



**Mungai v GN (Minor suing through next of kin AO) (Civil Appeal
45 of 2016) [2024] KEHC 1609 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 45 OF 2016
SM MOHOCHI, J
FEBRUARY 22, 2024**

BETWEEN

PETER MUNGAI APPELLANT

AND

GN (MINOR SUING THROUGH NEXT OF KIN AO) RESPONDENT

*(Being an appeal from the Judgement of Honourable R. Amwanyi (Resident
Magistrate) in Molo PMCC No. 296 of 2010 delivered on 23rd March, 2016)*

JUDGMENT

Introduction

1. The Respondent vide Plaintiff dated 24th June, 2010 and amended by the Amended Plaintiff dated 9th February, 2015 and filed on 10th February, 2015 moved Court seeking compensation for injuries which the Respondent sustained on 12th March, 2010 as a result of a road traffic accident. The Respondent, then Plaintiff, claimed that on the fateful day he was lawfully cycling along the Molo-Elburgon Road, when the 2nd Defendant who was the driver of the Appellant's vehicle registration number, KBJ 541K knocked the Respondent causing the injuries sustained.
2. The Appellant, the 1st Defendant therein, entered appearance and filed his defence dated 16th August, 2010 which was later amended with the Amended Defence filed on 27th June, 2011. He denied occurrence of the accident as well as the particulars of negligence. He blamed the Respondent for the injuries sustained. The Appellant also stated that the Respondent was estopped from bring suit as against the Respondent as he had signed an agreement releasing the Appellant from any Liability arising from the accident.
3. The matter proceeded to full hearing and the Trial Court delivered judgement delivered on 23rd March, 2016 in favour of the Respondent as follows:



- a. Liability 100%
- b. General damages Kshs 600,000
- c. Special Damages Kshs. 10,000

The Appeal

4. The Appellant being dissatisfied with the decision of the Trial Court filed the instant Appeal vide Memorandum of Appeal dated 15th April, 2016 on the following three (3) grounds:
 - a. That the Learned Magistrate erred in Law and in fact in finding the Appellant 100% liable, whereas the evidence on record in particular that of reinvestigating officer was not clear on who was to blame for the accident.
 - b. The Learned Trial Magistrate erred in fact and in law in awarding excessive general damages to the Respondent which in the circumstances were unfair and unjust.
 - c. The Leaned Trial Magistrate erred in fact and in law in failing to consider conventional awards on General damages in similar and/or related cases by superior Court(s) of law
5. The Appellant sought that the Appeal be allowed with costs to the Appellant and the Judgment on liability and quantum by the Trial Court be set aside.
6. Parties were directed on 18th July, 2023 to file written submissions. The Respondent filed submissions on 30th October, 2023 whereas the Appellant's submissions are not on record despite directed again on 31st October, 2023 to file.

Respondent's Submissions

7. The Respondent in opposing the Appeal submitted that there was no error on the part of the Trial Court and that the Respondent proved his case on a balance of probabilities and thus the Court should not interfere with the Trial Courts discretion while laying reliance in Robert Musyoki Kitavi vs Coastal Bottlers Limited (1985) 1 KAR 891; Butt vs Khan Civil Appeal No. 4 of 1997 and Valley Bakery Limited & Another vs Mathew Musyoki

Duty of the Court.

8. This Court as a first Appellate Court has a duty to re-evaluate the evidence and infer its own conclusions while bearing in mind that it did not have the advantage of hearing the witnesses. This position was held in *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 where the Court of Appeal stated inter alia that:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally...Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions...”

Analysis and Determination

9. The Court has carefully considered the Grounds of Appeal and the evidence adduced, the written submissions as well as the authorities relied on. I find that the twin issues for determination are on liability and quantum.



Liability

10. The question on liability is thus who is to blame for the accident?
11. The Court of Appeal in Michael Hubert Kloss & Another –v- David Soreney & 5 Others 2009 eKLR stated that:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a Court of law this question must be decided as a properly instructed and reasonable jury would decide it.....”

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”
12. The Appellant challenged the Trial Court’s decision and contended that liability should not have been apportioned at 100% since the evidence of the investigation officer was not forthcoming on who was to be blamed.
13. PW3 GN , testified that while heading to Elburgon he was hit by motor vehicle registration number KBJ 541K thereby sustaining injuries on his right leg and hand. He stated that he was taken to Molo District Hospital and later transferred to Nakuru PGH where he was admitted for 10 days. He produced the Discharge Summary as “P-Exh10”, X-ray report as “P-Exh11” and a demand letter “P-Exh12. He stated that a motor vehicle search was conducted and produced certificate of ownership and the receipt as “P-Exh13(a)” and “P-Exh13(b) respectively. He also produced receipts from Molo District Hospital and Nakuru PGH as “P-Exh14(a), (b)” and “P-Exh15(a)” respectively as well as the P3 Form as “P-Exh17.
14. PW4 No. 633221 PC Ng’etich testified that on 12th March 2010 an accident was reported and according to the OB a cyclist was hit from behind by a motor vehicle which was being driven by one Sammy Gikara but no one was charged with any traffic offence he produced the police Abstract as “P-Exh18”. He stated that he was not the Investigating Officer, that he did not have the police file in Court or any sketch maps of the scene. He added that according to the OB the cyclist turned right without due care. He added that reliance is not placed on the initial report since it is not the final finding.
15. DW1 No. 633221 PC David Ng’etich stated that the driver of motor vehicle registration number KBJ 541K was overtaking a cyclist when the pedal cyclist turned right to enter a feeder road when he was hit. That the findings of the investigating officer recommended that the pedal cyclist be blamed for turning without due care.
16. On cross examination he stated that when he testified for the Plaintiff he stated that the driver of the motor vehicle hit the pedal cyclist from behind. That there was an agreement between the owner of the vehicle and the guardian of the of the plaintiff who was a minor then on 21st April, 2010. The cyclist



was not part of the agreement. He stated that he could not tell whether the investigating officer used the agreement to reach a conclusion not to charge the driver.

17. When it comes to liability, according to the judgement, the Learned Trial Magistrate disregarded the testimony of P.C Ngetich who testified both for the parties. His testimony was contradictory to the extent that on behalf of the Respondent, he testified that the driver knocked the Respondent from behind and on behalf of the Appellant, he testified that the Respondent was knocked from the right when the driver was overtaking. On cross examination he stated that the Respondent was knocked from behind. From that witness testimony it was not clear how the accident occurred and since he was not the investigating officer it was difficult for him to shed light as to the occurrence of the accident. To this end the Court agrees with the findings of the Learned Trial Magistrate.
18. The Trial Court relied on the testimony of PW3. According to the record PW3 testified and stated that:

“I did not reach my farm. I was involved in an accident on the left side and knocked me off my path.....it proceeded to move to my side and knocked him of my path. I sustained injuries on my left leg and hand”
19. The Learned Trial Magistrate in her judgment stated that

“the Plaintiff was knocked from behind by the said motor vehicle...”
20. According to the testimony of PW3 it was not clear whether he was knocked from behind or from the left. He just said that he was on his side and the driver encroached his lane. As to why the Trial Court stated that the Respondent was hit from behind was not clear from the record. The Court is cognizant of the fact that the trial magistrate had the advantage of hearing the witnesses as they testified which this Court does not have.
21. It is also worth noting that the P3 form dated 1st April, 2010 indicates that the accident took place on 1st April, 2010 and on the same date the Respondent was taken for examination. The Police abstract dated 16th April, 2010 also indicates that the accident occurred on 1st April, 2010. On the other hand, the discharge summary from Nakuru PGH and the referral form from Molo District Hospital indicate that the Respondent was injured on the 12th of March, 2010. Were these documents referring to the same accident? The Court is not sure how the Trial Court did not notice this discrepancy and address it.
22. The Court of Appeal of Kenya in Philip Nzaka Watu v Republic [2016] eKLR adopted the reasoning in the decision of the Court of Appeal of Tanzania in Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007 and stated as follows :

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a Court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”
23. DW1 confirmed that the Appellants motor vehicle registration number KBJ 541B was involved in a road traffic accident with the Respondent. The Police Abstract confirms occurrence of the accident involving the subject vehicle and the Respondent. The Appellant has not refuted that his vehicle knocked the Respondent or challenged the dated or injuries sustained. The Appellant has not raised this as a Ground of Appeal and as such the Court will be inclined to treat the discrepancy as a minor inconsistency that does not go to the root of the matter.



24. It is trite that, the burden of proof in civil cases is on a balance of probabilities. The burden of proof was on the Respondent who sought the relief of this Court by blaming the Appellant for the accident. He tendered his evidence and the burden of proof thereafter shifted to the Appellant to rebut. The Court having concluded the evidence of the police as contradictory and thus not reliable it was upon the Appellant to rebut the evidence tendered by the Respondent.
25. The only testimony on record that gives an account of events on the fateful day is that of the Respondent, the driver of the motor vehicle should have been presented in Court to shed light on how the accident happened. The Respondent testified and gave his account of events. What is clear from his testimony is that he was hit while on his lane and blamed the driver of the Appellant. The Court finds that the Respondent proved his case on a balance of probabilities The Court finds no reason to disturb the findings of the trial magistrate on liability.

Quantum

26. The conditions that have to be met before an Appellate Court can interfere with the Trial Court's discretion in assessment of damages were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services & Another v Lubia & Another* Civil Appeal No 21 of 1984 [1985] eKLR thus:

“The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

General Damages

27. The trial magistrate awarded Kshs 600,000 as general damages for pain and suffering, which amount the Appellant regards as inordinately high. The Respondent agrees with the trial magistrate on the award and submitted that it should not be disturbed.
28. On the circumstances under which a first Appellate Court would interfere with an award of general damages was stated by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR as follows:

‘An appellate Court will not disturb an award for general 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 so arrived at a figure which was either inordinately high or low...’

29. Similarly in *Butler V Butler* [1984] KLR 225 the Court held:

“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate Court should be slow to reverse the trial judge unless he has acted on wrong principles or awarded so excessive or so little damages that no reasonable Court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision.”



30. In evaluating compensation for general damages, the Court has to evaluate the nature of the injuries and the awards given by other Courts. The Court of Appeal observed in *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR that: –
- “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
31. In evidence, PW1, Dr. Obed Omunyoma testified that that the Respondent sustained the following injuries
- a. Compound fracture on right tibia and fibula
 - b. Deep cut wound on forehead
 - c. Multiple bruises on the face
 - d. Deep cut wound on the left thigh
 - e. Multiple cut wounds on the left leg
32. He classified his nature of injuries as grievous harm with a permanent disability of 30% in his report dated 15th June, 2010 and produced as “P-Exh1” as well as the receipt for the charges produced as “P-exh2”. He also produced the receipt to attend Court as “P-Exh3”.
33. PW2 Gabriel Mburu, a Health Record and Information officer at Nakuru PGH testified that the Respondent was admitted on 12th March, 2010 and discharged on 22nd March, 2010. He produced the radiological report as “P-Exh6 and the treatment card as P-Exh8”.
34. The pertinent question therefore is whether the learned Trial Magistrate gave an award that was too high to warrant this Courts interference.
35. Having considered the nature of the injuries and the medical records the following authorities are relevant decisions as to the injuries sustained and awards given.
- a. *Harun Munyoma Boge vs Daniel Otieno Agulo* [2015] eKLR. Majanja J. on Appeal gave an award for damages of Kshs. 300,00 where the Plaintiff sustained multiple injuries and fracture of right tibia and fibula.
 - b. In *Sammy Mugo Kinyanjui & another v Kairo Thuo* [2017] eKLR, the Plaintiff suffered fractures of the tibia and fibula bones of both legs. On appeal, the High Court set aside the Trial Court’s award of Kshs 1,000,000/- and substituted it with a sum Kshs 600,000/- in 2017.
 - c. *Wakim Sodas Limited vs Sammy Aritos* [2017] eKLR, the Respondent was awarded general damages of Kshs. 400,000 where he sustained a fracture of the fourth rib and a compound fracture of the left tibia and fibula. The Court upheld the award on Appeal.
 - d. In *Pauline Gesare Onami v Samuel Changamure & another* [2017] eKLR, the plaintiff sustained fractures of the tibia and fibula bones of both legs, laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft. The Court upheld an award of Kshs 600,000
 - e. *Daniel Otieno Owino & Another vs Elizabeth Otieno Owuor* [2020] eKLR lady Justice E. Aburili reduced an award of Kshs. 600,000 to Kshs. 400,000 for compound fractures of the tibia and fibula bones on the right leg, deep cut wound and tissue damage on the right leg,



head injury with cut wound on the nose, blunt chest injury and soft tissue injury on the lower left leg in 2020.

36. It is noteworthy that the Learned Trial Magistrate awarded general damages without citing an authority that was relied on to base the award of Kshs,600,000. Taking into consideration the cited decisions on similar injuries, it is the Court's considered view that the award by the Trial Court was on the higher side thus warranting interference. It is the Court's considered view and bearing in mind past trends, the award of Kshs. 400,000 would be reasonable taking inflation into account.
37. With the foregoing, the appeal has partially succeeded and the Trial Court's award of Kshs 600,000 for of general damages is hereby set aside and substituted with an award of Kshs 400,000. The special damages of shall remain as awarded.
38. There shall be no orders as to costs.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 22ND DAY OF FEBRUARY 2024.

MOHOCHI S. M.

JUDGE OF THE HIGH COURT.

