



Mwangi v Abura aka Micheal Juma aka Abura Juma (Civil Appeal 121 of 2021) [2024] KEHC 3684 (KLR) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 121 OF 2021
SM MOHOCHI, J
APRIL 2, 2024**

BETWEEN

SAMUEL NG'ANG'A MWANGI APPELLANT

AND

**MICHEAL JUMA ABURA AKA MICHEAL JUMA AKA ABURA
JUMA RESPONDENT**

JUDGMENT

Introduction

1. The Appeal herein emanates from the judgment in Nakuru CMCC No. 1048 of 2019. The Respondent (then Plaintiff) moved Court vide Complaint dated 1st October, 2019 seeking judgement against the Appellant, Defendant therein, for injuries that the Respondent sustained through a road accident that occurred on or about 9th June, 2019 along the Nakuru- Ravine Road at Kiamunyi area. The Respondent was riding motor cycle registration number KMCV 019Q when the Respondent's vehicle registration number KAR 490H Pick-Up and hit him causing the bodily injuries.
2. The Respondent entered appearance on 11th October and filed its Statement of Defence on 16th October, 2019 denying the allegations and, in the alternative, blamed the Respondent for the accident.

Evidence

3. PW1, was Micheal Juma Aburu, a driver, adopted his Witness Statement filed on 1st October, 2019. He stated that he was out of employment for 6 months. He was still not yet well and he had pain in his leg. He added that he could not drive a vehicle for long distances. He produced list of documents marked Ex 1, Ex-2 MFI-3, Exh-4, Exh-5, MFI-6 and Ex 7-11. He denied being drunk. He stated that he was wearing a helmet and drove the motorcycle on left side of the road.



4. On cross examination, he stated that Ex 9 was his old license and that he had applied for a new one (shown in Court). The old license expired on 24th February, 2020 for both motor vehicle and motor cycle though the stamps for motor cycle were not so clear. He got the new one the old one was defaced. That the motor cycle was for his personal use when going to work. He was also a taxi driver. He had a helmet and reflector jacket on.
5. He stated that there was no other vehicle ahead but could not tell if there was one behind the one that hit him although he knew there was a vehicle behind him but could not tell if was the same one. It was at 3.00am. The police visited the scene to investigate and he recorded his statement. He added that he was not sure if other people recorded statement.
6. He further stated that he was not sure which part of the motor vehicle collided with him. He denied overtaking and hitting the mirror. He blamed the owner of the vehicle. He stated that he left the driver at the police station and it was upon the police to prefer charges or not. He also stated that he had not testified in another matter and that it was not upon him to know why the driver was not charged.
7. He testified that he was injured on the right ankle joint, 2 fractures, thigh and left leg. He was treated at PGH and discharged on 15th June, 2019. He was admitted for 6 days and had receipt dated 18th July, 2019, a month after admission. Dr. Malik's report dated 25th November, 2019 stated that there was no clear source of pain. He was still in crutches.
8. Further he added that he was a taxi driver employed by Ernest and no other better employment. That he earned 1500 a day and worked daily hence the claim for Kshs 45,000 per month. He stated that he had no pay slip thus no tax record.
9. On re-examination he stated that he was hit from behind.
10. By Consent of the parties, the medical legal report by Dr. Kiambaa marked as MFI-6 and the police abstract marked MFI-3 was produced as Ex-6 and Ex-3 respectively.
11. The report by Dr. Malik dated 25th October, 2019 was by consent produced as D Ex-1. The Defence closed its case.
12. By judgment of the trial Court dated 12th March, 2021, the trial Court entered judgment in favour of the Respondent as follows:-
 - a. Liability 100%
 - b. Pain, suffering and loss of amenities Kshs 1,000,000
 - c. Loss of earning Kshs 101,448
 - d. Special Damages Kshs 30,810
 - e. Costs of suit plus interest.

Appeal

13. Being dissatisfied with the judgement of the Court, the Appellant preferred an appeal vide Memorandum of Appeal dated 29th October 2021 on the following grounds:
 - i. That the Learned Trial Magistrate erred in law and in fact by failing to properly consider the circumstances of the accident were not clear from the evidence before Court.



- ii. That the Learned Trial Magistrate erred in law and in fact when ascertaining liability as there wasn't sufficient evidence pointing liability to the defendant.
 - iii. That the Learned Trial Magistrate erred and misdirected herself in fact and in law by awarding damages to the Respondent that were manifestly excessive in the circumstances and thus failed to appreciate the principles applied in the award of damages.
 - iv. That the Learned Magistrate erred in failing to find that the Plaintiff/Respondent contributed to the accident in riding uninsured motor cycle by his own evidence.
 - v. That the Learned Magistrate erred in law and in fact in failing to find that the Plaintiff was riding an uninsured motor cycle that was not supposed to be on the road and hence dismiss the case.
 - vi. That the Learned Magistrate erred in failing to consider and critically analyse the submissions made on behalf of the Defendants and thus arrived an unjustifiably high award for the injuries sustained.
 - vii. That the award of damages was so inordinately high
 - viii. The Learned Magistrate erred in failing to consider the nature of the injuries sustained by the Respondent an awarding what was excessive and unjustified in the circumstances.
 - ix. That the Learned Trial Magistrate erred in his assessment of damages and failed to apply the principles applicable in award of damages and comparable awards
 - x. That the Learned Trial Magistrate erred in law and in fact by failing to take into account certain factors material to an estimate of value.
 - xi. That the Learned Magistrate was in error of law and fact in awarding damages for loss of earnings.
14. The Appeal was canvassed by way of written submissions. The Appellant dated and filed its submissions on 1st December, 2023. The Respondent filed his submissions 16th February, 2024.

Appellant's Submissions

15. The Appellant submitted that the Respondent failed to tender the contents of the police file and the Occurrence Book to lead evidence through sketch maps and to show collusion of investigations respectively as underscored in *Lochab Brothers Ltd & another v Johanna Kipkosgei Yegon* (2017) eKLR. That the police abstract did not blame the driver and further that the matter was pending under investigation therefore it would have been speculative to blame the Appellant. That on this the Respondent failed to prove negligence on the part of the Appellant and relied in the case of *Samuel Irungu Njuguna vs Francis Kibe & another* (2016) eKLR.
16. According to the Appellant, the mere occurrence of an accident does not impute blame, that negligence has to be proved. He relied on the decision in *Caren Auma Oyugi Okwiri vs Emergency Relief Supplies Ltd and another* (2017) eKLR. The Appellant submitted also that the burden of proof does not shift to a Defendant at any point. That the duty was on the Respondent to prove liability on a balance of probabilities. Reliance was placed on *Charterhouse Limited (Under Statutory Management) vs Frank N. Kamau* (2016) eKLR. Further that since the Appellant was not charged with any traffic offence, and that the matter is still pending under investigation, the Court should dismiss the Respondent's clam or in favour of contributory negligence and apportion liability at 50:50



17. According to the Appellant there was no appreciation of the principles awarding general damages. That the case of *Henry Hilaya Ilanga vs Menyaem Manyoka* (1961) EA 705 dealt with the principles of assessing damages. That when it came to determining justification of the award of damages, the Court be guided by the case of *Kemfro Africa Limited T/A Meru Express Service, Gathongo Kanini vs A.M. Lubia and Olive Lubia* (1985.)
18. The Appellant further submitted that an award of damages should consider comparable injuries while relying in *Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd* (2013) eKLR. That both doctors did not award permanent disability thus the award by the Trial Court was inordinately high. He prayed the Court be guided by the following authorities; *John Oluoch Otieno vs San Carriers Limited* (2016) eKLR, *Bhatyani Randeep & Another v Johnstone Kianga Paul* (2021) eKLR and he opined that an award of Kshs 500,000 would be ideal.
19. On the issue of loss of income, the Appellant submitted that Dr. Kiambaa is a general doctor while Dr. Malik is a consultant surgeon thus more cognizant. He implored the Court to rely on his report being a consultant surgeon as evidence of an expert. He relied on *Elizabeth Kamene Ndolo vs George Matata Ndolo* (1996) eKLR. Further that the Respondent was admitted for only six days. There was no basis for Dr. Kiambaa to award temporary incapacity of 6 months. That it was also erroneous for the magistrate to indicate that the Respondent was incapacitated for 6 months and therefore lost earnings. He contended that the issue of loss of earning is a special damage and ought to be proven and placed reliance on *Cecilia W. Mwangi & Ano. Vs Ruth W. Mwangi* 1997) eKLR, *Douglas Kafafa Ombeva v David Ngama* (2013) eKLR and *Mohammed Husein v Mahat Kuno Ribe* (2019) eKLR. The Appellant also implored the Court to consider that since there was no proof that he was a taxi driver. An NTSA permit did not mean that at the time of the accident the Respondent was a taxi driver. The Appellant prayed that the Respondent be considered as a general labourer.

Respondent's Submissions

20. The Respondent in opposing the appeal submitted that in determining liability there was no particular evidence that each case must be evaluated on its own facts and relied in the case of *Jackson Mutuku Ndeti v A.O. Bayusuf & Sons Ltd* (2007) eKLR. He argued that there is no legal requirement to produce a police file or occurrence book in evidence or charge a driver for a traffic offence or an officer to testify to succeed in a civil case as underscored in *John Kiriimi Stanley vs Evergreen Agencies Ltd & Another*, 2014) eKLR, *Mecy Njoki Kamau v Tiny M. Royal Company Limited* (2016) eKLR and *Catholic Diocese of Machakos & another v Janet Munaa Mutua & Another* (2021) eKLR.
21. The Respondent contended that his evidence met the required standard to establish liability at 100% on a balance of probability. That it was consistent and cogent and reliance was placed in the case of *Susan Kanini Mwangangi & another vs Patrick Mbithi Kavita* (2019) eKLR. The Respondent also submitted that there is no limit to the number of witnesses to testify as provided for under Section 143 of the *Evidence Act* and that in *Isinya Roses v Zakayo Nyongesa* the Court relied on a single witness.
22. According to the Respondent, the Appellant failed to tender evidence. He reminded Court that the Magistrate had the advantage of seeing the witness testify and the aptness of the Respondent's evidence ought to be upheld as it was held in the following authorities; *Jonas Akuno Okubasu v Republic* eKLR, *Regina Wangechi vs Eldoret Express Company Limited* (2008) eKLR, *MMG v Muchemi Teres* (2015) and *Family Health International v Jackson Musita Asira* (2006) eKLR.
23. The Respondent submitted that the injuries sustained were not in dispute and the award was reasonable, within the range set by decided cases for comparable injuries by taking into account the nature of the injuries, the age of quoted decisions and the prevailing economic position at the time.



That the Appellant has relied on new authorities that were not relied on in the Trial Court. That the Appellants have not faulted the Trial Court decisions relied on. He urged Court to note that the authorities relied on by the Appellant had less severe injuries and thus not applicable. The Respondent contended that the proposal was too little for a double fracture thus unmerited. On this issue the Respondent placed reliance in the following judicial decisions; *Wanyonyi v Kivuvi & another* (2022) eKLR, *Municipal Council of Nakuru & another v David Mburu Gathiaya* (1993) eKLR, *Afro sugar Limited & another v Levi Juma Eliud* (2009), *Sila Tiren & Another v Simon Ombati Omiambo* (2014) eKLR, *Monica Wangui Mundia v Simon Njuguna* (2020) eKLR, *Kenya Hotels Limited v Oriental / commercial Bank Limited* (2018) eKLR, *Letayaro & another v JK (Suing as the Legal Representative of the Estate of CK)* (2022) eKLR and *Easy Coach Limited v Emily Nyangasi* (2017) eKLR.

24. On the issue of loss of income, the Respondent submitted that it is not mandatory to prove income by way of documents as was stated in *Jacob Ayiga Maruja & another v Simeon Obayo* (2005) eKLR, *James Mukatui Mavi v M.A Bayusuf & Sons Limited* (2013) eKLR, and *Githinji & Grace Maile (suing as the Administrator of the Estate of Catherine Njeri Kimani (Deceased) v Mutai Hardware Stores Limited*. Further that the Respondent's NTSA permit together with his oral evidence was sufficient and relied on the case of *Ondingo Gilbert v Joab Jonah Olunyama* (2018) eKLR.
25. The Respondent contended that he possesses skills unlike a general worker and thus their income cannot be the same while relying on *Kipkoech Cherutich & Another v James Akenga Etabale (Legal Representative & Administrator of the Estate of Fred Akenga (Deceased))* (2015) and *Odonyo Oburu v Jane Kerubo Miruka & another (suing as the legal representatives of John Onywoki Sanganyi (deceased) & another* (2018) eKLR. That the magistrate should not have applied a multiplier of the 6 days the Responded was admitted as argued by the Appellant that since that the period of temporary disability was the best approach.

Analysis and Determination

26. The duty of the Court in a first appeal such as this one was stated in *Selle & Another- Vs- Associated Motor Boat Co. Ltd & Others* (1968) in the following terms;

“I accept counsel for the respondent's proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

27. The doctrine of *res ipsa loquitur*, as I understand it, is where you have a subject matter entirely under the control of one party and something happens while it is under the control of that party, which could not in the ordinary course of things happen without negligence you may presume negligence from the mere fact ... So to this extent bearing in mind the Appellant did not call any evidence to rebut the testimony of the Respondent that he was hit from behind and could not tell which part of motor vehicle registration number KAR 490H Pick-up hit him and on the converse the Appellant had a duty of care not to knock motorcyclists from the rear I respectfully decline to disturb the adverse finding of negligence and that that accident could not occur under ordinary circumstances, no alternative version



to insinuate contributory negligence on the part of the Respondent. This Court shall thus not disturb the same and the liability finding.

28. I have considered the foregoing. As indicated the appeal only challenges the quantum of award of damages. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and Courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See *Tayab v Kinanu* [1983] KLR 114; *West (H) & Son Ltd v Shephard* [1964] AC 326 at 345.
29. In the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil* Appeal No. 284 of 2001 [2004] 2 KLR 55 The Court of Appeal set out the circumstances under which an appellate Court can interfere with an award of damages in the following terms:
- “It is trite law that the assessment of general damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate Court can justifiably interfere with the quantum of damages awarded by the trial Court only if it is satisfied that the trial Court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
30. It was therefore held by the same Court in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:
- “The appellate Court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate Court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”
31. Similarly, in *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:
- “In effect, the Court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate Court is to interfere, whether on the ground of excess or insufficiency.”



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33. The principles which ought to guide a Court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd. v Musingi Mutia* [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different Courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If, however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in Court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

34. In this case, according to the plaint, the Respondent had compound fracture of the right malleolus, fracture medial malleolus, multiple bruises and abrasions on the right leg, abrasions on the left leg.



These injuries were confirmed by PW1- Dr. W. Kiamba, who was the only medical expert to testify at the trial. Accordingly, there is no basis for disbelieving his evidence. As was held by the Court of Appeal in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil Appeal No. 203 of 2001 [2007] 1 EA 139:

“Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

35. The trial magistrate awarded the Respondent general damages of Kshs 1,000,000/-. Before the trial Court, the Respondent never made any proposals.
36. In the case of *Ambrose Micheni Kinyamu v Gilbert Bundi & Another* [2012] eKLR, the Appellant sustained fracture of the right leg on the ankle. The Appellate Court in 2012 enhanced the award given by the trial Court to Kshs 400,000/=.
37. In *Vincent Mbogholi v Harrison Tunje Chilyalya* [2017] eKLR the injuries suffered and the award were as follows: Fracture of the left tibia leg bone (medial malleolus); Blunt object injury to the chest and left lower limb and Bruises on the left forearm, right foot and right big toe. The Appellate Court declined to disturb an award of Kshs 500,000.00 for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.
38. Suffice it to say that I note that the authorities cited on appeal by the Respondent were decided over five (5) years ago and bearing in mind the rapid inflationary trends, I am convinced that the award by the learned trial magistrate was on the higher side. In my view, given the absence of any degree of permanent disability assessed, an Award of Kshs 700,000/- would suffice and be appropriate under this head.
39. Consequently, the Appeal partially succeeds in respect to the award made on general damages for pain and suffering and loss of amenities. Consequently, the trial Court’s award of Kshs 1,000,000/ under that head is hereby set-aside and is substituted with an award of Kshs 700,000/-. The judgment on appeal shall now read as follows:
 - a. Liability 100%
 - b. Pain, suffering and loss of amenities Kshs 700,000/-
 - c. Loss of earning Kshs 101,448/-
 - d. Special Damages Kshs 30,810/-
 - e. Costs of suit plus interest.
40. The Respondent shall have interest on special damages and loss of earning at Court rates from the date of filing suit, and interest on general damages at Court rates from the date of judgment until payment in full.
41. Parties shall bear their respective costs of the appeal.

It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 2ND DAY OF APRIL 2024.

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MOHOCHI S. M.
JUDGE

