



**Maoya & 2 others v Mutubachi (Civil Appeal E059 of 2022)
[2024] KEHC 6388 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E059 OF 2022
SC CHIRCHIR, J
MAY 30, 2024**

A). THE TRIAL COURT’S FINDING ON LIABILITY IS HEREBY SET ASIDE.

B). JUDGEMENT IS HEREBY ENTERED ON LIABILITY IN THE RATIO OF 80% AGAINST THE APPELLANTS JOINTLY AND SEVERALLY, AND 20% AGAINST THE RESPONDENT.

- 1. THE LOWER COURT AWARD OF KSHS.200,000/= IS UPHELD SUBJECT TO APPORTIONMENT AS AFORESAID.**
- 2. THE AWARD OF KSHS. 12,517/= REMAIN UNDISTURBED.**
- 3. THE AWARDS WILL ATTRACT INTEREST AT COURT RATES FROM THE DATE OF JUDGEMENT AT THE TRIAL COURT.**
- 4. THE APPEAL HAVING BEEN PARTIALLY SUCCESSFUL, EACH PARTY WILL MEET THEIR OWN COSTS IN THIS APPEAL.**

BETWEEN

ROBERT MAOYA 1ST APPELLANT
ENA INVESTMENT LTD 2ND APPELLANT
HEMWIL INVESTMEN LTD 3RD APPELLANT

AND

ROSELINE WESONGA MUTUBACHI RESPONDENT

JUDGMENT

1. The Respondent filed suit in the Small Claims Court seeking for damages for personal injuries sustained as a result of a Road Traffic Accident which occurred along Kakamega-Mumias Road. The accident involved motor vehicle registration number KDE 361U and the Respondent who was a pedestrian on the said road.



2. After hearing the parties, the trial court delivered judgement in which it held the Appellant fully liable for the accident and awarded the Respondent general damages of Kshs. 200,000/= and special damages of Kshs.5,542/=.
3. Dissatisfied with the outcome the Appellants filed this appeal in which they set out the following grounds:
 1. That the learned trial magistrate erred in law and fact in holding the appellants 100% liable in negligence.
 2. That the learned trial magistrate erred in law and fact in failing to dismiss the respondent's suit in view of the evidence adduced.
 3. That the learned trial magistrate erred in law and fact by failing to apportion liability on the basis of contributory negligence on the part of the claimant in view of the evidence adduced.
 4. That the learned magistrate erred in law and fact in failing to consider the submissions by the Appellant on both issues of liability and quantum.
 5. That the learned trial magistrate erred in law and in fact by adopting the wrong principles in assessment of damages.
 6. That the trial magistrate erred in law and fact by awarding the respondent Kshs. 200,000/= in general damages which was excessive thereby arriving at a wrong decision.
 7. That the learned trial magistrate erred in assessing general damages as Kshs.200.000/= and failed to apply the principles applicable in award of damages and comparable award made for similar injuries.
4. The Appeal was canvassed by way of written submissions

Appellant's Submissions

5. It is the Appellant's Submission that since there was divergent explanations on how the accident occurred then liability should have been apportioned equally
6. On whether general damages should have been awarded, the Appellant submits that the Respondent did not produce treatment chits while Dr. Andai prepared his report 5 days later. To the Appellant, Dr.Andai's report had no basis as the primary treatment notes were not availed.
7. It is the Appellant's final submission that the award of Kshs.200,000 was too high and ought to be disturbed.

Respondent's Submissions

8. It is the Respondent's submission that the Appellant should have anticipated any foreseeable acts while driving on the road. It is further submitted that the allegation of drunkenness was not supported by any medical evidence. On the injuries sustained , it is submitted that it was sufficiently proved.

Analysis of the evidence and determination

9. This is a first appeal and the duty of this court is to review the evidence, re-evaluate it and arrive at its own conclusion (Ref: *Selle & Ano vs Associated motor Boat ltd* (1968) EA 123)



Liability

10. It was the Respondent's case that she was standing at the edge of the road, waiting to cross, when the 1st Appellant lost control vehicle veered off the road and hit her.
11. On the other hand, the Appellant's testimony was that the Respondent came running from the right side on an attempt to cross towards the left.
12. The pertinent question then is whether whether the Respondent was hit off, or on the road while crossing as the answer to this question will largely determine the decree of liability of each party.
13. The Respondent told the court that she was from Mumias and had stood on the left side of the road. The 1st Appellant also told the court that he was from Mumias, heading towards Kakamega which ,as expected would have been keeping to his left in the general direction of kakamega , as per the Highway Code. He further stated that the Respondent was on his lane . This position was not challenged. There is common ground therefore that both parties were on the left side in the general direction of kakamega.
14. I have looked at the injuries sustained by the Respondent. Most of the injuries are concentrated on the left side of the body. . E.g, she sustained blunt injury to the left hip, left knee, abrasions on the left leg and a cut wound to the left knee.
15. Based on the scenario given by the Respondent, if indeed the vehicle had lost control, she would have been hit on the right side and hence her injuries would mostly be on the right not left
16. On the other hand, the 1st Appellant told the court that the Respondent was crossing from the right to the left. Everything remaining constant, this would then explain why her left side of the body took the most impact.
17. I am therefore inclined to believe the Appellant's version that the Respondent was crossing the road.
18. However, the Appellant was not without blame. He told the court that the accident occurred within the shopping Centre. The speed limit at shopping centers is a maximum of 50km/hr. He admitted that he was driving at between 60-70 km/hr. His speed was therefore high in the circumstances. Being a town Centre, pedestrians are expected to keep crossing to and from either side of the road, and a prudent driver would anticipate that kind of scenario.
19. Moreover, the accident was at about 7.30 p.m , according to the Respondent. This is consistent with the police abstract which indicated 1930 hrs. That was early in the evening, when people are generally still up and about the town centre or heading home. The Appellant ought to have been extra careful.
20. I have considered the Appellant's evidence in this regard. In his written statement, he said the accident happened at 10.30 pm. In court he talked of 9 pm. This contradiction discredits his testimony in this regard.
21. Further going by the Appellant's own testimony the Pedestrian was approaching from the right side. If he had been on a proper look-out, he would to have taken note of her presence on the road before pedestrian reached his lane.
22. Further again, he said he was going over the bumps, and hence, his speed should have been slow enough to stop, as the pedestrian approached. It is either that the driver was not paying attention or moving at a high speed or was less than candid in his testimony.



23. Finally, while both pedestrians and motorists have an obligation to be on the look-out on the road, the greater burden is placed on a motorist, who must always be alive to the fact that unlike a pedestrian, he is in control of a potentially lethal machine.
24. In view of the forgoing, I apportion liability at the rate of 20% against the Respondent and 80% against the Appellants.

Quantum of Damages

25. The Appellant has taken issue with the fact that the Respondent had no treatment chits. The Respondent produced a P3 form and medical report by Dr. Andai. The accident occurred on 16/7/2022 and she was examined on 21/7/2022. That was just 5 days after the accident.
26. On the report the Doctor recorded the impressions he made on examining the patient. He also indicated in the medical report that X-ray films of the chest and pelvis were availed to him. I have noted the observations of the court in the case of *Timsales Ltd vs. Libuywa* (Nakuru HCCA No. 135 of 2006) and *Amalgamated Saw Mills Ltd vs. Stephen Muturi* (Nakuru HCCA No. 75/2005). However these were situations where there had been a long intervening period between the date of injury and time of examination.
27. In this case the examination took place just 5 days after the accident. The doctor could see stitched wounds (Paragraph 2 of page 2 of the report), he had the x-ray films (Paragraph 1 of page 2 of the report). It was also the Appellant's own testimony that he took the victim to St. Mary's Hospital (The last paragraph of his written statement).
28. In view of the foregoing, I have no reason to doubt that the injuries enumerated in the report were the ones sustained during the accident. In any event, it is trite law that the evidence of an expert can only be rebutted by a fellow expert. The Appellant had the liberty to seek for a second medical opinion. There is no evidence that another opinion was sought.
29. Finally is the question of damages awarded. It is now well settled that assessment of damages is a matter of discretion. An appellate court can only interfere with the discretion of the trial court where the award is too excessive or too low, or the court has taken into account irrelevant factors, or failed to take into consideration the relevant ones.
30. From Dr. Andai's report, the injuries sustained were facial bruises, cut wound on the face, brain concussion with loss of consciousness, blunt chest injury, blunt injury to the left hip, bruises to the left knee, abrasions to the left leg and cut wound to the left knee. Although the injuries were soft tissue in nature, it is evident that they were multiple. In my view, the award of Kshs. 200,000 was rather modest. The Appellant's complaint in this regard is devoid of any merit and I dismiss it.
31. In conclusion, I will proceed to make the following orders:
 - a). The Trial court's finding on liability is hereby set aside.
 - b). Judgement is hereby entered on liability in the ratio of 80% against the Appellants jointly and severally, and 20% against the Respondent.
 1. The Lower Court award of Kshs.200,000/= is upheld subject to apportionment as aforesaid.
 2. The award of Kshs. 12,517/= remain undisturbed.



3. The awards will attract interest at court rates from the date of judgement at the Trial Court.
4. The Appeal having been partially successful, each party will meet their own costs in this Appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 30TH DAY OF MAY 2024.

S.CHIRCHIR

JUDGE

In the presence of:

Godwin – Court Assistant.

