



**Kamau & another v Kimweli (Civil Appeal 26 of 2020)
[2022] KEHC 10675 (KLR) (14 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 10675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL 26 OF 2020
SN MUTUKU, J
FEBRUARY 14, 2022**

BETWEEN

EVANS MUKURIA KAMAU 1ST APPELLANT

MILIGAN HERITAGE 2ND APPELLANT

AND

BONFACE ITUMO KIMWELI RESPONDENT

*(Being an Appeal from the whole of the Judgment delivered at Ngong by
the Hon. Ruguru N. Principal Magistrate on the 15th January, 2020)*

JUDGMENT

Memorandum of Appeal

1. The respondent sued the appellants in the lower court at Ngong in Civil Suit No 11 of 2018 seeking general and special damages arising from a road traffic accident that occurred on or about February 11, 2017 at a stage in Kiserian township. The respondent testified in the lower court that he was boarding Motor Vehicle No KBG 547M when the 1st appellant who was driving this motor vehicle owned by the 2nd appellant negligently drove off before the respondent fully boarded the vehicle. As a result the respondent fell down as a result of which he sustained injuries on the chest and left leg. The respondent testified and called one more witness. The appellants filed their defence but did not however call any witnesses although they were represented during the trial. They however filed submissions.
2. The trial court found the appellants liable at 100% and ruled in favour of the respondent. The respondent was awarded general damages amounting to Kshs 350,000; special damages amounting to Kshs 35,190, costs and interest at court rates applicable from the date of the judgment.
3. It is that judgment that the appellants are appealing against. In the memorandum of appeal filed on August 13, 2020, the appellants have listed six (6) grounds of appeal as follows:



1. That the learned magistrate erred in fact and in law in awarding the respondent Kshs 350,000 for general damages and Kshs 35,190 for special damages with costs and interest which amount was exorbitantly high in the circumstances and injuries suffered by the respondent.
 2. That the learned magistrate erred in fact and in law in holding that the respondent had proved his case on a balance of probabilities which finding was against the weight of the evidence on record.
 3. That the learned magistrate erred in law and in fact when she failed to consider the appellant's evidence on points of law and facts in finding the appellants fully liable for the accident which is the subject matter of this suit.
 4. That the learned magistrate's decision was unjust, against the weight of the evidence and was based on misguided points of facts and wrong principles of law and has occasioned a miscarriage of justice.
 5. That the learned magistrate erred in law and fact in failing to pay regard to decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding (sic).
 6. That the learned magistrate erred in fact and law in finding that the respondent was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff.
4. The appellants seek to have this appeal allowed with costs and secondly, to have this court set aside the learned trial magistrate's judgment delivered on January 15, 2020 on quantum and re-place with its own assessment.
 5. In compliance with the directions given by my predecessor to have this appeal disposed of through written submissions, parties have filed their respective submissions.

Appellants' Submissions

6. The Appellants filed their submissions on 12th November 2021. Their case is that the trial court erred in concluding that the Respondent had proved his case on a balance of probabilities and in finding the Appellants 100% liable. They cited *Stratpack Industries v James Mbiti Munyao, Nairobi HCCA No 152 of 2013* quoted in *EW0 (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR and Karugi & another v Kabiya & 3 others [1983] eKLR* quoted in *Benter Atieno Obonyo v Anne Nganga & another [2021] eKLR* to emphasize the law that the burden of proof is on the party that alleges. They argue that the respondent did not provided proof on a balance of probability that he was injured in a road traffic accident as a result of the negligence of the 1st appellant. They allege that it is not far-fetched to assume that the respondent was not even involved in a motor vehicle accident given that he is boda boda rider.
7. They have argued that there is no evidence from the respondent on how the accident occurred and therefore the trial court failed to weigh the evidence on a balance of probability and therefore the respondent failed to meet the requisite burden of proof.
8. On the issue of quantum of damages awarded to the respondent, the appellants have submitted that comparable injuries should as far as possible be compensated by comparable awards keeping & Lighting Co. Ltd [2013] eKLR. The Appellants have cited several cases in support of a lower amount of general damages and to show the intervention of the appellate court in reducing quantum of damages in cases where the trial court had given higher amounts in general damages. I have read these authorities and have understood the reasoning behind the decisions the various courts have made in those cases.



9. The appellants have submitted that the injuries suffered by the respondent were soft tissue with no permanent incapacity assessed and therefore the award in general damages is erroneous and unjustified. They have submitted that the award rendered is grossly exaggerated and should be cut down or set aside.

Respondent's Submissions

10. It is the respondent's submission on the issue of liability that the appellants' appeal ought to be dismissed given that they did not adduce evidence to controvert the respondent's case. He relies on *Isaac Katambani Iminya v. Firestone East Africa (1969) Limited* [2015] eKLR where the appellants had failed to adduce evidence in support of their case in which the court reasoned that the evidentiary burden of proof lies on the person who wishes the court to believe in the existence of any particular fact (see section 109 of the *Evidence Act*).
11. On the issue of quantum of damages awarded, the respondent has submitted that he pleaded and proved the injuries he sustained and that the trial court, in exercise of its discretion awarded him Kshs 350,000. He submitted that this court, sitting as an appellate court, should not disturb that award unless it is too high or too low or unless the trial court failed to take into account factors which it ought to have taken or took into account irrelevant factors. The respondent relied on *Agnes Kamene Mulyali v Harvest Limited* [2017] eKLR where the Court of Appeal on that point. The respondent argued that the trial court did not fall into any demonstrable error in its method of approach in awarding general damages and asked this court to dismiss this appeal with costs to him.

Analysis and Determination

12. I have taken time to read the record of the lower court and the judgment. It is glaringly clear to me that the appellants did not defend their case in the lower court. They were represented in court during trial and cross examined the respondent and his witness as the record shows but they did not produce a witness to adduce evidence. Not even the driver of the vehicle involved. What could have been easier for them than to adduce evidence negating the evidence of the respondent? On the appellants' failure to adduce evidence in defence of their case, the trial court rendered itself as follows:

I have considered rival submission and pleadings. The evidence of PW1 and PW2 was never challenged as to how the accident occurred. The defendants opted to close their case without calling any witnesses including the crew members of the matatu.

13. In the result, I find on a balance of probability, the plaintiff has proved his case and I find defendants 100% liable for the accident.”
14. Indeed the record is clear that the Appellants closed their case without calling any witnesses. The respondent on the other hand testified and called one witness. He produced exhibits including police abstract on the accident, P3 form, medical reports and medical bill . There was no evidence to point to show that the Respondent was not involved in the accident as alleged, was injured and was treated for those injuries.
15. For the fact that the case by the respondent was unchallenged and that the injuries he sustained are supported by medical evidence, I am satisfied with the trial magistrate's reasoning in arriving at 100% liability on the part of the appellants. I have considered the appellants' half-hearted submissions on the issue of liability. What comes out is clear that the appellants do not have a case in defence, hence their failure to attempt to defend their case in the lower court. Their Appeal seems to challenge the amount in quantum of damages other than their being liable.



16. On the issue of quantum of damages, I have carefully read and appreciated the cases cited by both parties. There are a plethora of authorities on damages and these authorities are varied. It is not possible for two courts to agree on all issues pertaining to quantum awarded. This decision is left to the individual discretion of each judicial officer/judge. On this particular point, the trial magistrate reasoned as follows:

I have carefully considered the pleadings, filed submissions, cited authorities, inflation trends, law applicable and Plaintiff's medical report by Dr Wokabi and Dr Kabambayi as well as the P3 form. According to the medical reports and P3 form the Plaintiff sustained soft tissue injuries. De Wokabi opined that due to his injuries he will experience pain for an indefinite period of time.

17. I have considered the above factors and appreciated that, both parties cited authorities whose injuries were multiple soft tissue injuries which are similar and comparable to those sustained by the plaintiff save for the pain the plaintiff will continue to endure for an indefinite period of time. In the result, I find that, an award of Kshs 350,000 in general damages sufficient to compensate the plaintiff for pain and suffering.”

18. I find no fault in the reasoning above. It cannot be true that the trial magistrate did not consider the authorities cited, or relied on the wrong principles, or was unjust in her decision. I find that she considered all relevant factors including inflation. I find no fault in the trial magistrate in arriving at the conclusions she arrived at. She had no other evidence on record to challenge that of the respondent. The appellants squandered their chance to defend their case at the right forum. They cannot be heard to come to this court, sitting as an appellate court, to argue their case. They ought to have done so at the right forum.

19. In conclusion, I find no merit in this appeal, which must fail. Consequently, I hereby uphold the decision of the trial court and dismiss this appeal with costs to the Respondent. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 14TH FEBRUARY 2022.

S. N. MUTUKU

JUDGE

