



REPUBLIC OF KENYA



KENYA LAW
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**Investment & another v Lomala (Civil Appeal 1 of 2021)
[2023] KEHC 78 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 78 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 1 OF 2021
RN NYAKUNDI, J
JANUARY 18, 2023**

BETWEEN

WEI WEI INVESTMENT 1ST APPELLANT

WEI WEI INVESTMENT 2ND APPELLANT

AND

SAMUEL EKAI LOMALA RESPONDENT

*(Being an Appeal from the judgment and decree of Hon. D. Milimo(RM)
delivered on the 18th day of December 2020 in Eldoret CMCC No.
434 of 2019 between Samuel Ekai Lomala –V- Wei Wei Investment)*

JUDGMENT

1. The appeal is both on quantum and liability. In the trial Court the Respondent had sued the Appellant claiming general damages, special damages of Kshs.8,400/=, cost of future medical expenses to remove the implants of Kshs.150,000/= and costs and interest of the suit arising from road accident that occurred on 28th January, 2019. The Respondent was lawfully cycling a bicycle at Jamboni area when the Appellant and or its driver negligently drove motor vehicle registration number KCF 588Q causing it knock down the Respondent and as a result the Respondent sustained severe injuries.
2. In a statement of defence dated 20th June, 2019 the Appellant denied the occurrence of the accident. Alternatively, it blamed the Respondent for causing the accident
After trial Judgment was delivered on 6th January, 2022 and the Appellant was found 100% liable and damages assessed as hereunder: -
 - a. General Damages..... Kshs.550,000/=
 - b. Future medical expenses..... Kshs.150,000/=



- c. Special Damages..... Kshs.8,400/=
 - d. TotalKshs.708,400/=
 - e. Plus, costs and interests
3. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (6) grounds: -
- 1. That the learned trial Magistrate erred in law and fact in holding the Appellant 100% liable in negligence in view of the evidence adduced and/ or on record.
 - 2. That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent contributed to the occurrence of the accident in view of the evidence on record.
 - 3. That the learned trial Magistrate erred in law and fact in failing to consider the submissions tendered by the Appellant.
 - 4. That the learned trial Magistrate erred in law and fact in failing to take into account the evidence on record thereby arriving at an erroneous decision.
 - 5. That the learned trial Magistrate erred in law and fact in adopting the wrong principles in the assessment of damages payable to the Respondent.
 - 6. That the learned trial Magistrate erred in law and fact in awarding damages which were manifestly excessive in the circumstances.

The Appellant's Submissions

4. The Appellant filed submissions dated 6th September, 2022 on 12th September, 2022.
- On the issue of liability, the Appellant submitted that the Respondent did not prove his case on a balance of probability and therefore the trial Court should have dismissed the Respondent's suit.
- The Appellant contended that during cross-examination, PW1 PC Cheruto Kiptoo, told the Court conceded that he was not the investigating officer in this matter and that he did not visit the scene and did not have the police file nor the sketch maps in Court.
5. The Appellant relied on the following case to buttress its arguments; *Kennedy Nyangoya v Bash Hauliers* [2016] eKLR and *Ismael Nyasimi & Another v David Onchangu Orioki (Suing as the Personal Representative of Antony Nyabondo (Deceased))* [2018] eKLR.
- The Appellant further submitted that from the OB that was presented in Court by PW1 it evident that both parties were heading in the same direction and that the Respondent had crossed the road without checking.
- The Appellant faults the trial Magistrate for not taking into account the evidence of PW1 that extinguishes all liability from the Appellant.
- The Appellant further contended that on cross-examination PW3, Samuel Ekai Lamu, had told the Court that he was coming from a feeder road and joining the main highway. The Appellant contended that from his testimony it is clear that the suit motor vehicle had the right of way and that PW3 had failed to ascertain that the road was clear and abide by the traffic rules.
6. The Appellant further submitted that PW3 testimony was full of contradiction and that on cross-examination he told the Court that he was hit on the road whereas on re-examination he told the Court that he had been hit off the road.



The Appellant blames the Respondent for causing the said accident and urged the Court to find that the Appellant is 100% liable for causing the said accident.

On quantum, the Appellant submitted that as a result of the said accident the Appellant sustained the following injuries;

- a. Degloving injury to the right leg/ankle
- b. Lacerations on the left leg
- c. Fracture right tibia/shaft
- d. Fracture right proximal fibula
- e. Developed non-union of the fracture tibia

7. The Appellant faults the trial Court for awarding Kshs. 550,000/= as general damages. The Appellant maintained that the said amount is inordinately high in light of there being no permanent disability.

The Appellant submitted that in view of the injuries sustained then Kshs.250,000/= to Kshs.300,000/= would have been appropriate in the circumstances.

The Appellant relied on the findings in the following cases; *Maselus Eric Atieno v United Services Limited* [2017] eKLR and *Gladys Lyaka Mwobe v Francis Namatsi & 2 Others* [2019] eKLR to buttress its submissions.

The Appellant also faults the trial Court for failing to consider its submissions.

The Respondent's Submissions

8. The Respondent filed submissions dated 21st July, 2022 on 22nd July, 2022.

On the issue of liability, the Respondent submitted that he was candid in his evidence that on the material date he was lawfully cycling along Jamboni road, having emerged from a feeder road when motor vehicle registration number KCF 588Q came from behind and rammed into the bicycle. The Respondent further submitted that the suit motor vehicle was being driven at a high speed.

The Respondent further submitted that PW1 PC Cheruto Kiptoo clearly stated in his evidence in chief that the suit motor vehicle was being driven from Eldoret towards Nakuru direction when it rammed into the bicycle causing the said accident. Further, in cross-examination PW1 told the Court that the Respondent and the suit motor vehicle were moving towards the same direction when the accident occurred.

9. The Respondent submitted that his evidence was further corroborated by PW1 whereas the Appellant opted not to call any evidence in defence and thus his testimony stood unchallenged and uncontroverted. Further, the Respondent argued that the severity of the injuries he sustained is a further indication that the suit motor vehicle was being driven at a high speed.

Lastly, the Appellant argued that the finding by the trial on the issue liability was therefore proper.

On the issue of quantum, the Respondent submitted that in view of the injuries sustained the award of Kshs.550,000/= was reasonable compensation.

Regarding the award on special damages, the Respondent submitted that the same was pleaded and strictly proved by receipts.



Determination

10. 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] 1 EA 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.”

As stated above the two limbs to this appeal are quantum and liability. I propose to deal with the issue of liability first. 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

11. The facts speak for themselves that an accident indeed occurred on 28th January, 2019 involving motor vehicle registration number KCF 588Q belonging to the Appellant and the Respondent’s bicycle and that as a result of which the Respondent sustained injuries.

On one hand the Appellant blames the Respondent for the accident whereas on the other hand the Respondent blames the Appellant for causing the said accident.

What then is the extent of the respondent’s liability? To determine this the Court will draw upon the evidence at the trial Court.

12. The account narrated by the Respondent was that he was that he was riding his bicycle from a feeder road entering the Eldoret/Nakuru highway when the Appellant’s motor vehicle which was heading towards Nakuru from Eldoret hit him from behind. The Respondent testified that as a result of said accident his right leg was broken.

PW1 PC Cheruto Kiptoo, confirmed that indeed on the material date an accident had occurred involving the Appellant’s motor vehicle and the Respondent’s bicycle and as a result of which the Respondents sustained injuries. On cross-examination PW1 conceded that he was not the investigating officer in this matter and did not have the police file with. 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 Respondent and the Appellant’s motor vehicle were heading in the same direction.

13. PW2 Dr. Joseph Sokobe, testified that on 9th May, 2019 he examined the Respondent who had been involved in accident on 28th January, 2019 and had sustained injuries and had been treated at Moi Teaching and Referral Hospital. PW2 told the Court that the Respondent had sustained both soft tissue and body tissue injuries which he was healing and that he needed implants to be removed at the cost of Kshs.150,000/=. PW2 further observed that the degree of injuries that had been sustained by the Respondent amount to what he termed as grievous harm. On cross-examination PW2 told the Court that there no permanent disability.

PW4 Dr. Paul Kipkorir Rono, in his testimony confirmed that indeed Respondent been treated at Moi Teaching and Referral Hospital and that he had sustained a fracture of the right fibula which was a major one.



At the trial Court the Appellant did not call any witnesses.

14. The evidence by the 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 the accident occurred. The Respondent evidence in this matter was further corroborate by PW1, PW2 and PW4 who all confirmed that indeed on the fateful day an accident had occurred and as a result of which the Respondent sustained injuries.

I do not find evidence to disapprove the account of the PW3 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% against the Appellant.

Quantum

15. The issue for determination here is whether the award of general damages of Kshs. 550,000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that

“comparable injuries should attract comparable awards”.

It has long been held that an appellate court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.

In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] Kneller, J.A, stated:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango v. Manyoka* [1961] EA 705, 709, 713; *lukenya Ranching And Farming Co-operatives Society Ltd v. Kavoloto* [1970] EA, 414, 418, 419. This Court follows the same principles.”

16. The question is whether this court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.

To begin, the injuries suffered by the appellant were listed in the treatment notes, the P3 form and the Medical report by Dr. Joseph Sokobe as:

- f. Degloving injury to the right leg/ankle
- g. Lacerations on the left leg
- h. Fracture right tibia/shaft
- i. Fracture right proximal fibula
- j. Developed non-union of the fracture tibia



17. I have considered both the Appellant's and Respondent's submissions on the issue of quantum of damages, the authorities cited by Counsel in their submissions for this appeal. It must be noted that injuries will never be fully comparable to other person's injuries. What a court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.

Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

From the evidence adduced by Dr. Joseph Sokobe it is clear that the Respondent herein sustained both soft tissue and body tissues injuries which he was recovering well. In the doctor's opinion the degree of injury was grievous harm. The doctor further informed the Court that Respondent needed further treatment which entailed the removal of implants whose estimated cost was Kshs.150,000/=.

18. While appreciating that money cannot renew a physical frame that has been shattered or battered, the Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.

Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that the trial court was properly guided by the authorities cited before her and arrived at a reasonable assessment of general damages. The learned trial magistrate cannot be faulted as the award of Kshs.550,000/= is neither too low nor too high in the circumstances.

Turning to special damages, the same were pleaded as strictly proved as was held in the case of *Hahn v Singh*, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

19. In the end the Court finds no merit in this appeal and therefore proceeds to enter judgment in favour of the Respondent in the following terms;

- i. The Appellant shall bear Liability 100%
- ii. General Damages..... Kshs.550,000/=
- iii. Future medical expenses..... Kshs.150,000/=
- iv. Special Damages..... Kshs.8,400/=
- v. TotalKshs.708,400/=

Costs shall be for the Respondent.

It is ordered so.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF JANUARY, 2023.

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R. NYAKUNDI

JUDGE

