



REPUBLIC OF KENYA



KENYA LAW
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**Ogambe v Akinyi (Civil Appeal E040 of 2022)
[2025] KEHC 201 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E040 OF 2022
DK KEMEL, J
JANUARY 17, 2025**

BETWEEN

MICHAEL OUMA OGAMBE APPELLANT

AND

FAITH AKINYI RESPONDENT

*(Being an appeal from the judgment of the Honorable S.W.Mathenge
(SRM) delivered on 3rd August 2022 in Bondo PMCC 134 of 2019)*

JUDGMENT

1. The appeal herein arises from the judgement of Hon S.W. Mathenge dated 03/08/2022 in Bondo PMCC No. 134 of 2019. The Respondent had filed a claim at the trial court arising from a Road traffic accident wherein she claimed the following reliefs:

- a. General damages.
- b. Special damages of Kshs 202,745/=.
- c. Interest on General and Special damages.
- d. Any other relief the court deems fit and just to grant.

The trial court apportioned liability to 100% in favour of the Respondent. On the aspect of quantum of damages, the trial court awarded as follows:

General damages Kshs. 600,000/=

Special damages Kshs 202, 745/=

Net Award Kshs 802,745/=



2. Dissatisfied with the judgement of the trial court, the Appellant has appealed to this court vide his Memorandum of Appeal dated 25/8/2022 wherein he raised the following grounds of appeal:
 - i. The trial magistrate erred in law and in fact in apportioning 100% liability in favor of the Respondent without considering the circumstances of the case.
 - ii. The trial magistrate erred in law and in fact in finding in favor of the Respondent when there was no credible evidence or proof of negligence on the part of the Appellant.
 - iii. The trial magistrate erred in law and in fact in failing to consider the appellant's submissions on liability by disregarding the said submissions and authorities thus arriving at an unjustifiable decision.
3. For the foregoing reasons, he prayed that the appeal be allowed with costs.
4. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
5. This being the first appellate court, its duty is well spelt out namely to re-evaluate and analyze the evidence tendered in the trial court and subject it to an independent analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court as was stated in *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 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.”

6. PW1 Faith Akinyi testified that she is a teacher from Migori. She produced a copy of her ID No. 35489515 as Exhibit 1. She adopted her statement filed on 20/9/2019 as her evidence in chief. She stated that from the accident she sustained the following injuries: fracture on right leg; deformed thigh; wounds on her shoulder and head. That she was first treated at Bondo County Hospital as per the treatment notes (PMFI-2a), receipt (PMFI- 2b). She was also treated at Milimani Maternity Hospital as per the treatment note marked PMFI- 3a, invoice (PMFI -3b), bunch of receipts from Milimani (PMFI- 3c). That she wrote a cheque for her medication vide KCB cheque (PMFI- 3d), receipt for Kshs 30,000/- (PMFI- 3e). That she went for an x-ray at West Kenya as per the x-ray report (PMFI- 4). That she reported at Bondo police station where she was issued with P3 form (PMFI- 5) and PAR form (PMFI 6). That she was issued with insurance sticker (exhibit 7), medical report dated 18/4/2019 by Dr Okombo (PMFI- 8a), receipt of Kshs 5000/- (PMFI- 8b), demand letter (Exhibit 9). She stated that she is not fully healed as she still has stiffness and muscle pull on her right side, severe headache, painful and swollen leg and thigh and chest pain. She prayed for compensation.

On cross examination, she stated that they were three people on the motorcycle comprising of two pillion passengers and the rider. That she was not wearing a helmet or reflective jacket. That they were on the right hand side of the road. That after the accident she was unconscious. That she spent Kshs 207,000/= and above at Milimani hospital. That she did not have NHIF or any cover. That she was seen by Dr. Okuto and paid Kshs 5000/= and Kshs 30,000/=. That she still sees a doctor.

7. PW2 No. 235864 Inspector Maloba testified that he is the Base Commander Bondo and had the PAR for Faith Akinyi. That Faith was a pillion passenger on 25/11/2018 at 1930hrs at Koyucho-Useungu



road on motorcycle registration number KMEN 167X make Bajaj when it collided with motor vehicle registration number KBN 182Y make Toyota Wish driven by Michael Ogambe. That he was not the investigating officer and that the matter was still pending investigation. He produced the PAR as Exhibit 6. That he charged Kshs 5000/- for attendance. That as he was not the investigating officer then he did not know the circumstances of the case.

8. PW3 Prof. Were Okombo testified that he is a physician and epidemiologist. That he examined Faith Akinyi on 18/4/2019 after having been involved in a road traffic accident and sustained injuries. That she was seen at Bondo Sub County Hospital for head injury and cut wounds, loss of consciousness, bruises on both shoulders, injury on right leg with right hip joint swelling, injury to the back, right ankle joint and cut wound.

That at the time of the examination she had not fully healed with headache, pain on the right shoulder, right knee, on the back, ankle joint, both knee joints and inability to walk without crutches. He concluded that she had suffered soft tissue and bone injury and that the degree of incapacity was 50% and injury was grievous harm. That he relied on the victim's history. He presented his findings on examination, treatment notes from Bondo Sub County Hospital and x-ray films. He signed the medical report which he produced as Exhibit 8a, receipt of Kshs 5000/- (P exhibit 8b), and that he charged Kshs 7000/= to attend court.

On cross examination, he stated that he examined Faith himself and that the 50% disability comes from the fractures and the injuries sustained. That was his opinion and one may seek another opinion if they so wish as they are not bound to give the same opinion.

9. PW4 Sammy Luzuri testified that he is a clinician from Bondo Sub County Hospital. He produced the P3 form and treatment notes for Faith Akinyi. That the maker of the documents was Dalmas Okuku who no longer worked at the hospital but they had worked together. That faith went to the facility on 25/11/2018 complaining of inability to use her right lower limb, bleeding tibia fibula region, deformed right thigh. That an x-ray was ordered. That the P3 form showed head injury with cut wounds and loss of consciousness. That she had inter alia; bruises on both shoulders and arms, swollen right leg, swollen right hip joint, deep cut at the ankle. That she was unable to walk without support. That the degree of injury was grievous harm. Treatment notes (P exhibit 2a), receipt for Kshs 400 (Exhibit 2b), P3 form (Exhibit 5). He charged Kshs 3000/- for court attendance.

On cross examination, he stated that Exhibit 2a does not show head injury and loss of consciousness and that fractures heal over time.

10. PW5 Dr. Beatrice Bonyo of Milimani Maternity Hospital-Kisumu. She testified that she is the proprietor of the facility. That she attended to Faith Akinyi who was admitted on 26/11/2018 and had an operation of the right tibia. That she was discharged on 30/11/2018. She produced the discharge summary as exhibit 3 and the X-ray report as exhibit 4. That at discharge she was charged ksh 200,345/= which she cleared later partly cash and the balance via a cheque. She produced the invoice as exhibit 3b, five receipts for Kshs 123,000/= (exhibit 3c), receipt for Kshs 30,000/= (exhibit 3e), KCB cheque (exhibit 3d). That she charged Kshs 3000/= for court attendance.

On cross examination, she stated that a specialist attended to Faith. She had a compound fracture which takes time to heal.

11. At that juncture the Respondent's case closed.
12. DW1 Michael Ouma Ogambe stated that he is a resident of Usenge, a teacher by profession. That on the evening of 25/11/2018 he was driving motor vehicle registration number KBN 182 Y Toyota Wish from Bondo to Usenge. He had a valid driving licence-D exhibit 1. That he was on the left



side heading to Usenge when suddenly a motor cycle heading in the same direction entered the road without indicating and hit his left side bumper. The motorcycle had three people, two passengers and the rider. That he assisted them into his vehicle and took them to hospital. The rider was not hurt but the two passengers were. The rider caused the accident and wanted to run away. His name is Moffat. He wanted to run away because he did not have a licence nor insurance. That he reported to the police, and he together with the police went to the scene. That at the scene, they did not find the motor cycle or even the wreckage that had been there. That he blamed the rider for the accident. He was not charged with any traffic offence. That he recorded his statement and which he adopted.

On cross examination, he stated that the accident occurred around 6.00pm along Bondo-Usenge road near JOOUST. That the rider was not hurt, as he was immediately discharged but the two passengers were admitted in the hospital as they could not walk. That his left side bumper, headlamp and windscreen were damaged. The rider was riding the motor cycle at a high speed because his speed was higher than his.

On re-examination, he stated that the rider suddenly joined the road and crossed. He ought to have waited for him to pass before joining the road.

13. DW2 No. 235864 Inspector Sebastian Maloba testified that he is the base commander Bondo and was in court to present a PAR for motor vehicle KBN 182Y Toyota Wish which was involved in an accident on 25/11/2018 at Kobil Petrol station along Bondo Usenge Road. That one Michael Ouma was driving the said vehicle and it collided with motor cycle ridden beside the road. That the motor cycle rider had joined the road without due care and attention and collided with the vehicle causing the accident. That the rider was Victor Odhiambo who was carrying two passengers namely Julius Gachao Njoroge and Faith Akinyi who were both students. That Faith was seriously injured and was rushed to Bondo Sub County Hospital. That the driver of the motor vehicle reported the accident vide OB32/25/11/2018; Corporal Munyika and P.C. Rioba were in conduct of the case but now transferred had gone to the scene but did not find the motorcycle at the scene. That they went to the hospital and found the victims on treatment. That in the cause of investigations, Faith, Gachao, Victor and vehicle driver and Edwin Nyarioro a passenger in the vehicle all stated that the motor cycle entered the road without due care while the Toyota Wish was passing and that the rider was to blame for the accident.

He stated further that he is not the investigating officer but he had all the documents ie police file necessary in the case. That the driver of KBN 182Y was never charged because the motor cyclist was to blame. He produced the O. B Extract as Exhibit 3 .

On cross examination, he stated that it is the driver of the motor vehicle that reported vide Ob exhibit 3. That the driver gave a different name upon reporting but the rider himself later went and confirmed that it was him who was riding. That he was given a police bond of Kshs 10,000/= and that he left and disappeared. That he has not produced the statement of the people involved but had the police file in court. That if he sees the rider of the motor cycle, he must charge him.

On reexamination, he stated that Victor was the rider and he blamed him for recklessly joining the road and causing the accident.

14. On submissions in the appeal, the Appellant submitted that the record bears witness that the rider abruptly entered the road without indicating hence knocked the bumper of the motor vehicle. The appellant further submitted that the evidence of DW1 was not rebutted even in cross examination. He thus concluded that the appeal be allowed with costs.
15. On her part, the Respondent submitted that she tendered sufficient evidence against the appellant as regards liability.



16. I have considered the evidence on record plus the rival submissions by the parties. Indeed, it is not in doubt that the Respondent was injured in an accident where she was a passenger on a motor cycle. The injuries sustained by the Respondent were well stipulated by all her witnesses from PW1 to PW5. However, none of the witnesses on record adduced evidence to prove that it was the Appellant that caused the accident. DW1 testified that as he drove the suit motor vehicle, the rider of the motor cycle who was carrying two pillion passengers including the Respondent, carelessly and recklessly without indicating, entered the road hitting the bumper of the motor vehicle.

This testimony was corroborated by the police commander (DW2) who testified that in the course of investigations, Faith, Gachao, Victor and vehicle driver and Edwin Nyarioro a passenger in the vehicle all stated that the motor cycle entered the road without due care while the Toyota Wish was passing and that the rider was to blame for the accident. Dw2 further testified that they did not charge the Appellant because he was not to blame for the accident. He concluded by stating that Victor the rider of the motor cycle, disappeared after being given a police bond of Kshs 10,000/= and that he will charge him once he is arrested.

17. The burden of proof lay with the Respondent to discharge and which was on a balance of probability. The evidence tendered by the Appellant and his witness left no doubt that the rider of the motor cycle was solely to blame. It is instructive that the Respondent did not even bother to enjoin the rider or the owner of the motorcycle as a party so as to bring in the issue of contribution and or indemnity between the Defendants. Indeed, the Respondent admitted that she did not even wear a helmet as a pillion passenger and thus endangered herself. It was incumbent upon the Respondent to avail evidence of negligence on the part of the Appellant so as to have him blamed for the accident as per the dictates of section 107 of the *Evidence Act* that provide that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Looking at the evidence of the Respondent and her witnesses as compared with that of the Appellant, it is clear that the Appellant has given the true version of events regarding the accident. The evidence of the base commander (DW2) put paid the Respondent's claim and left no doubt that the rider of the motor cycle was solely to blame for the accident as he had suddenly joined the road without warning, notice and without due care and attention. I find the act of the Appellant in assisting the injured rider and his pillion passengers to hospital was out of human kindness and did not connote any scintilla of liability on his part for the accident. It was therefore quite erroneous on the part of the learned trial magistrate to heap blame upon the Appellant for the accident when the evidence laid bare that the rider was solely to blame. Hence, the finding on liability by the learned trial magistrate was clearly in error and must be interfered with. As the Appellant was absolved from liability by the evidence, then the rider ought to shoulder 100% liability in damages to the Respondent in any event. It is now upon the Respondent to liaise with the police and pursue the runaway rider and bring him to book and thereafter pursue him for damages. In that regard, the finding on liability by the learned trial magistrate was in error and must be interfered with.

18. Even though the issue of liability has been determined in favour of the Appellant, this court is still mandated to assess the damages that would have been awarded had the Respondent's suit succeeded. It is noted from the evidence of the doctors called by the Respondent that the Respondent sustained a fracture of the tibia bone with multiple soft tissue injuries and swelling on the hip joint as per the medical report of Dr Okombo who opined that she sustained 50% degree of incapacity. In the case of Geoffrey Wamalwa Wamba & Another Vs Kyalo Wambua [2018] eKLR a Plaintiff who sustained a compound fracture of the right distal tibia/fibula and cut wound on scalp, chest and lower lip was awarded a sum of Kshs 700, 000/ as general damages for pain, suffering and loss of amenities. The Respondent herein sustained almost similar injuries and that with the incapacity assessed by her doctor,



then I find that a sum of Kshs 1,000, 000/ would have been adequate for her. On special damages, the sum of Kshs 202,745/ backed by requisite receipts would also have been awarded had the suit succeeded.

19. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The judgement of the trial court dated 3/8/2022 is hereby set aside and substituted with an order that the Respondent's suit be and is hereby dismissed with costs to the Appellant. The Appellant is also awarded the costs of this appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JANUARY 2025

D. KEMEI

JUDGE

In the presence of :

Ms Turgut.....for Appellant

M/s Nyangweso.....for Respondent

Mboya.....Court Assistant

