



REPUBLIC OF KENYA



**Rusinga Investments Limited & another v Munyeke (Civil Appeal E112 of 2021)
[2023] KEHC 26044 (KLR) (Civ) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26044 (KLR)

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

CIVIL

CIVIL APPEAL E112 OF 2021

DAS MAJANJA, J

NOVEMBER 30, 2023

BETWEEN

RUSINGA INVESTMENTS LIMITED 1ST APPELLANT

OSCAR OLALA OMOLO 2ND APPELLANT

AND

DANIEL MWAU MUNYEKE RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D.O. Mbeja, PM dated 12th February 2021 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 8628 of 2018)

JUDGMENT

1. This appeal is against the judgment of the Subordinate Court holding the Appellants fully liable and awarding the Respondent Kshs. 350,000.00 as general damages and Kshs. 3,550.00 as special damages and Kshs. 4,000.00 for dental prosthesis. The Respondent was injured in a road traffic accident that took place along Karen Road, Nairobi on 09.02.2018 while riding his motor cycle registration number KMDU 927 which was knocked down by the 1st Appellant's motor vehicle registration number KBJ 180W driven by the 2nd Appellant.
2. The Appellants appeal to this court is grounded on the Memorandum of Appeal dated 08.03.2021. The Appellants complain that the trial magistrate erred in law and in fact in holding them 100% liable for the accident and that the award of damages was excessive in the circumstances. They urge the court to set aside the judgment on liability and without prejudice apportion liability equally between the parties and re-assess damages.
3. At the hearing of the suit, the Respondent (PW 1) testified on his own behalf. He recalled that on the material day, he was riding his motorcycle when the 2nd Appellant overtook him and hit him in the



process. He admitted that he was speeding as was the 2nd Appellant. In cross-examination, he states that the 2nd Appellant hit him from behind and he fell in a ditch. The Appellant's did not call any witnesses.

4. Based on PW 1's testimony, the trial magistrate found the Appellants liable as the evidence of PW 1 was uncontroverted. I agree with the trial magistrate that this was the only conclusion that the court could come to based on PW 1's uncontested testimony. PW 1 and the 2nd Appellant were moving in the same direction. The 2nd Appellant was the one driving behind PW 1 and if he wished to overtake him, he had to exercise due care before overtaking. The fact that PW 1 was riding on the extreme left side is confirmed by the fact that he fell into the ditch. Even if he tried to avoid the accident, he would have ended into a ditch.
5. The Appellants pleaded contributory negligence in their statement of defence but did not call any evidence to support the averments therein. Likewise, the totality of Respondent's evidence did not support any inference of contribution. Having analysed the evidence independently as required of the first appellate court, I reach the same conclusion as the trial court (see *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] EA 212). I also agree with the decision cited by the trial magistrate, *Uneek Electrical Company Limited v Joseph Fanuel Alela* [2005] eKLR where Visram J., in a case of uncontested evidence stated as follows:

This evidence is uncontroverted. The defence did not provide any evidence to the contrary. There was nothing easier for the Appellant to do than to come to court and say "no, we did not refuse the use of a four-legged ladder ..." or whatever it wanted to say, and then leave it to the court to decide who should be believed. Here the Court had no choice. The only evidence before it was that of the Respondent, and the Court had no reason to disbelieve his testimony. Accordingly, I see no reason to interfere with that finding, and I uphold the finding of fact that the Appellant was 100% to blame for this accident.

6. Turning to the issue of quantum of damages, the Respondent pleaded that he sustained deep cuts on the face, lacerations of the upper buccal mucosa and recurrent headaches. The parties agreed on production of medical reports of Dr Cyprianus Okoth Okere dated 24.05.2018 and that of Dr P. M. Wambugu dated 04.12.2019. Both reports confirm the injuries sustained by the Respondent. Dr Wambugu adds that the right central incisor could be bridged by using a dental prosthesis at an estimated cost of Kshs. 4,000.00.
7. Before the trial court, the Respondent suggested that a sum of Kshs. 700,000.00 as compensation for general damages would be appropriate. He relied on *Ahmed Mzee Famau t/a Najaa Coach Ltd and Another v Veronica Ngii Muia aka Veronica Muya aka Veronica Ngui Muiya* [2017]eKLR where the plaintiff sustained a fracture of the right mandible, deep cut on the left forearm, blunt object injury to the right ear and blunt object injury to the chest. The court affirmed an award of Kshs. 500,000.00 as general damages. In *Patrick Murithi Mukuba v Edwin Warui Munene and 5 others* [2005]eKLR the plaintiff sustained a loss of the right upper premolar, loosening of the left upper incisor, cut on the occipital, chest haemoptysis, blunt abdominal injuries and tender testicular area with a testical missing. The court awarded Kshs. 1,200,000.00 as general damages. In *Martha Agok v Kampala Coach* [2017]eKLR the court awarded Kshs. 350,000.00 to the plaintiff who sustained injuries on the mouth with two loose teeth and injures on the stomach, back and right leg on the lower section. In *Gusii Deluxe Limited and 2 Others v Janet Atieno* [2012]eKLR the Court of Appeal affirmed an award of Kshs. 500,000.00 as general damages for the claimant who had suffer a deep cut wound on the front side of the head leading to her being unconscious for about 8 hours with brain concussion, injury on the jaw, losing the right lower incisors, bruises on the right shoulder, deep cut wound on the right upper limbs, injury to the right toe with bruises over it and blunt injury to the anterior part of the chest.



8. The Appellants urged the court to award Kshs. 200,000.00 as general damages. They cited *Isaac Muriungimbataru v Silas Kalumani* [2017]eKLR where the plaintiff suffered soft tissue injuries on the right side of the face evidenced by swellings, lacerations and bruises, loss of 2 incisors and tenderness and swelling of the lower back. He was awarded Kshs. 200,000.00. In *James Nganga Kimani and Another v Giachagi Njoroge and 2 others* [2019]eKLR the plaintiff sustained deep cut wounds on the nasal bridge, cut wound on the left eyebrow, bruises on the forehead, blunt injury on the chest wall, swollen tender left wrist, cut wounds on the left leg and broken upper central incisor and was awarded Kshs. 200,000.00.
9. As this is an appeal on quantum of damages, the appellate court can only intervene if it is shown that the trial court, in awarding of the damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan* [1981] KLR 349).
10. It is clear that the cases cited by the Respondent bore little relation to the relatively minor injuries sustained by the Respondent. Those by cited by the Appellants relate to comparable injuries and as they were decided in 2017 and 2019, an element of inflation ought to be taken into account. In the circumstances, I would not say that the award of Kshs. 350,000.00 is excessive in the circumstances.
11. The appeal is dismissed. The Appellants shall pay costs assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023.

D.S. MAJANJA

JUDGE

Mr Chengecha instructed by Wangai Nyuthe and Company Advocates for the Appellants.

Mr Musili instructed by Musili Mbiti and Company Advocates for the Respondent.

