



REPUBLIC OF KENYA



**Muchau v Ngatu & another (Civil Appeal E227 of 2022)
[2024] KEHC 7711 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E227 OF 2022**

**H NAMISI, J
JUNE 28, 2024**

BETWEEN

ROSE NYAKIO MUCHAU APPELLANT

AND

DAVID GITAU NGATU 1ST RESPONDENT

EVAJERINA NJOKI MUNYUA 2ND RESPONDENT

(Being an Appeal from judgement by Hon. Kibet Sambu (Mr.), Senior Principal Magistrate delivered on 24th August 2022 in Kiambu CMCC No. 133 of 2020)

JUDGMENT

1. This appeal arises from a suit in the Magistrate court filed by the Appellant seeking special damages of Kshs 87,100, general damages, costs of the suit and interest thereon. The claim by the Appellant is in respect of a road traffic accident that occurred on 24th March 2018, involving motor vehicle registration number KBZ 884S, in which the Appellant was travelling as a passenger. As a result of the accident, the Appellant sustained the following injuries:
 - i. Compound fractures of the tibia/fibula left leg
 - ii. Head injuries
 - iii. Physical and emotional trauma
2. The Respondents, the registered and/or beneficial owners of the said motor vehicle, entered appearance and filed a Statement of Defence.
3. At the hearing, the Appellant adopted her witness statement and testified as to the injuries she sustained. The Appellant called one witness, PC Raphael Musyoka, who testified as to the accident and produced the Police Abstract. The Respondents did not call any witnesses.



4. In its judgement dated 24th August 2022, the trial magistrate dismissed the suit. The court noted that the Appellant had failed to prove her claim on quantum of damages, which claim was dismissed with costs to the Respondents. The Appellant's case, however, succeeded only to the extent of the determined liability of the parties. The Court also found that the Appellant had failed to prove her claim for special damages, loss of future earnings and future medical expenses.
5. Aggrieved by the judgement of the trial court, the Appellant filed a Memorandum of Appeal dated 30th September 2022 on the following grounds:
 - i. That the learned Magistrate erred in fact and in law by finding and holding that the Plaintiff failed to prove her claim on quantum of damages despite the existence of evidence to the contrary;
 - ii. That the learned Magistrate erred in law and in fact by disregarding documents produced by consent of parties which demonstrated the extent of injuries suffered by the Appellant;
 - iii. That the learned Magistrate erred in law by failing to award general damages for pain and suffering and loss of amenities;
 - iv. That the learned Magistrate erred in law and fact by failing to award special damages despite acknowledging that it was proved;
 - v. That the learned Magistrate erred in law by dismissing the Plaintiff's claim on quantum with costs to the Defendant
6. Parties canvassed the appeal by way of written submissions. The Appellant filed written submissions dated 25th October 2023. By the time of writing this judgement, the Respondent had not filed their submissions.

Issues for Determination

7. I have considered the Memorandum of Appeal, Record of Appeal as well as the Applicant's submissions. The issues for determination in this appeal can be summarised as follows:
 - i. Whether the Appellants proved their case on a balance of probability;
 - ii. Whether the Appellant is entitled to damages

Analysis

8. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

9. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge



has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

10. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

11. The Appellant herein, a graduate of Master of Business Administration, was involved in a road traffic accident. She sustained injuries and was treated at various hospitals, including Kiambu Level 5 Hospital as well as the National Spinal Injury Referral Hospital. Following surgery on her leg, the Appellant was discharged and had to have regular medical checkups as well as physiotherapy with costs Kshs 5,000/- per session. The Appellant also testified that she will have to undergo a future operation to remove the metal placed in her leg, which procedure will cost Kshs 1 million. The Appellant submitted that the damages she is entitled to, both special and general, is Kshs 32,061,000/-.

12. In her bundle of documents filed in Court, the Appellant had the following:

- i. National Identification Card
- ii. Master of Business Administration Certificate
- iii. Pay slip for December 2017
- iv. Police Abstract dated 17th April 2018
- v. Motor Vehicle search dated 12th June 2018
- vi. Demand Letters to the Respondents
- vii. Medical Receipts
- viii. Discharge Summary dated 29th March 2018
- ix. Medical Report dated 3rd May 2018
- x. Medical Examination Report dated 17th April 2018
- xi. Statutory Notice dated 18th May 2018

13. At the hearing, the Appellant produced the following documents:

- i. National Identification Card
- ii. Master of Business Administration Certificate
- iii. Motor Vehicle Search dated 12th June 2018
- iv. Demand Letters to the Respondent
- v. Medical Report dated 3rd May 2018
- vi. Medical Examination Report dated 17th April 2018.

14. The Police Abstract was later produced by PW2.



15. At the close of the Appellant’s case, Counsel for the Appellant indicated that he had no intention of calling the makers of the documents marked for identification, and as such the same were expunged from the record by consent. These were the Pay slip and the Medical Examination Report dated 17th April 2018. It is not clear from the Record of Appeal whether or not the Medical Report dated 3rd May 2018 remained on record, but inferring from the impugned judgement, it would seem that the same was also expunged. Further, the receipts relating to the medical expenses incurred by the Appellant were not adduced into evidence.
16. In its judgement, the trial court noted as follows:
- “The expunged documents, particularly the Plaintiff Medical Report, in my view were the Plaintiff’s crucial and vital documents in prove of her case on the nature of the bodily injuries sustained. Plaintiff having proved her case on the issue of liability as against the Defendants whom and hereby hold liable for the accident on 100% liability basis.”
17. The issue is whether Appellant proved his claim on the balance of probabilities. In *Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR* it was held that:
- “As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
18. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526* as follows:
- “In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
19. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR*, the judges of Appeal held that:
- “Denning J. in *Miller Vs Minister of Pensions (1947) 2 ALL ER 372* discussing the burden of proof had this to say; -
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept,



where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

20. In its judgement, the trial court herein stated thus:

“with regard to the issue of quantum of damages payable to the Plaintiff, the court in the absence of the material crucial medical evidence to witness the initial treatment notes, the P3 Form and the Medical Report, which were expunged from the record, is handicapped and has no basis upon which to assess the award on quantum of damages.:

21. I concur with the trial magistrate’s findings. Other than the Appellant’s testimony, no other evidence was adduced to substantiate the claim of injuries sustained, the extent of the said injuries, or the need for future medical expenses. Indeed, the Appellant did not prove her case on a balance of probabilities with regard to the injuries.

22. On the issue of the special damages, it is noteworthy that the receipts, too, were not produced by the Appellant. This error, whether inadvertent or otherwise, was rather costly to the Appellant’s claim for special damages, based on the principle that special damages must not only be specifically pleaded but also must be proved. The Appellant did not prove the special damages.

23. In view of the foregoing, the appeal fails. The appeal is dismissed with costs to the Respondents.

DATED AND DELIVERED AT KIAMBU THIS 28 DAY OF JUNE 2024.

HELENE R. NAMISI

JUDGE

In the presence of:

GITHINJI... for the Appellant

N/A..... for the Respondent

