



**Maina v Adan & another (Civil Appeal 32 of 2020)  
[2024] KEHC 6699 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6699 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL 32 OF 2020  
CW GITHUA, J  
MAY 29, 2024**

**BETWEEN**

**FREDRICK R MAINA ..... APPELLANT**

**AND**

**KARE ADAN ..... 1<sup>ST</sup> RESPONDENT**

**BERE GOLICHA CHOKE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgment and decree of Hon. Irene W. Gichobi (S.R.M)  
in Kangema SPMCC No. 66 of 2018 delivered on the 22nd day of October 2020)*

**JUDGMENT**

1. The backdrop of this appeal is that the appellant, Fredrick Maina instituted suit in the lower court against the two respondents namely, Kare Adan and Bere Golicha Choke claiming both general and special damages as a result of personal injuries he allegedly sustained in a road accident on or about 16<sup>th</sup> December 2015. Occurrence of the accident was blamed on the negligence of the 2<sup>nd</sup> respondent.
2. In the amended plaint dated 12<sup>th</sup> February 2020, it was alleged that at the material time, the 2<sup>nd</sup> respondent was the driver of Motor Vehicle Registration Number KCB 574 S and he negligently caused a collision with Motor Vehicle Registration Number KAZ 356 B in which the appellant was being conveyed as a passenger; that as the 2<sup>nd</sup> respondent was the 1<sup>st</sup> respondent's authorised driver or agent, the 1<sup>st</sup> respondent was vicariously liable for the accident.
3. The record of the trial court shows that both respondents did not enter appearance or file a defence to the suit as a result of which interlocutory judgment was entered against them.  
Case subsequently proceeded for formal proof and only the plaintiff testified.



4. In its Judgment delivered on 22<sup>nd</sup> October 2020, the trial court found both respondents liable at 100% jointly and severally and awarded the appellant special damages in the sum of Kshs 2,550 but declined to award him general damages for pain and suffering after finding that the appellant had failed to prove that he had sustained injuries in the accident in question.

5. The appellant was aggrieved by the trial court's decision. He preferred the instant appeal through a memorandum of appeal filed on 20<sup>th</sup> November 2020.

In his memorandum of appeal, the appellant raised four grounds of appeal in which he principally faulted the learned trial magistrate for misdirecting herself on the nature and scope of the injuries he had allegedly sustained leading to an erroneous assessment of damages which were manifestly low. He also blamed the trial court for failing to award all the special damages which had been pleaded and proved. Further, he contended that the learned trial magistrate erred by failing to consider his pleadings, evidence and submissions.

6. The appeal was prosecuted by way of written submissions and since the respondents did not participate in the suit and in this appeal, only the appellant filed written submissions. The submissions were filed on his behalf by his Advocates on record, Ms. Mbue Ndegwa & Company Advocates on 23<sup>rd</sup> January 2024.

7. At the hearing, learned counsel Mr. Ndegwa chose to rely entirely on his submission.

After considering the appellant's grounds of appeal as well as his written submissions, it is apparent that the appellant abandoned his challenge on the quantum of special damages since he made no reference to it in his submissions. The appellant did not therefore demonstrate that there was any amount pleaded and proved as special damages which was not taken into account in the award of special damages.

8. In any event, my analysis of the evidence presented before the trial court confirms that the appellant only pleaded and proved special damages in the sum of Kshs 2,550 which is the amount that was awarded by the trial court. I therefore find no merit in the appellant's claim that the trial court erred in the assessment of special damages pleaded and proved.

9. Having found as I have above, I find that the only issue remaining for determination in this appeal is whether the learned trial magistrate erred in law or fact when she failed to award general damages to the appellant for pain and suffering as sought in the amended plaint dated 12<sup>th</sup> February 2020.

10. In the amended plaint, the appellant pleaded that he had sustained a blunt injury on the right cheek and on the back.

It is a cardinal principle of the law of evidence that he who alleges must prove. See : Section 107 to section 109 of the *Evidence Act*.

The appellant had the burden of proving on a balance of probabilities that he had in fact sustained the injuries pleaded in his amended plaint before he became entitled to an award of general damages to compensate him for any pain or suffering he may have endured as a result of the injuries.

11. In his evidence before the trial court, the appellant adopted his amended written statement dated 12<sup>th</sup> February 2020 as his evidence in chief and relied on the following documents:

- i. Treatment notes form Kiriaini Mission Hospital.
- ii. A P3 form.
- iii. Medical Report by Dr. J. K Gitau.



- iv. Treatment notes from Kimkan Health Services.
12. In his amended witness statement, the appellant claimed that after the accident, he sustained a blunt injury on his right cheek and on his back and he was taken to Kiriaini Mission Hospital where he was treated and discharged.
- However, a reading of the treatment notes from the said hospital reveals that although the appellant was indeed seen at the hospital on the date of the accident, upon examination, no injury was noted on any part of his body and his only complaint was of general body aches for which pain killers were prescribed.
13. From this evidence, it is clear that on the date of the accident when the injuries sustained by the plaintiff, if any, were expected to be fresh and visible, none were found on the appellant upon physical examination.
14. Besides, the P3 form dated 23<sup>rd</sup> December 2016 which the appellant also relied on as proof of the injuries allegedly sustained in the accident also indicated that no injuries were noted on the appellant when he was examined by the author of the P3 form. It is however noted that at paragraph 5, it is indicated that injuries sustained by the appellant were assessed and classified as 'harm'. This is a contradiction which was not resolved since the doctor who completed the P3 form was not called as a witness to explain how injuries which had not been noted could be classified as harm.
15. The medical evidence contained in Dr Gitau's medical report further compounded the claim regarding the appellant's alleged injuries. In his report, Dr Gitau claimed that in concluding that the appellant had sustained a blunt injury on the right cheek and on his back, he had been guided by treatment notes from Kiriaini Mission Hospital, copy of a P3 form and physical examination of the appellant.
16. It is pertinent to note that the medical report was prepared on 27<sup>th</sup> June 2018 about 2 ½ years after the accident. Given that the injuries pleaded were apparently minor soft tissue injuries which were not even visible to the doctor who treated the appellant on the date of the accident at Kiriaini Mission Hospital, it is difficult to understand how Dr Gitau was able to see the injuries upon a physical examination of the appellant over two years later. Moreover, the treatment notes and the P3 form which he claimed were his source documents were clear that no such injuries had been found on the appellant upon his examination on 16<sup>th</sup> December 2015 and 24<sup>th</sup> February 2016 respectively.
17. Flowing from the foregoing, I am unable to fault the learned trial magistrate's conclusion that Dr Gitau's findings in his medical report were unreliable as they lacked any factual basis.
- My independent appraisal of the evidence on record leads me to the same conclusion as the learned trial magistrate that the appellant failed to discharge his burden of proving to the required legal standard that he had sustained injuries in the subject accident for which he was entitled to compensation.
18. For all the above reasons, I am satisfied that this appeal lacks merit and it is hereby dismissed.
- As the respondents did not participate in the appeal, I make no orders as to costs.
- It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH MAY 2024.**

**C.W. GITHUA**

**JUDGE**

In the Presence of:



Mr. Mbue Ndegwa for the appellant.

Ms. Susan Waiganjo, Court Assistant

No appearance for the Respondent.

