



**Macharia v Kamau (Civil Appeal E713 of 2021)
[2024] KEHC 8280 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E713 OF 2021**

**JN NJAGI, J
JUNE 28, 2024**

BETWEEN

GEORGE NJOGU MACHARIA APPELLANT

AND

LYDIA NJOKI KAMAU RESPONDENT

(Being an appeal from the judgment and decree of Hon. D.O Mbeja, Principal Magistrate, in Milimani CMCC No. 8786 of 2017 delivered on 18/12/2020)

JUDGMENT

1. The respondent herein brought suit against the appellant at the magistrate's court claiming general and special damages after the motor cycle she was riding on as a pillion passenger was hit by a motor vehicle being driven by the appellant wherein she, the respondent, sustained injuries. The trial court held the appellant 100% liable for the accident and awarded the respondent Ksh.800,000/= in general damages.
2. The appellant was aggrieved with the decision on liability and the amount of award and preferred this appeal. The appeal raised 13 grounds which can be summarized into that the trial court erred into holding that the appellant was wholly to blame for the accident and that the award of Ksh.800,000/= in general damages was inordinately excessive considering the injuries sustained by the respondent.
3. The appeal was disposed of by way of written submissions.

Appellant's submissions on liability

4. The appellant submitted that the evidence adduced before the trial court shows that the appellant was not to blame for the accident. That the trial court ignored and failed to evaluate the evidence adduced in court by the appellant and as a result arrived at an erroneous decision on liability.



5. It was submitted that the appellant was driving on the main road and the rider of the motor cycle was joining the main road. That the rider did not stop at the junction to give way as required by the highway code. That the rider was at the time he was joining the main road hidden from the appellant's view by vehicles which were stationary at the junction to give way to vehicles which were on the main road. Therefore, that the rider is the one who was to blame for causing the accident.
6. It was submitted that it was incumbent upon the respondent to sue the party who was to blame for causing the accident and in this case it was the rider of the motor cycle. The appellant submitted that the blameworthiness of the rider cannot be passed to the appellant.
7. The appellant submitted that the trial court was wrong in holding that the appellant was not observant when he testified that he saw vehicles which had stopped at the junction to give way and that as he passed the motor cycle emerged from the junction while overlapping vehicles that were stationary at the junction on the wrong side of the road and joined the main road. That this evidence showed that he was observant.
8. It was submitted that the trial court erred in holding that the appellant did not do anything to avoid the accident yet he said in his evidence that he tried to swerve and therefore did his best in the circumstances of the case.
9. It was submitted that at the very least the trial court ought to have apportioned liability at 20 % for the appellant as the appellant was on the main road and bigger blame of 80% be borne by the rider or be assumed by the respondent who did not sue the right party.
10. It was submitted that the trial court relied on irrelevant facts in arriving at its decision by observing that drivers are credited for causing accidents through speeding, negligence, carelessness driving under the influence of alcohol, drugs, fatigue, bad health and lack of driving skills. Counsel cited the case of Nakuru HCCA No. 85 of 2013 Lochab Brothers Ltd & another vs. Kikosgei Yegon where the High Court held that the trial magistrate had failed to analyze the evidence on causation of the accident and that the judgment was devoid of a serious interrogation and analysis of evidence.

Respondent's submissions on liability

11. The respondent submitted that she had proved a case of negligence against the appellant. That the appellant ought to have initiated third party proceedings against the owner of the said motor cycle if they were keen on blaming him. Reliance was placed in the case of Kenya Bus Service Ltd & anor vs. Githae Gatururi (2013) eKLR where the Court of Appeal cited Ang'awa J. (as she then was) in her judgment of the matter at the High Court that:

As a court, I am NOT permitted to find contributory negligence against a party who is not named in the plaint but has been merely mentioned by the defendants. As stated elsewhere this is the principle of Audi altercum pastime. (sic) "No man should be condemned without being heard and offer his side of his story."

I would therefore hold that as the defendant failed to join a third party to this suit, they must bear the full liability in this case. I therefore enter judgment on liability at 100% jointly and severally with the defendant No. 1 being vicariously liable for the acts of his agent and or servant defendant No. 2.....

The Court of Appeal then upon reviewing the evidence of the High Court held that:

We therefore come to the conclusion that the respondent proved the particulars of negligence as pleaded. In any case, the fact that the deceased was a passenger on the 1st



appellant's public carrier cast a duty on the 1st appellant to carry the deceased safely as far as reasonable care and forethought could attain. If indeed a third party was involved, the appellants ought not to have abandoned the third proceedings.”

12. The respondent also cited the case of Jemimmah Wambui Njoroge v Philip Mwangi (2020) eKLR where it was held that:

As failure to take out third party proceedings was not so done by the Defendant, he must bear the blame for the accident. He may perhaps later claim for the alleged third parties not joined subject to the limitation of actions. I compute liability at 100%.

13. The respondent submitted that she was a pillion passenger and did not at any time contribute to that accident. She urged this court to be persuaded by the decision in the case of Paskalia Abuko Shiberu vs. George Onyango Orodi (2020) eKLR where it was held that:

The appellant was a pillion passenger. A pillion passenger cannot be held liable for the causation of an accident...

14. The respondent urged the court to find that the appellant was wholly liable for the accident.

Determination on liability

15. This being a first appeal this court's jurisdiction as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123.
16. I have considered the record of the trial court and the submissions on liability by counsels for the parties. The issue for determination is whether the trial court erred in finding the appellant wholly liable for causing the accident.
17. Appellant testified as DW2 in the case and called one witness, a police officer DW1 from Kabete police station Traffic Department. In his evidence the appellant testified that he was driving on the main road along Kapenguria road in Uthiru. That ahead of him was a junction to his left. That there were vehicles that were stationary at the junction giving way to the vehicles on the main road. That as he approached the junction, a motor cycle overtook the stationary vehicles at the junction and emerged into the main road at high speed without stopping to give way. By then he was very close and there was nothing he could do to avoid the accident. He hit the motor cycle. His vehicle was damaged. He made a report of the accident at Kabete police station. He blamed the rider for causing the accident.
18. The witness for the appellant DW1 produced a police abstract dated 31/7/2015 as exhibit. The same indicated that the rider of the motor cycle was to blame for occasioning the accident. The witness however stated that he is not the one who investigated the case nor did he visit the scene of the accident.
19. The respondent on the other hand testified as PW1 in the case. She did not call any witness. She adopted her witness statement dated 17/11/2017 as her evidence-in-chief in the case. The statement stated that she was riding as a pillion passenger on a motor cycle reg. No. KMDK 294X along Uthiru Ndumbuini road when the driver of motor vehicle reg. No. KZX 825 so negligently and carelessly drove the said motor vehicle at a very high speed that he lost control thereby allowing the motor vehicle to collide onto the motor cycle causing her very serious injuries. In her evidence in court, she stated in cross-examination that at the time of the accident they were on Uthiru-Ndumbuini road. That they were on a straight stretch of the road when the accident occurred. That they were going down a slope while



the vehicle was coming from Uthiru. That the vehicle was over speeding when it lost control and hit them. That they were on their side of the road when they were hit. She said that they had not reached the junction when they were hit by the vehicle.

20. I have considered the evidence adduced before the trial court and the submissions tendered by counsels for the parties concerning liability. The appellant blamed the occurrence of the accident on the rider of motor cycle registration No. KMDK 294X while the respondent blamed the appellant for losing control of his motor vehicle and causing the accident. The trial magistrate though holding the appellant entirely to blame for causing the accident did not address the issue of liability between the appellant and the purported third party.
21. It was not disputed that the appellant did not serve a third-party notice on the motor cycle rider. The question then is: what is the effect of failure to serve the third-party notice on the rider of the motor cycle?
22. The purpose and procedure for lodging third party proceedings is provided for under Order 1 rule 15 – 22 of Civil Procedure Rules, 2010. Rules 15 and 17 of the same provide as follows:

“ 15.

(1) Where a defendant claims against any other person not already a party to the suit (herein after called the third party) –

- (a) that he is entitled to contribution or indemnity; or
- (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and served on the third party according to the rules relating to the service of a summons.

17. If a person not a party to the suit who is served as mentioned in rule 15 (herein after called the “third party”) ... must enter appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to



contribute or indemnify, as the case may be, to the extent claimed in the third party notice.”

23. Whereas the appellant in his statement of defence blamed the rider for causing the accident and indicated that he would be seeking for issuance of third-party notice on the said rider, he did not comply with the provisions of Order 1 Rule 15 (2) that requires such notice to be served on the third party. In *Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR*, the Court held that;

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.

24. The purpose of serving third party notice on the third party is to avoid a multiplicity of suits. In my view, a party who in his statement of defence blames a third party for the act complained of by the plaintiff and fails to serve a third-party notice on such third party is, for all purposes, deemed to have abandoned the defence raised in the statement of defence.
25. The appellant herein having blamed a third party, the rider of the subject motor vehicle, for causing the accident and failed to serve a third-party notice can only be deemed to have abandoned the defence that the rider is the one who was to blame for causing the accident. As such the court cannot determine the issue between the appellant and the motor cycle rider as to who between them was to blame for causing the accident. That would amount to condemning the rider unheard. In the final end, the appellant’s defence is of no consequence and the evidence of the respondent that the appellant was the one to blame for causing the accident stood uncontroverted. In the premises, I hold that the appellant was wholly liable for causing the accident. Liability at 100% is therefore confirmed against the appellant.

Quantum.

26. The principles which guide appellate courts in interfering with award of damages by lower courts have been laid down in several court decisions. In the case of *Kemfro Africa limited –vs- Lubia & Another (No.2) [1987] KLR 30*, Kneller JA held as follows: -

“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 for 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 wholly erroneous estimate of the damage”.

27. Similarly in the case of *Catholic Diocese of Kisumu –vs- Sophia Achieng Tete – Civil Appeal No. 284 of 2001 [2004] 2KLR 55* the court of Appeal held as follows:-

“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 applied 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 inordinately high or low as to represented and entirely erroneous estimate.”

28. Based on the above principles, my duty is to consider whether there is reason to interfere with the trial court’s award of Ksh.800,000/= in general damages.
29. The appellant pleaded to have suffered the following injuries;
 - (a) Missing (extracted) incisor tooth (tooth retained);
 - (b) Bruises chin;
 - (c) Deep Cut wound and bruises lower lip.
30. The appellant submitted that the award of Ksh.800,000/= was excessive and not commensurate to the injuries sustained by the respondent. That the trial magistrate did not demonstrate how he arrived at the said figure.
31. It was argued that the trial court had failed to consider the nature and extent of the injuries sustained per the medical report and pleadings. It was also averred that the trial court failed to consider the authorities relied upon by the appellant.
32. The appellant submitted that this is a case where this court should exercise its discretion and disturb the award by the trial court. The appellant relied on three authorities where awards ranging between Ksh.80,000/= and 200,000/= were made. The appellant also cited the case of *Dhiray Manji v Falin Khasiani, Eldoret HCCA No.114 of 2018* where an award of Ksh.700,000/ in general damages was reduced to Ksh.300,000/=. He urged this court to substitute the award of Ksh. 800,000.00/= with one of Ksh.150,000/=.
33. The respondent on the other hand submitted that the award of Ksh.800,000/= made by the trial court was reasonable. She relied on the cases of Henry Ngila vs. HK (minor Suing through his father and next friend DKM) [2021] and Patrick Murithi Mukuha vs. Edwin Warui Munene & 5 others [2005] eKLR where the plaintiffs were awarded Ksh.700,000/= and Ksh.500,000/= respectively for comparable injuries.
34. I have considered the authorities cited by the parties. The respondent sustained loss of one tooth and soft tissue injuries. I am of the considered view that the award of Ksh.800,000/= for the type of injuries suffered by the respondent was inordinately excessive. I consider an award of Ksh.200,000/= to be appropriate for the injuries suffered.
35. The upshot is that the appeal on liability is dismissed. The court however finds merit on the appeal on quantum of damages. Consequently, the award of the trial on general damages is set aside and substituted with one of Ksh.200,000/=.
36. As the appeal has partially succeeded, I order each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JUNE 2024.

J. N. NJAGI

JUDGE

In the presence of:

Ms Kanana HB for Mr. Kaburu for Appellant

Mrs Ochieng for Respondent



Court Assistant – Mokoira

30 days R/A

Thereafter: Mr. Kiptanui HB for Mr. Wachira for Respondent

