. Further, that if the accident occurred, the same was beyond the control of the Defendants. The court was urged to dismiss the claim.

### **Hearing**

4. At the hearing, the Plaintiff called two witnesses. PW1 was corporal Zephania who testified that on 21/12/2018, a police abstract was filed for the plaintiff of KMBE686 U- that he was involved in a road accident with motor vehicle KBT 374M. The accident occurred at 6am along Namanga road there was a collision at the junction and the plaintiff sustained injuries. She stated that a P3 was issued and motor vehicle KBT was to blame since it failed to give way at the junction. She produced the police abstract as an exhibit.
5. Upon cross examination, she stated that she was not the investigating officer and as per the police abstract, there was pending investigations. That Mr. Nyumbu the investigating officer visited the accident scene and- he could not tell if photographs were taken and no charges had been preferred.
6. PW2 was the plaintiff who stated that he recorded a witness statement and relied on the evidence in chief. He produced the documents as per list dated 28/5/19. He averred that he still had pain on his leg and could not walk properly. He prayed for medical expenses and compensation.
7. Upon cross examination he stated that he was riding motor cycle on the left hand and the motor vehicle was on the right hand. The motor vehicle was not overtaking it hit him from the front side, on the right hand and he fell on his left side. He got injured on the mouth, chest and leg. He had his helmet on. He had not been healed completely and was on medication. He had no documents to prove he still attends the hospital for treatment.
8. The Defendants did not call any witness.

### **Trial Court Judgment**

9. On liability, the Trial court found the injuries sustained by the plaintiff indicate that he was not wearing a helmet and thus contributed to the accident. She apportioned liability in the ratio of 70.30 for the plaintiff as against the defendant.
10. As regards special damages, the court found that kshs 3,550 had been pleaded and proven and was therefore awarded.
11. In conclusion, the court awarded as follows;
  - a. Liability in favor of the Plaintiff against the Defendants as ratio of 70.30 percent
  - b. General damages for pain and suffering Kshs 560,000
  - c. Future medical expenses Kshs 200,000
  - d. Special Damages Kshs 3,550
  - e. Cost and interest of the suit



## **The Appeal**

12. Dissatisfied by this judgment, the appellants who were the De in the Trial court filed a memorandum of Appeal dated 05.08.2021 seeking the following orders
  - i. That this appeal be allowed.
  - ii. The Honourable Court be pleased to re- assess and re- evaluate the entire evidence on record and arrive at its own independent conclusion
  - iii. The costs of the Appeal be awarded to the Appellant.
13. The same is founded on the grounds that;
  - a. The learned Trial Magistrate erred in law and in fact by apportioning liability on the part of the plaintiff in the ratio of 70:30
  - b. The learned Trial Magistrate erred in law and in fact by treated the evidence and submissions on liability before her and consequently coming to a wrong conclusion on the same.
  - c. The learned Trial Magistrate erred in law and in fact by ignoring the principles applicable to liability in the written submissions presented and filed by the appellant.
  - d. The learned Trial Magistrate erred on all points of fact and law in as far as liability is concerned.
  - e. The Learned Trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the appellant if any and failed to apply precedents and tenets of the law applicable.
  - f. That the learned Trial Magistrate failed to adequately evaluate the evidence and exhibits for special damages and thereby arrived at a decision unsustainable in law.
  - g. That the learned Trial Magistrate erred in law and fact misdirected herself on the principles applicable in determining liability and on matters based on negligence and rules of evidence as applicable.
14. The Appeal was canvassed by way of written submissions.

## **Submissions**

15. The Appellants filed submissions on 7.7.2023 and indicated that the issues for determination were whether the appellant contributed to the accident and whether the appellant proved his claim for special damages. It was submitted that the Trial Magistrate made the observations that the police officer did not investigate the case and was not at the scene of the accident and that the injuries sustained by the appellant indicated that he was not wearing a helmet and thus the appellant contributed to the accident.
16. It was submitted that the finding of the Trial magistrate on apportionment of liability was erroneous because the appellant's evidence that it was the respondent's agent, servant and /or agent driving the suit motor vehicle stood uncontroverted as the respondent did not call any witness, that the learned Trial Magistrate did not examine the circumstances of the accident and /or consider the appellant's submissions on negligence of the respondent's driver, there was no evidence adduced by the respondent to prove that the appellant was not wearing a helmet.
17. It was submitted that the perusal of the judgement of the Trial court led to a conclusion that there was a miscarriage of justice with view to the precedents on the issue of contributory negligence.



- That on contributory negligence, the appellant's evidence as to how the accident occurred remained uncontroverted, reliance was made in the case of *Onesmus Macharia Kimani v SK (minor suing through his father and next friend) & another*[2019] eKLR to buttress the point that failure to adduce any evidence means that the evidence adduced by the plaintiff against them, is uncontroverted and therefore unchallenged.
18. It was submitted that there being no evidence on contributory negligence, there was no basis of apportioning contributory negligence on the appellant. Reliance was placed in the case of *Edward Mungai Waweru v Samson Ochieng Kagunda & another*[2017] eKLR.
  19. It was submitted that being found riding on the road is not negligent as it was not shown that the plaintiff had left his side of the road and ride onto the defendant's motor vehicle or it was not shown that the road had a designated path for cyclists yet the plaintiff ignored and used the road exclusively meant for use by motorists.
  20. The court was thus urged to make a finding that the Trial Magistrate erred to apportion 30% liability to the plaintiff without much evidence.
  21. As regards to whether the appellant had proved special damages, it was submitted that the appellant did prove his claim for special damages because he produced 14 exhibits which was inclusive of the supplementary list of documents. That the trial magistrate completely ignored PEXH 11 and 12 as per the supplementary list of documents dated 5/3/2021.
  22. It was finally submitted that the Honourable Court does find merit in the appeal and allow the same and also apportion full liability on the respondent. It was also submitted the appellant was entitled to the award on special damages which were pleaded and proved.
  23. The Respondent filed submissions on 28.6.2023 and stated that the issues for determination were who was to blame for the accident and to what extent and whether the appellant proved his claim for special damages.
  24. Reliance was placed in the case of *Stapley vs Gypsum Mines Limited*(2) (1953) A.C 663 to buttress the issue of who is to blame for the accident and to what extent. It was submitted that as provided for in section 107 and 108 of the *evidence Act*, the appellant had the burden of proving his allegations on the negligence on a balance of probability.
  25. It was submitted that the Trial Magistrate was generous in apportioning liability in the ration of 70:30 for the reason that the appellant testified that he was riding his motor cycle from shell petrol station heading to kwamangeli when he was hit by the suit motor vehicle which was overtaking from his right side. That indeed if the suit motor vehicle was overtaking then PW1 would have been hit on the right front side and not in front as he testified. Further that if indeed the appellant was wearing a helmet he would not have sustained injuries on his jaws.
  26. It was submitted that PW2 testified that he was not the investigating officer and could not confirm whether the investigating officer visited the scene of the accident. Reliance was made in the case of *Hussein omar farar v Lento agencies* C.A Nairobi, Civil Appeal No.34/2005[2006] eKLR and *Ndatbo v Chebet* Civil Appeal 8 of 2020.
  27. It was submitted that where the court is unable to determine who is to blame for the accident, liability is apportioned equally. Reliance was made in the case of *Platinum Care Hire Limited v Samuel Arasa Nyamesi and another* to buttress this point.
  28. On whether the appellant had proved his claims for special damages, it was submitted that the appellant had pleaded a sum of kshs 586,035 yet the receipts produced were for sum kshs 3,550 and that the



trial court was right in awarding kshs 3,550 in special damages as that was the appellant had proved. Reliance was made to the case of *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR where the court stated that it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.

29. It was finally submitted by the respondent there was not fault in the decision of the trial court and urged the court to dismiss the appellant's appeal with costs to the respondent.

### **Determination**

30. The Court considered the Memorandum of Appeal, the Trial Court record and the submissions of the parties in this Appeal.

31. This is a 1<sup>st</sup> appellate court and as aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 this court should evaluate and/or assess the evidence on record as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”

32. From the Memorandum of Appeal, the appellant took issue with the apportionment of liability and special damages awarded.

### **Liability**

33. 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.”

34. Similarly, in *Masembe vs. Sugar Corporation and Another* [2002] 2 EA 434, it was held that an apportionment of liability made by a trial Court will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous.

35. In this case the evidence by the appellant was that he was riding his motor cycle on the left hand and the motor vehicle was on the right hand when it hit him from the front side of the motor vehicle and he fell on the left side. The respondent on the other side simply denied the allegations without calling any witnesses.

36. It is clear that there was an accident on the said day in which the appellant was injured. The evidence of the appellant was corroborated by the police officer who produced the police abstract. There was no other evidence to challenge this evidence. Accordingly, what was pleaded in the defence without more could not form a basis upon which liability could be found. The learned trial magistrate can therefore not be faulted on apportioning liability as between the two parties. The Trial Magistrate



apportioned 30% to the Appellant on the grounds that according to the nature of injuries sustained he was not wearing a helmet and thus he was also liable, I agree with the Trial Magistrate however I find the liability 30% to be on the higher side given that the defendant did not adduce any evidence as to how the accident occurred apart from merely denying that he was to blame. In the upshot I reduce the liability ratio from 30% to 10 % for the appellant.

37. As to the issue of Special Damages, in *Hahn v Singh*, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows; “Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
38. while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances.
39. The Appellant submitted that the Trial Magistrate erred in her judgement in noting that the prayer for special damages was kshs. 586,035 yet she made a determination that the Appellant had only produced receipts worth Kshs, 3,550 and in doing so completely ignored the Exhibits 11 and 12 as per the supplementary list of documents dated 5/3/2021.
40. From the perusal of the Trial Court Record, the Appellant produced a medical receipt of Kshs 3000 and search receipt of kshs 550, and that was what formed the basis of the special damages award. I do not find any reason to interfere with that given that was what was proved.

### **Disposition**

1. In the end, the Appeal partially succeeds on the award on liability in the ratio of 90:10 for the Appellant as against the Respondent.
2. Since the Appeal is partly successful, there shall be no orders as to costs. Each party shall bear own Costs.

It is so ordered

**JUDGMENT DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25<sup>TH</sup> JANUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

