



REPUBLIC OF KENYA



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**Ngaruiya v Karanja (Civil Appeal 4 of 2020)
[2024] KEHC 3064 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL 4 OF 2020
CM KARIUKI, J
MARCH 19, 2024**

BETWEEN

SIMON NJOYA NGARUIYA APPELLANT

AND

SAMUEL KIMANI KARANJA RESPONDENT

*(Being an Appeal from the judgment of Honourable Ocharo Momanyi (SRM)
delivered on 16th January 2020 in Nyabururu Civil Suit No. 247 of 2017)*

JUDGMENT

1. By a plaint dated 23/8/2017, the appellant sued the Respondent claiming that on or about 17/7/2018 he was a pillion passenger on the respondent's Motorcycle KMCL 146 F when the Respondent negligently or recklessly drove the same.
2. It occasioned an accident in which the Appellant sustained severe body injuries.
3. The Respondent denied the claim and attributed negligence on the part of the appellant for; failing to wear protective gear being a pillion passenger sitting improperly, and attempting to stand while the motorcycle cycle was in motion, inter alia.
4. The matter was heard where the Appellant gave testimony but the respondent failed to testify despite being offered an opportunity.
5. Thus, the court rendered a verdict that liability was 80% to 20% in favour of the Appellant quantum of 863,636.80 after apportionment. Special damages for Kshs. 19,546.
6. This verdict aggrieved the Appellant thus lodged the instant appeal where the following grounds were set:



7. That the learned magistrate misdirected himself and failed to give any due and proper to the pleadings and evidence on record and submissions and thereby made an erroneous judgment on liability noting that the Defendant neither testified nor filed submissions
8. The learned magistrate erred in law and fact in failing to appreciate the relevant case law and the submissions on record in assessing quantum and thereby an inadequate amount yet the Appellant suffered 45% incapacity.
9. The court directed the parties to canvass appeals via submissions but only the Appellant has complied with directions of the court.
10. Appellant submissions
11. The Appellant submitted before the trial court that, the facts and principles of the law to satisfy the issue of liability. He submitted that he was a lawful pillion passenger on the motorcycle registration number KMCL 146F along Park Shamata Road when the accident occurred. That on or about July 2016, the Respondent's motor vehicle registration number KAG 604S was driven negligently and carelessly by over-speeding it caused the accident. The Appellant testified during the trial that the said suit motor vehicle lost control and knocked him down and as a result, he sustained serious bodily injuries. He attached all the supporting documents which were properly considered by the trial court. The Appellant wholly blamed the driver of the Respondent's motor vehicle for causing the accident.
12. It was properly submitted that the Respondent neither availed any witness nor attended court on the hearing day and therefore the Appellant's testimony remained uncontroverted. The Appellant relied on various authorities to support this fact in his final submissions. Starting with the issue of ownership of the suit motor vehicle, the Appellant submitted that the police abstract indicated that the Respondent was the owner of the motor vehicle and there was no contrary evidence to controvert the Appellant's evidence. He relied on the case of JRS Group Limited v Kennedy Odhiambo Andwak (2016) eKLR where the court held that it is upon the Defendant to substantiate the allegations put to him by bringing evidence contradicting the documentary evidence produced by the Plaintiff. In the case of Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu [2012] eKLR where the court held that evidence adduced by the Plaintiff remains uncontroverted and unchallenged if the Defendant fails to substantiate the pleadings. The Appellant also relied on the case of Harrison Kamau Nganga vs Attorney General & Another (2004) eKLR where the court held a similar position.
13. Based on the foregoing, it is evident that the Honourable trial magistrate acted on wrong principles in making the findings he did by apportioning liability at 80:20 even though the Appellant was merely a passenger and the Respondent failed to adduce any contrary evidence. We submit that the Respondent should be held liable 100% for causing the accident since the Appellant's evidence is unchallenged.

ii) Whether the award on quantum is inordinately low?

14. In an appeal against the assessment of damages, an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of Kemfro Africa Limited t/a "Meru Express Services (1976)" Another v Lubia & Another (No 2) 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.

15. The Appellant rightfully submitted before the trial court the facts and principles to satisfy the issue of quantum. Under the head of quantum, he pleaded under two sub-heads; General damages and Loss of past, present, and future earnings. For General Damages, the Appellant properly submitted that as a result of the accident he suffered loss and damages. This evidence was properly captured in the Appellant's witness statement which was adopted and relied upon by the Appellant during testimony that he sustained the following injuries:
 - a. Degloving scrotal injury
 - b. Bilateral superior and inferior pubic rami fracture of pelvis
 - c. Left acetabulum fracture (bicolumnar)
 - d. Comminuted fracture of the left ilium, pubis, and ischium (of the pelvis) with involvement of the acetabulum
 - e. Fracture of the left rib
16. According to the medical records and the Appellant's submissions, he had difficulties walking and was unable to walk without crutches. The Doctor noted that the Appellant had urine incontinence. The doctor also established that the Appellant walked with the aid of elbow crutches with a left-sided limping gait. His left lower limb is shorter as it measures 94cm from the anterior superior iliac spine to the medial malleolus while the right lower limb measures 96cm. It was the Doctor's opinion that the Appellant went through physical pain, and suffering and classified his injuries as grievous harm. Following the multiple fractures sustained by the Appellant, he correctly relied on authorities where similar injuries were sustained and pleaded for Kshs,3,000,000/=.
17. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. This position finds support in the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
18. The trial court failed to consider comparable injuries compensated by comparable awards as submitted by the Appellant. In the case of:

Peace Kemuma Nyang'era v Michael Thuo & another [2014] eKLR where the Plaintiff sustained a fracture of the sacrum bone (transforaminal fracture), fracture of the right superior pubic ramus of the public bone, fracture of the right ischium] inferior pubic ramus of the pelvic bone, a hematoma on both thighs and lumbosacral hematoma. The court awarded the Plaintiff Kshs. 2,500,000/= where her permanent incapacity was assessed at 45%.
19. On the second limb on quantum, the Appellant pleaded for Loss of earning capacity, and loss of past, present and future earnings. The Appellant submitted that he was a casual worker who used to earn at least Kshs. 500,000/= per day but due to the accident and the injuries sustained as a result, he could not work anymore. He submitted that the effect of the accident was the inability to continue working as such that his occupation needs a lot of physicalities which he was lacking considering the accident left



him with a permanent incapacity of 45%. He properly submitted that he was 47 years old at the time the accident occurred and that he would have worked until the age of 60 years as he was a healthy and energetic man. He properly cited and relied on the case of *Jacob Ayiga Maruia & Another v Simeon Obayo* [2005] eKLR where it was held as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records, and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

20. He also urged the Honourable Court to adopt the Minimum Wages Regulations 2015 which was operational at the time and placed the general workers at Kshs. 10,954.70 and to consider the relevant principles when determining whether an injured person is entitled to damages at the time of the accident. He cited the court of Appeal decision of *Butler vs Butler* (1984) KLR 225 where it was held that:

- “ 1. A Person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury
6. The factors to be taken into account in considering damages under the head of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”

21. The Appellant rightly submitted that he met the above-stated principles and thus was entitled to this award as hereunder:

Kshs. 10,954.70x13 years x12 months = 1,708,933.20

22. From the evidence on record and submitted, the Appellant proved his case on a balance of probabilities. It is our humble view that the award made by the learned trial Magistrate fell on the lower side in comparison to comparable awards, hence there is a need for interference. This appeal should be allowed and the Appellant should be awarded the quantum as follows;

- i. General DamagesKshs. 3,000,000.00
 - ii. Loss of past, Present, and Future Earnings ...Kshs. 1,708.933.20
 - iii. Special damages (inclusive of future treatment expenses) ...Kshs. 179,546.00
- TotalKshs 4,888,479.20

23. The trial court determination based on the appellant's testimony stated that:

24. The issues for determination by this court can be framed as follows:

- a. Whether the plaintiffs have established that the injuries they sustained were caused by the negligence of the defendant.
- b. What damages are to be awarded to the plaintiff as a consequence of the injuries they suffered?



25. On the first question, the evidence on record only relates to the plaintiff in CMCC 247/2017. The evidence establishes that an accident did happen as pleaded in the plaint. Documents produced to support this fact as well. The plaintiff was a pillion rider on the motorcycle in question.
26. The defendant never testified to give his version of what happened or any not have happened during the incident. He only did plead general denials in his statement of defense. I have also considered the witness statements as filled and the narration in the statements about the unfortunate incident. I thereof find that the occurrence of the accident in question is not contested and consequently, I find that the plaintiffs have on a balance of probabilities established the negligence on the part of the defendant.
27. The defendant in his statement of defense shifts the particulars of negligence on the plaintiffs but fails to tender any evidence to support the alleged negligence by the plaintiffs.
28. A. on liability
29. The plaintiff admits that he was not wearing any safety gear at the time of the accident. In the circumstances, I will apportion liability at the ratio of 80:20 in favour of the plaintiff as against the defendant.
30. On quantum
31. During the hearing, medical documents were produced by consent. The plaintiffs also testified on the injuries sustained as listed above in the judgment.
32. Having evaluated the evidence adduced, and noting that the defendant never shifted the blame of the accident elsewhere, I do find that the defendant to have been negligent in controlling the motor vehicle in question and therefore liable for injuries that the plaintiff suffered as a result of the accident. I hold the defendant liable for his negligence. Consequently, the defendant is liable to pay damages for injuries suffered by the plaintiff. See Kenya Bus Services Limited vs Humprey [2003] KLR 655

“where it is provided that a car has caused damage by negligence, then in the absence of evidence of the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible...”
33. Regarding loss of past, present, and future earnings I decline to make an award on the same as there is no evidence procured by the plaintiff on the income of the plaintiff.
34. Having considered the evidence adduced by the plaintiff, injuries sustained by the plaintiff, comparable awards, relevant case law relied on, as well as the exhibits produced in support of the claim I do order the defendant to pay the plaintiff in CMCC 247/2017 as follows:
 - i. General Damages for pain, suffering, and loss of amenities Kshs. 900,000.00
 - ii. Special damages (including future treatment) Kshs. 179,546.00

Total cost of the suit Kshs. 1,079,546.00
35. ... Issue, analysis and for determination:
36. After going through the evidence on record and the filed submissions, I find the issues are; -whether the finding on liability by the trial court was erroneous. Whether the award on quantum is inordinately low? And the order as to costs.



37. The first appellant court, is that, it should evaluate the evidence on the record and make its determination bearing in mind that it did not have the advantage of hearing witnesses. The Court in the case of *Bundi Murube V Joseph Omkuba Nyamuro* [1982-88]1 KAR 108 had this to say; -
- “However, a Court on appeal will not normally interfere with a finding of fact by the trial Court unless, it is based on no evidence or a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did. ”
38. “On the issue of liability,” the trial court made a finding, that; the plaintiff admits that he was not wearing any safety gear at the time of the accident. In the circumstances, I will apportion liability at the ratio of 80:20 in favour of the plaintiff as against the defendant”
39. The un-rebutted evidence on record is to the effect that, the appellant was a lawful pillion passenger on the motorcycle registration number KMCL 146F along Park Shamata Road when the accident occurred. That on or about July 2016, the Respondent’s motor vehicle registration number KAG 604S was driven negligently and carelessly by over-speeding it caused the accident. The Appellant testified during the trial that the said suit motor vehicle lost control and knocked him down and as a result, he sustained serious bodily injuries.
40. It is a principle of law that, where the evidence adduced by Plaintiff remains uncontroverted and unchallenged if Defendant fails to substantiate the pleadings. See the cases, of *Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu* [2012] eKLR and *Harrison Kamau Nganga vs Attorney General & Another* (2004) eKLR.
41. Based on the foregoing, it is evident that the Honourable trial magistrate acted on wrong principles in making the findings he did by apportioning liability at 80:20 even though the Appellant was merely a passenger and the Respondent failed to adduce any contrary evidence. It is this court finding that the respondent was 100% liable.
42. On whether the quantum is inordinately low, an appellate court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984* [1985] eKLR.
43. Under the head of quantum, the appellant pleaded under two sub-heads; General damages and Loss of past, present, and future earnings. For General Damages, the Appellant submitted that as a result of the accident he suffered loss and damages. This evidence was captured in the Appellant’s witness statement which was adopted and relied upon by the Appellant during testimony that he sustained the following injuries: Degloving scrotal injury Bilateral superior and inferior pubic rami fracture of pelvis Left acetabulum fracture (bicolumnar) Comminuted fracture of the left ilium, pubis, and ischium (of the pelvis) with involvement of the acetabulum Fracture of the left rib
44. According to the medical records and the Appellant’s submissions, he had difficulties walking and was unable to walk without crutches. The Doctor noted that the Appellant had urine incontinence. The doctor also established that the Appellant walked with the aid of elbow crutches with a left-sided limping gait. His left lower limb is shorter as it measures 94cm from the anterior superior iliac spine to the medial malleolus while the right lower limb measures 96cm. It was the Doctor’s opinion that the Appellant went through physical pain, and suffering and classified his injuries as grievous harm.
45. The appellant submitted that, Following the multiple fractures sustained by the Appellant and relying on authorities where similar injuries were sustained and pleaded he proposes an award, of Kshs,3,000,000/=.



46. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR.
47. One of the cited cases, is *Peace Kemuma Nyang'era v Michael Thuo & another* [2014] eKLR where the Plaintiff sustained a fracture of the sacrum bone (transforaminal fracture), fracture of the right superior pubic ramus of the public bone, fracture of the right ischium] inferior pubic ramus of the pelvic bone, a hematoma on both thighs and lumbosacral hematoma. The court awarded the Plaintiff Kshs. 2,500,000/= where her permanent incapacity was assessed at 45%.
1. Comparing the injuries in the cited case and the instant case, the injuries are more severe than the ones sustained by the appellant therefore, the court would award ksh2,000,000 as general damages.
 2. On loss of earnings, he was 47 years old at the time the accident occurred, and he would have worked until the age of 60 years as he was a healthy and energetic man. He properly cited and relied on the case of *Jacob Ayiga Maruia & Another v Simeon Obayo* [2005] eKLR where it was held as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records, and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”
 3. He also urged the Honourable Court to adopt the Minimum Wages Regulations 2015 which was operational at the time and placed the general workers at Kshs. 10,954.70 and to consider the relevant principles when determining whether an injured person is entitled to damages at the time of the accident. He cited the court of Appeal decision of *Butler vs Butler* (1984) KLR 225 where it was held that:
 - “ 1. A Person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury 6. The factors to be taken into account in considering damages under the head of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”
 4. The Appellant submitted that he met the above-stated principles and thus was entitled to this award as hereunder: Kshs. 10,954.70x13 years x12 months = 1,708,933.20,
 5. However, the appellant has not considered the imponderables of life and vicissitudes of life which would shorten the appellants' life below 60 years thus the court would apply a multiplier of 10 years. On minimum wage, the same would be subject to statutory deductions and also other factors thus the court would apply an amount of 3000 per month; Thus it works as follows;3000 x10 years x12 months =360,000. Special damages remain as pleaded and awarded Ksh. 19,546. Add 2,000,000, a global amount of Ksh 2,379,546. Plus costs of the appeal.



6. In respect to appeal no 5 of 2020, it is stated that there was a consolidation of the same with the instant file but there is no consolidating order only that court ordered the judgment in the instant case to apply to no HCA 5 of 2020. Similarly, I have perused the trial court proceedings but I cannot find consolidating consent of the CMCC 247 of 2017 and 246 of 2017. However, trial courts seem to allude to the same just like the advocates.
7. The court cannot rule on quantum even after setting aside a trial court dismissal order but can only order the finding on liability to apply in the same case. The quantum will be assessed by the subordinate court.
8. Thus, the court makes the following orders; that,
 - i. The judgment order on liability is set aside and instead respondent is held 100% liable for the accident subject herein.
 - ii. The appeal on the award is adjusted as hereunder and thus partially succeeds as follows;
 - a. General Damages ksh 2,000,000
 - b. Loss of earning ksh 3000 x10 years x12 months = ksh 360,000.
 - c. Special damages Ksh. 19,546.
Total kshKsh 2,379,546
 - d. Plus, costs and interests.
 - iii. The dismissal order of CMCC 246 of 2017 is set aside and the matter is returned to Magistrates court Olkalou for assessment of damages. For the avoidance of doubt, the order on liability holding the respondent 100% liable for the accident applies to the remitted CMC 246 of 2017.

DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 19TH DAY OF MARCH 2024.

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CHARLES KARIUKI

JUDGE

