



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Delights Motors Limited & 2 others (Civil Appeal
E112 of 2022) [2024] KEHC 6578 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E112 OF 2022**

MS SHARIFF, J

MAY 31, 2024

BETWEEN

DAVID MWENJA NJUGUNA APPELLANT

AND

DELIGHTS MOTORS LIMITED 1ST RESPONDENT

NJORO OPERATION SACCO 2ND RESPONDENT

SAMUEL WANYOIKE 3RD RESPONDENT

*(Being an appeal from the judgment and/or decree of Hon. A. K. Mokeross
(PM) in Tamu CMCC No. E002 of 2020 delivered on 8th November 2022)*

JUDGMENT

A. Case Background

1. *Vide* a plaint dated 15th of August 2020 the Appellant filed a claim of tortious negligence against the Respondents pursuant to a road traffic accident that occurred on 15.1.2020 involving the 1st Respondent's motor vehicle registration number KCW 523D then being driven by the 3rd Respondent and motor vehicle registration number GKB 7845/GKZ 009. Consequent thereto the Appellant, who was the fare paying passenger on board the 1st Respondent's said motor vehicle sustained serious bodily injuries.
2. The claim in the lower court was resisted by the 3rd Respondent through a written statement of defense dated 21st August 2021.
3. The 1st and 2nd Respondent failed to enter appearance.



B. Evidence

4. The case proceeded for hearing where the Appellant testified and called 4 witnesses. PW1 Caroline Limo; a health records and information officer from Nakuru Provision National Hospital produced a discharge summary as P. Exhibit 3. PW3 Dr. Obed Omuyoma a medical practitioner in Nakuru town produced a medical report as P. Exhibit 9b while PW4 one Nancy Wendot a Senior Clinical Officer at Kericho County Referral Hospital produced medical examination notes as P. exhibit -2 and P3 form as P. exhibit 5. PW5 1 Police Constable Ismail Bashir from Kipsitet Police Station produced a police abstract as P. Exhibit 6.
5. The appellant's injuries as pleaded and supported by treatment notes P. Exhibit 2, discharge summary P. Exhibit 3 and medical report P. Exhibit 9a were described as follows:
 - a. Fracture right tibia and fibula.
 - b. Severe soft tissue injuries of the right leg.
 - c. Blunt injury to the anterior chest wall leading to soft tissue injuries.According to Dr. Obed Omuyoma, the said injuries healed with a resultant permanent disability of 10%. This witness stated that the Appellant will require a further surgery for removal of implant at a cost of Kshs.200,000.
6. Whereas the 3rd Respondent entered appearance and even filed the defence dated 12/8/2021 and a list of witnesses dated 1/4/2021 he did not tender any evidence in support of his statement of defence.

C. Impugned Judgement

7. At the conclusion of the hearing the trial court made a finding on liability of ratio 50% against motor vehicles registration number KCW 523D and GKB 7845 /GKZ0099 respectively. On the issue of quantum the trial court made an award of Kshs.100,000/= by way of general damages and special damages of Kshs.15,987/=and the total sum awarded was Kshs.115,987/= .

D. Appeal

8. The Appellant was aggrieved by the judgment on both liability and quantum thus filed this appeal. He premises his appeal on the following grounds:
 - a. That the learned trial magistrate erred in law by not properly considering the evidence and the circumstances surrounding the accident herein and failed to take judicial notice that the standard of proof in civil cases is on the balance of probability and treating submissions on liability before him superficially.
 - b. That the learned trial magistrate grossly erred in fact and in law in holding motor vehicle Registration Number GKB 7845/GKZ 099 50% liable yet it was not a party to the suit and failing to hold motor vehicle Registration Number KCW 523D 100% liable yet the respondents did not adduce any evidence as far as liability is concerned.
 - c. That the learned trial magistrate erred in law and in fact to adequately evaluate the evidence and exhibits tendered and failing to consider pertinent factors while making the awards on both liability and quantum.
 - d. That the learned trial magistrate erred in law and in fact in failing to appreciate the contents of the Discharge Summary from Provincial General Hospital, Annex, Medical Report by Dr.



Obed Omuyoma and the testimony of the plaintiff's witnesses in so far as the plaintiff's injuries are concerned.

- e. That the learned trial magistrate erred in law and in fact in awarding general damages of Kshs.100,000/= which was inordinately low and not commensurate with the injuries sustained by the Appellant and failing to award the plaintiff costs of future operation of Kshs.200,000/= which was specifically pleaded and strictly proved by Dr. Omuyoma.
9. The appeal is resisted by the 3rd Respondent. The issue for consideration is:
- a. Whether the trial magistrate erred in apportioning liability at 50:50.
 - b. Whether the award on quantum was inordinately low as to form an erroneous estimate of the general damages.

E. Submissions

10. The appeal was canvassed by way of written submissions. Both parties the Appellant and the 3rd Respondent complied.

E1. Appellant's Submissions

11. On the issue of apportionment of 50% liability against motor vehicle GKB 7845/GKZ the Appellant submits that the trial court erred given that the Government was not a party to the suit.
12. The Appellant maintains that the medical evidence as tendered by PW1- Carolyn Limo PW3 Dr. Obed Omuyoma and PW4 and the documentary proof produced as exhibits 2, 3, 5 and 9b Nancy Wendot revealed that the Appellant had sustained severe soft tissue and bones injuries. Further that whereas Dr. Charles Omuyoma had opined that the Appellant would require future treatment at an estimated cost of Kshs.200,000. The trial court failed to consider this evidence and thus omitted to make an award on future medical costs.

E2. Appellant's Submissions

13. The Respondents submit that the award on quantum was commensurate to the nature of injuries suffered by the Appellant and they urge this court not to disturb the impugned judgement. They further relied on their earlier submissions filed in the main case.

F. Analysis and Determination

14. As a first appellate court I am duty bound to re-evaluate, re-assess and reanalyze the evidence and make my own conclusions while taking into account that I did not see nor hear the witness. In the case of [*Oluoch Erick Gogo -v- Universal Corporation Limited*](#) 2015 eKLR the court stated that:

“As a first appellate court the duty of court is to approach the whole of the evidence on record from a fresh perspective and with an open mind.”

15. The 3rd respondent has blamed the owner/or driver of the motor vehicle GKB 7845 /GKZ 099 for the accident in his pleadings however no evidence was led to support the pleadings contrary to section 109 of the [*Evidence Act*](#) Cap 80 Laws of Kenya which provides:

“109. Proof of particular fact



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

16. It is clear from the evidence tendered before the trial magistrate that the single fact which contributed to the cause of the accident is the manner of driving by the driver of KCW 523D. Nothing pointed a finger on the driver of GKB 7845/GKZ 099 as the one who caused the accident.
17. Since neither of the parties filed proceedings against the owner and or driver of motor vehicle GKB 7845/GKZ 099, I find the trial court erred in apportioning liability to a motor vehicle that had not been sued or enjoined to the proceedings by way of third party proceedings, nor any evidence tendered to attribute negligence to its driver.
18. The appellant averred that the trial court misdirected itself by departing from the submissions presented and filed by the appellant. The court is not bound by the submissions of parties as they are neither pleadings nor evidence but rather parties’ focus pointers to the court to assist in concentrating on points of relevance to each parties’ case in making its decision.
19. In the case of *Clement Gitau -vs- AKK* (2016) eKLR the court made an award of Kshs.600,000 for comparable injuries while in the case of *Dennis Matagaro -vs- NKO (minor suing through next friend and father WOO)* (2021) eKLR an award of Kshs.700,000 was made for more severe injuries. In yet the case of *Herbat Otara Marube -vs- Dankan Ochara* (2022) eKLR an award of Kshs.450,000 was made for comparable injuries.
20. The principles upon which an appellate court can disturb a judgement of a trial court were enunciated in the case of *Butt v. Khan* Civil Appeal No. 40 of 1997 thus: -

“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 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.”
21. Yet in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2001[2004]2 KLR 55, the court underscored the principle that the assessment of damages is a discretion of the trial court and stated that :-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
22. In this instance I do find that the trial court misapprehended the evidence and arrived at a figure that was so inordinately low that it amounts to an entirely erroneous estimate. I will thus disturb it and award the Appellant Kshs.450,000 by way of general damages and Kshs.200,000 as future medical costs.



23. On the balance I do hereby find that this appeal is well merited and I thus allow it and I set aside the judgment of the trial court on both liability and quantum and I make the following orders:-
- a. Judgment of liability is entered at 100% against all the Respondents jointly and severally.
 - b. The Appellant is awarded general damages of Kshs.450,000.
 - c. Special damages award is undisturbed.
 - d. The Appellant is awarded Kshs.200,000 for further medical costs.
 - e. The Appellant is awarded costs of this appeal assessed at Kshs.30,000.
 - f. This file is marked as closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF MAY, 2024

MWANAISHA S. SHARIFF

JUDGE

