



**Rotich & another v Ouma (Civil Appeal E252 of 2022)
[2024] KEHC 8864 (KLR) (Civ) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8864 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E252 OF 2022

AB MWAMUYE, J

JUNE 27, 2024

BETWEEN

HILLARY KIPLANGAT ROTICH 1ST APPELLANT

CHEPKEMOI ANN BUNEI 2ND APPELLANT

AND

ERIC OKOTH OUMA RESPONDENT

*(Being an Appeal against the Judgment and Decree of the Hon. D.O. Mbeja
(SRM) delivered on 2nd October, 2020 in Milimani CMCC No. 3178 of 2019)*

JUDGMENT

1. The Appellants herein have approached this Court via the Memorandum of Appeal dated 14th October, 2020 together with the Amended Record of Appeal dated 17th May, 2022. The Appellants are challenging the Trial Court's findings on both liability and quantum; and they are aggrieved with the Trial Court for apportioning 100% liability to the Appellants and also the Trial Court's decision of awarding the Respondent herein KShs.1,000,000.00 as general damages for pain and suffering.
2. The Parties filed and exchanged written submission. The Appellants' Written Submissions dated 11th March, 2024 and the Respondent's Written Submissions dated 20th March, 2024 are in agreement that the three issues for determination in this Appeal are as follows:
 - a. Whether the Trial Court erred in its findings on liability;
 - b. Whether the Trial Court erred in its findings on general damages;
 - c. Who should bear the costs of the Appeal?



3. On the issue of liability, the Appellants have cited numerous authorities in their written submissions in support of their contention that the Trial Court acted without any legal or evidential justification and thus erred both in law and in fact by apportioning 100% liability against the Appellants. While the Appellants do not expressly state what ratio they are in favour of, the authorities they have cited exhibit a 50:50 liability split. They do so having faulted the Trial Magistrate for in their view not taking into consideration that the Respondent failed to utilize the pedestrian footbridge and also failed to ascertain the road was clear before attempting to cross it.
4. Unsurprisingly, the Respondent takes the view that the Trial Court properly considered the evidence tendered by the Parties in arriving at the conclusion that the Appellants were entirely at fault for the accident. The Respondent underscored that the Respondent was not on the road when he was struck by the motor vehicle being driven by the 2nd Appellant.
5. In the impugned Judgment, the Trial Court gave its reasons for a finding of 100% liability against the Appellants as being that it was satisfied that the 2nd Respondent herein was not observant and that she did “absolutely nothing to avoid the accident”.
6. While the Trial Court dwelt with the 2nd Respondent’s driving at length and stated that: “she ought to have taken reasonable measures to avoid the accident by slowing down or otherwise acting in a manner that could have aided her avoid the accident having in mind the presence [of] other road users on the road and particularly the plaintiff at the time”. The trial court did not apply its finding that the Respondent had failed to use the pedestrian flyover at the scene of the accident in arriving at a determination on liability.
7. The Trial Court’s position on culpability was well illustrated both before and after the above quoted section of the Judgment. Before finding that the 2nd Respondent was wholly negligent in the words quoted above, the trial court had the following to say:

“Drivers take the biggest blame for the occurrence of road accidents. For it is assumed that by virtue of their professional capability, they are not only supposed to react momentarily to various changes in the vehicle and its surroundings, but are also expected to be in full control of the situation. They are credited for causing accidents through speeding, negligence, carelessness, driving under the influence of alcohol and drugs, fatigue, bad health and lack of driving skills. All these are within the parameters of human behaviour.”
8. After finding that the 2nd Respondent was not observant and did not take reasonable measures to avoid the accident, the Trial Court proceeded to add the following:

“A lot of lives have been lost on our roads due to carelessness and recklessness by motorists. It is important that all road users are aware of The Highway Code and are considerate towards each other. This court is reluctant to hold the plaintiff liable for causing the accident. Given the circumstances obtaining above, this court is satisfied that the plaintiff has established a prima facie case against the defendants on a balance of probabilities. There’s nothing absolutely DW1 did to avoid the accident. I will hold the defendants liable for causation of the accident at 100% all circumstances considered flowing from the negligence of the driver and the first defendant is vicariously liable.”
9. From the foregoing, it is clear that the Trial Court was in error in both law and in fact due to it taking into account matters it ought not to and giving them undue consideration, and also for not taking into consideration matters it ought to have considered.



10. The unnumbered paragraphs of the Trial Court’s judgment quoted above indicate that the Trial Court did not take the view that the 2nd Appellant lost control of the motor vehicle and veered off the road and impacted the Respondent outside of the road but rather it was the case that she could have done more to have avoided the occurrence of the motor vehicle impact with the Respondent on the road by slowing down or taking some other anticipatory action. The 2nd Appellant’s testimony that the Respondent was contributorily negligent was not addressed by the Trial Court, and this was a significant error.
11. In re-examining the evidence tendered before the Trial Court and after considering the testimonies of the Parties during the hearing of 3rd March, 2020 I find that the apportioning of 100% liability by the Trial Court was unsafe. The Respondent herein did not demonstrate that the accident that occurred was wholly the responsibility of the Appellants and neither did he satisfactorily oust the allegation that he ought to have used the pedestrian overpass.
12. It is not correct to hold that the very nature of a motor vehicle hitting a pedestrian is in of itself a negligent act that necessarily means that the driver of the motor vehicle was at fault. In the case of *Henderson V Henry E Jenkins and Sons*, [1970] AC 232 at 301 it was held that:

“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff’s action fails. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff’s favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants.”
13. Based on the evidence presented before it, the Trial Court could not have determined which of the two sides was to blame for the accident. There was no concrete evidence to blame the 2nd Appellant for causing the accident, and the findings of the trial court inferring speeding and carelessness could not flow naturally from the evidence that was presented. In the circumstances, I agree with the Appellants that the rule set out in *Hussein Omar Farar V Lento Agencies*, Nairobi COA Civil Appeal No. 34 of 2005 should apply in the present case and both sides should be found equally to blame for the accident.
14. On the issue of Quantum, the Appellants did not challenge the veracity of the medical reports that were produced as exhibits by the Respondent during the trial. Their concern was that upon consideration of the injuries sustained by the Respondent the Trial Court gave regard to the authorities cited by Respondent that exhibited higher awards and disregarded the Appellants’ authorities that exhibited lower awards.
15. In their written submissions, the Appellants argue that the sum of KShs.1,000,000.00 awarded by the Trial Court as general damages was excessive; and they seek that the same be substituted with an award of KShs.400,000.00 which they contend would be fair, just, and reasonable based on the authorities they cited.
16. On its part, the Respondent is of the view that the award is fair and commensurate to the injuries suffered. In support of this, the Respondent’s Written Submissions have cited authorities where similar injuries yielded higher awards than what the Trial Court gave.



17. The award of general damages by a trial court is not an exact science. Parties can cite any number of authorities where similar injuries resulted in higher or lower awards. Given this reality, the appellate court's role is limited to analysis of whether a case has been made that the trial court made an award of damages that was too high or too low, or was one that enriches rather than compensates the injured party, or it was one which was not commensurate with the injuries sustained.
18. Having examined the judgment of the Trial Court in light of the testimony given before it and the documentary evidence tendered by the parties during the trial, and after considering the pleadings and submissions filed at this appellate stage; I take the view that the Trial Court's finding on Quantum does not meet the criteria for interference by this Court as an appellate court. The award of KShs.1,000,000.00 was neither too high nor too low, and it was commensurate with the injuries suffered by the Respondent herein as guided by past cases of similar injuries.
19. On the question of costs, I note that each Party has prayed for the costs of this Appeal. Noting that one of the substantive issues for determination has swung in favour of the Appellants while the other has remained in the Respondent's camp; it would not be fair to condemn either Party to bear the costs of this Appeal.
20. Consequently, the Appeal herein partially succeeds as follows:
 - a. The Trial Court's finding of 100% liability against the Appellants is set-aside and substituted with a finding of 50:50 liability between the Appellants and the Respondent;
 - b. The Trial Court's finding on the quantum of general damages for pain and suffering in the amount of KShs.1,000,000.00 is maintained, save for that it shall be subject to a liability of 50:50; and
 - c. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JUNE, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Ms. Wambua Counsel for the Appellant

Ms. Mumbi h/b Mr. Waiganjo Counsel for the Respondent

Mr. Guyo, Court Assistant

