



REPUBLIC OF KENYA



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**Onsarigo v Mutai & 2 others (Civil Appeal E05 of 2020)  
[2023] KEHC 20462 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20462 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E05 OF 2020  
RN NYAKUNDI, J  
JULY 21, 2023**

**BETWEEN**

**MOSES ONSARIGO ..... APPELLANT**

**AND**

**EZRA KIPYEGO MUTAI ..... 1<sup>ST</sup> RESPONDENT**

**BERNARD KIPRUTO ..... 2<sup>ND</sup> RESPONDENT**

**ONYANGO CHRISTOPHER ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from judgment and decree of Hon. S. Wewa (SPM)  
in Eldoret CMCC NO. 77 OF 2015 delivered on 12th May, 2020)*

**JUDGMENT**

**Coram:** Before Hon. Justice R. Nyakundi

M/s Isiaho Sawe & Co. Advocates

M/s Kimondi Gachoka & Co. Advocates

1. The appeal is mainly on liability. In the trial Court the 1<sup>st</sup> Respondent had sued the Appellant together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents claiming general damages, special damages of Kshs 11,300/=, cost of future medical expenses and costs and interest of the suit arising from road accident that occurred on 14<sup>th</sup> April, 2015. It is alleged that the 1<sup>st</sup> Respondent was lawfully travelling aboard motor vehicle registration number KBC 812 Toyota Matatu when at Kapsaret area along the Eldoret-Kapsabet road, the said motor vehicle collided with motor vehicle registration number KAE 146V Toyota matatu and as result of which the 1<sup>st</sup> Respondent sustained severe injuries.
2. In an amended statement of defence dated 3<sup>rd</sup> November, 2016 the Appellant denied the occurrence of the accident. Alternatively, it blamed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for causing the accident.



3. After trial Judgment was delivered on May 12, 2020 and the Appellant, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were found 100% liable and damages assessed as hereunder: -
  - a. General Damages..... Kshs 300,000/=
  - b. Special Damages..... Kshs 11,300/=
  - c. Plus, costs and interests
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (4) grounds: -
  1. The learned trial Magistrate erred in fact and in law by apportioning 100% liability to the 3<sup>rd</sup> Defendant without considering the circumstances of the case.
  2. The learned trial Magistrate erred in fact and in law in apportioning 100% liability to the 3<sup>rd</sup> Defendant whereas the police abstract produced as Plaintiff's exhibit indicated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were to blame.
  3. The learned trial Magistrate erred in fact and in law by apportioning 100% liability to the 3<sup>rd</sup> Defendant whereas PW2 and PW3 gave evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were to blame for the accident.
  4. The learned trial Magistrate erred in fact and in law in failing to consider the Appellant/3<sup>rd</sup> Defendant's submissions generally and the in circumstances of this case.
5. The appeal was canvassed vide written submissions. On May 9, 2023 Counsel for the Appellant filed submissions dated March 26, 2023 whereas on May 23, 2023 Counsel for the 1<sup>st</sup> Respondent filed submissions dated the same date. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file any submissions.

### **The Appellant's Submissions**

6. On the issue of liability Mr Kavita, Counsel for the Appellant submitted that the 1<sup>st</sup> Respondent herein never proved any liability on the party of the Appellant herein. Counsel maintained that 1<sup>st</sup> Respondent testifying as (PW2) told the Court that he was aboard motor vehicle registration number KBC 812M and that motor vehicle registration number KAE 146V owned by the 3<sup>rd</sup> Respondent and driven by the 2<sup>nd</sup> Respondent suddenly made a U-turn. Counsel maintains that nothing can be stronger than first-hand testimony of the 1<sup>st</sup> Respondent himself which was ignored by the trial Magistrate.
7. Counsel further submitted that PW3 PC Chesere Kiptoo told the Court that motor vehicle registration number KAE 146V was to blame for the accident. Counsel further argued that PW3 had reiterated the fact the said motor vehicle had made a sudden U-turn colliding with the Appellant's motor vehicle. In view of the foregoing, Counsel faulted the trial Magistrate from finding that the 1<sup>st</sup> Respondent had proven his case against the Appellant.
8. To buttress her submissions Counsel relied on the findings in the following cases; *Karugi & another v Kabiya & 3 Others* [1983] eKLR and *Nickson Mutoka Mutaki v Kenya Agricultural Research Institute* [2016] eKLR.
9. In the end, Counsel reiterated that no liability would attach to the Appellant in light of the 1<sup>st</sup> Respondent own testimony. Counsel further urged the Court to uphold this instant appeal and disturb the judgment of the trial Court by wholly setting it aside.



## The 1st Respondent's Submissions

10. On the issue of liability, M/s Isiaho Counsel for the 1<sup>st</sup> Respondent submitted that it is not in dispute that the accident herein occurred and as a result of which the 1<sup>st</sup> Respondent sustained bodily injuries. Counsel further submitted that it is not undisputed that the 1<sup>st</sup> Respondent herein was aboard motor vehicle registration number KBC 812M, Toyota matatu.
11. Counsel argued that from the perusal of the police abstract on record, it is evident that motor vehicle registration number KAE 146V at the material time was registered in the name of the 3<sup>rd</sup> Respondent herein. Counsel further argued that it is also not in dispute that motor vehicle registration number KBC 812M belonged to the Appellant at time of the accident.
12. Counsel further submitted that from the 1<sup>st</sup> Respondent's testimony, it is evident that he blamed the two drivers for the said accident. Counsel further argued that the 1<sup>st</sup> Respondent told the Court that the driver of motor vehicle registration number KBC 812M was driving at a high speed. According to Counsel, this is the reason that he could not brake, swerve or in any manner control the said motor vehicle in order to avert the collision. Counsel argued that it is evident from the foregoing that the Appellant's motor vehicle contributed to the causation of the said accident. Counsel maintained that the finding by the trial Court that all the Defendants were jointly and severally liable for causation of the subject accident is factually supported. Counsel urged the Court to make a finding that the evidence by the 1<sup>st</sup> Respondents blaming both drivers was never uncontroverted by the Defendants who elected not call any witness to advance their cause. Counsel argued that the owners of the two motor vehicles are thus vicariously liable for the commissions and or omissions of their drivers and or agents in the cause of their employment. Counsel reiterated that it further evident from the 1<sup>st</sup> Respondent's evidence that the said drivers did not take any evasive actions such as reducing speed, braking, swerving and or in any other secure manner control the subject motor vehicle to avoid the collision.
13. To buttress his submissions Counsel relied in the case of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488.
14. Counsel argued that the evidence of the 1<sup>st</sup> Respondent in the primary suit lays the blame on the Defendants jointly and severally as indicated by the particulars of negligence as enumerated in the Plaintiff. Counsel maintained that in lieu of any evidence to the contrary, the 1<sup>st</sup> Respondent has demonstrated a prima facie case as against the Defendants jointly and severally on a balance of probability.

## Analysis and Determination

15. Being a first appeal the Court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
16. As stated above the appeal herein is solely on the issue of liability. The Appellant has argued that the trial Court misdirected itself at apportioning liability against the Appellant at 100% despite overwhelming evidence to the contrary.



## Liability

17. It would be remiss of me not to place on record the legal perspectives which informs the discretion of the court on liability. First and foremost is the burden of proof upon which relevant evidence is underpinned by the plaintiff and in this case the 1<sup>st</sup> Respondent. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Anther* [2015] eKLR the judges of Appeal held that:

“Dennis J. In *Miller v Minister of Pension* [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 loose, because the requisite standard will not have been attained.”

18. In determining whether or not a defendant sued for negligence can be held liable the following ingredients as propounded by *Clerk and Lindsel on Torts* has concisely set out the requirements by the plaintiff which must be proved by a balance of probability to establish a defendant’s negligence as follows:

1. The existence in law of a duty of care situation
2. Careless behaviour by the defendant
3. A causal connection between the defendant’s careless conduct and the damage
4. Foreseeability that such conduct would have inflicted on the particular claimant the particular damage of which he complains: (Once (a) to (d) are satisfied the defendant is liable in negligence and only then the next two factors arise
5. The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible
6. The monetary estimate of that extent of damage.

19. The facts speak for themselves that an accident indeed occurred on 14<sup>th</sup> April, 2015 involving motor vehicle registration number KBC 812M belonging to the Appellant and the 3<sup>rd</sup> Respondent’s motor vehicle registration number KAE 146V Toyota matatu and that as a result of which the 1<sup>st</sup> Respondent sustained injuries.

20. On one hand the Appellant blames the 3<sup>rd</sup> Respondent for the accident whereas on the other hand the 1<sup>st</sup> Respondent blames both the Appellant and the 3<sup>rd</sup> Respondent for causing the said accident.

21. What then is the extent of the parties liability? To determine this the Court will draw upon the evidence at the trial Court. In the case of *Treadsettrs Tyres Ltd v John Wekesa Wepukbulu* [2010] eKLR Ibrahim,



J (as he then was) cited *Charlesworth & Percy on Negligence*, 9th Edition at Pg 387 in which it is stated that:

“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damage. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred, negligence is in fact inferred”

22. What is at stake here is the duty on the part of the plaintiff to prove causation. However, that alone is not sufficient to establish culpability on the part of the defendant. The plaintiff has a further duty to link the damage to the defendant's negligence. The burden of proof on this element may only shift to the defendant on demonstrating existence of a prima facie case capable of calling for an answer from the defendant. This is what the House of Lords stated in the case of *Donoghue v Stevenson* [1932] All ER thus: negligence is a type of conduct which a reasonable man can avoid with a reasonable degree of care and caution. It is an independent thought. It is about whom the duty is owed. The scope of duty so raised extends to your neighbour. Lord Atkin said that the answer must be “the person who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or commissions which are called in question.”
23. The account narrated by the 1<sup>st</sup> Respondent as (PW2) was that on April 14, 2015 he was that he was travelling in motor vehicle registration number KAE 146V along Eldoret -Kapsabet road while and while at Kapsabet area another vehicle registration number KBC 812M Toyota matatu ahead of them and headed towards the same direction make a sudden U-turn and as a result of which motor vehicle registration number KAE 146 in which the 1<sup>st</sup> Respondent was travelling in rammed into it and as a result he sustained severe bodily injuries. The 1<sup>st</sup> Respondent blamed both drivers as they failed to manage the two motor vehicles in a manner so as to avoid the collision/accident.
24. PW1 Dr. Joseph Sokobe, testified that on April 29, 2015 he examined the 1<sup>st</sup> Respondent who had been involved in accident on April 15, 2015 and had sustained injuries and had been treated at Moi Teaching and Referral Hospital. PW1 told the Court that the Respondent had sustained the following injuries:
  - a. Blunt injury on the forehead
  - b. Fracture of the right distal radius
  - c. Bruises on both legs
25. It was his expert opinion that the Respondent herein had sustained both soft tissue and body tissue injuries which he had not recovered. He further told the Court that the fracture was expected to recover without any disability.
26. PW3 PC Tsenek Kiptoo, confirmed that indeed on the material date an accident had occurred involving the Appellant's motor vehicle and the 3<sup>rd</sup> Respondent's motor vehicle and as a result of which the 1<sup>st</sup> Respondent sustained injuries. He told Court that the two motor vehicles were headed in the same direction towards Kapsabet. He further told Court that motor vehicle registration number KAE 146V Toyota matatu had made a sudden U-turn and collided with motor vehicle registration number KBC 812M Toyota Matatu. On cross-examination PW1 conceded that he was not the investigating officer in this matter and that he did not have the police file nor the sketch plan. He however presented the abstract confirming that on the material date an accident had occurred. He further presented the



- Occurrence Book (OB) that indicated that both 3<sup>rd</sup> Respondent's and the Appellant's motor vehicle were heading in the same direction.
27. At the trial Court the Appellant did not call any witnesses.
28. The evidence by the 1<sup>st</sup> Respondent in this matter was uncontroverted. When I place the evidence on legal scale of balance of probabilities, it is more probable than not that the Appellant's driver was not paying attention to traffic rules and other road users when he collided with the 3<sup>rd</sup> Respondent's motor vehicle. The 1<sup>st</sup> Respondent's evidence in this matter was further corroborate by PW1 and PW3 who all confirmed that indeed on the fateful day an accident had occurred and as a result of which the 1<sup>st</sup> Respondent sustained injuries.
29. I do not find evidence to disapprove the account of the 1<sup>st</sup> Respondent testimony in the circumstances therefore, the will Court will not disturb the finding of liability by the trial Court. Accordingly, the trial Court did not err in apportioning liability at 100% jointly and severally against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
30. This analysis would be incomplete without saying something on the limb which deals with damages. The dominant idea in any claim under the tort of negligent is the objective to compensate the plaintiff for the harm suffered due to the defendant's breach of duty. The compensation is for the loss of time, pain and suffering, past or future, expenses incurred because of the injury or disability assessed to be temporary or permanent by medical practitioner. How does the trial court go about assessing the injuries? It is based on the pleadings, evidence, customary rules, past precedents by various superior courts as a measure of arriving at a fair and just quantum. All those specific combination of facts boils down into one objective, a compensation which restores the plaintiff to his or her original wellbeing condition before the harm was occasioned. There is therefore no precise mathematical formula which a trial court uses but with the aid of technical skills, experience, legal principles and guidelines, and the power of discretion is able to deliver a just outcome on assessment of damages. In *Sturrock Shipping (K) Ltd v Mnengwa Moka Maselwa*, Mombasa High Court Civil Appeal Number 47 of 2004 (Sergon, J on 13 February 2007).
- a) In awarding damages, the court ought to assess the general picture, the whole circumstances, the effect of the injuries, the particular person concerned and uniformity. The court must be guided by recent award in comparable cases in the local courts. (See *Tayab v Kimanu* [1983] KLR 114.
- b) An appellate court can only disturb an award pf damages when the trial court has taken into account a factor it ought not to have taken into account or the award is so high or so low tht it amounts to an erroneous estimate. See *Bildad Mwangi Gichuki v Tim – Am Construction Group (Africa)*, Civil Appeal Number 152 of 2001: Jackson Amwoka v Abdulhalim Salyani, Civil Appeal Number 288. (See also *Odunga's Digest on Civil Case Law and Procedure* 3<sup>rd</sup> Edition Volume 5 Page 3689 para (a) (b)
31. It turns out that a plaintiff has a legal interest entitling him /her to sue for compensation in tort if the integrity of his or her physical being is impaired by negligent act caused by the defendant. The compensation is not only in regard to pain, suffering, loss of amenities and disability but is also in regard to the continuous of life for its normal expectancy.
32. The question for this court is whether the assessment by the trial court is such that there was a misdirection which amounts to a miscarriage of justice on assessment of damages to occasion an appeals court to exercise discretion to interfere with the award. Indeed, this is the question canvassed by the appellant although the emphasis was on liability. In my view the summing up of the evidence and



the impugned judgement is crystal clear that the court below sufficiently appreciated the facts and the applicable law to assess proportionate and appropriate general and special damages in favour of the respondent. I disagree therefore with the appellant that this appeal should be allowed. I take the liberty to exercise discretion to have it dismissed with costs to the 1<sup>st</sup> respondent.

It is so ordered.

**DELIVERED, SIGNED AND DATED AT ELDORET THIS 21<sup>ST</sup> DAY OF JULY, 2023**

**In the presence of**

M/s Isiaho for Respondent

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**R. NYAKUNDI**

**JUDGE**

