



REPUBLIC OF KENYA



KENYA LAW
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**Ng'ang'a v Njogu & 2 others (Civil Appeal E572 of 2022)
[2024] KEHC 7692 (KLR) (Civ) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7692 (KLR)

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

CIVIL

CIVIL APPEAL E572 OF 2022

WM MUSYOKA, J

JUNE 26, 2024

BETWEEN

FRANCIS KAMAU NG'ANG'A APPELLANT

AND

GEORGE NJOGU 1ST RESPONDENT

AUTO INDUSTRIES LIMITED 2ND RESPONDENT

MARK HOLDINGS LIMITED 3RD RESPONDENT

*(An appeal arising from the judgment of Hon. SA Opande, Principal Magistrate,
PM, delivered on 15th July 2022, in Milimani CMCCC No. 2347 of 2016)*

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the 1st respondent, for compensation, arising from a road traffic accident, which allegedly happened on 26th July 2015, along Uthiru-Ndumbu-ini Road, Nairobi, involving the appellant and motor vehicle registration mark and number KZX 825, allegedly owned or controlled by the 1st respondent at the material time. The appellant, who was allegedly a pillion passenger on motorcycle registration mark and number KMDK 294X, was injured in the accident, and he attributed it to negligence from the 1st respondent. The 1st respondent filed a defence, in which he denied liability, and everything else pleaded in the plaint. In the alternative, he attributed negligence on the rider of the motorcycle on which the appellant was a pillion passenger, and he counterclaimed against the alleged owner of the said motorcycle, who was brought into the suit as a third party, which culminated in the joinder of the 2nd and 3rd respondents, as third parties, both of whom filed defences, denying liability.



2. The matter was disposed of orally. 3 witnesses testified for the appellant, 2 for the 1st respondent, 1 for the 2nd respondent, and 1 for the 3rd respondent. Judgment was delivered on 14th July 2022. Liability was apportioned at 80%:20% against the appellant. General damages were awarded at Kshs. 1,000,000.00. No award was made for special damages and future medical expenses, for the appellant was found to have had authored the accident.
3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 27th August 2021, revolve around liability being assessed against him at 80%; the award of general damages being too low; failure to award special damages, future medical expenses and costs; and failure to make a finding on who the rider of the accident motorcycle was.
4. Directions on the disposal of the appeal were given on 8th February 2024, for canvassing of the appeal by way of written submissions. Both sides filed written submissions.
5. The appellant has submitted on liability, general damages, special damages, future medical expenses and costs, but has cited no authorities. The 1st respondent has submitted only on liability, arguing that he was not negligent in any way, and urging the appellate court to exonerate him of the 20% liability apportioned on him by the trial court. He has cited Julius Omollo Ochando v [*Samson Nyaga Kinyua Nairobi HCCA No. 680 of 2007*](#), *Lochab Brothers Ltd & another v Johana Kipkosgei Yegon* [2017] eKLR (JN Mulwa, J) and *Kennedy Macharia Njeru vs. Packson Njau & another* [2019] eKLR (Gitari, J), to support his arguments.
6. The appeal turns on 4 issues: liability, general damages, special damages, future medical expenses and costs.
7. On liability, the key determinant would be whether the appellant was the rider of the accident motorcycle, or a mere pillion passenger on it. In his plaint, he alleged that he was a pillion passenger. At the trial, 2 police abstracts emerged, one indicating that he was a pillion passenger, and the other the rider of the accident motorcycle. It also emerged that the said motorcycle was in fact owned by him. It also emerged that there was another civil suit, where the 1st respondent had been sued by a woman, who claimed to have been involved in the same accident, where she was a pillion passenger on the same accident motorcycle. The appellant testified that he did not know that woman pillion passenger, and that he saw her for the first time in hospital; while the 1st respondent asserted that the appellant was the rider of that motorcycle, and that that woman was his pillion passenger. The appellant insisted that he was a pillion passenger, and he identified the rider of his motorcycle as a Simon, who was his employee, and who disappeared after the accident. Curiously, he did not know the full name of his employee, the person who was carrying him on the accident motorcycle. 2 police witnesses testified. One stated that the police records did not indicate who the rider of the accident motorcycle was, but that the appellant had claimed, to the police, that he was a passenger. He stated that a third police abstract was issued, out of the same matter, to a woman who claimed to have had also been involved in the same accident. The other officer testified that the records that he had access to showed the persons injured in that accident were the appellant and a woman, and the person blamed, for the accident, was the motorcyclist.
8. The trial court had the benefit of hearing and seeing the 4 witnesses testify on liability. It also had the benefit of seeing material that I have not had access to, including the file in CMCCC No. 8786 of 2017, between the 1st respondent and the alleged woman pillion passenger. That file was consolidated with the suit in Milimani CMCCC No. 2347 of 2016, which is the subject of these appeal proceedings. I have not had the benefit of seeing the original trial records, in both files, for the said original trial records were not availed. I am only determining this matter on the basis of the record of appeal filed herein. The trial court had the opportunity of observing the demeanours of the witnesses. I believe that the



- trial court was in a better position to make assessments on who, between those witnesses, was truthful, and its final verdict, on liability, was based on what it heard and saw. I would be reluctant to interfere.
9. The only observation that I would like to make is that the appellant appeared to be less than candid on a number of things. He did not disclose, in his plaint, that he was the owner of the accident motorcycle, and that only came to light when third parties were brought into the matrix, by the 1st respondent. The testimony of the 1st respondent and the police witnesses brought another actor into the picture, the woman pillion passenger, and it was from that material that it emerged that the appellant was the most probable rider of the accident motorcycle. That view was buttressed by the fact that the appellant alleged that the person who was riding that motorcycle at the time was his employee, who he only introduced as Simon, alleging that he did not know his other names, and who he alleged disappeared after the accident. I am persuaded that the appellant came out as a person who was not truthful, and the trial court was justified to conclude that he was the rider of the accident motorcycle, and that he was concealing that fact to avoid liability being apportioned against him. Given that he came out as an unreliable witness, then the testimonies from the appellant and the police witnesses, that the motorcyclist was to blame for the accident, led the trial court to find that he bore the greater responsibility for the accident.
 10. Should any liability have been apportioned against the 1st respondent? I note that the 1st respondent urges the appellate court to absolve him of blame, so as to find the appellant wholly liable. However, the 1st respondent did not file a cross-appeal, on the aspect of liability, and, for that reason, I shall be reluctant to address that question.
 11. On general damages, the appellant relies on the authorities that he cited at the trial, being *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another* [2018] eKLR (Muchemi, J) and *Michael Murage v Dorcas Atieno Ndwala* [2019] eKLR (Muchemi, J). The injuries in *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another* [2018] eKLR (Muchemi, J), were compound communitated fractures of the tibia and fibula bones of both legs, fracture of the left ulna and radius, blunt injury to the head and multiple soft tissue injuries, and an award of Kshs. 2,000,000.00 was made. In *Michael Murage v Dorcas Atieno Ndwala* [2019] eKLR (Muchemi, J), the injuries were compound fractures of the tibia and fibula bones of the left leg, fracture of the right femur, and massive swelling of the left leg. Permanent disability was assessed at 12%. General damages were assessed at Kshs. 2,000,000.00. The 1st respondent has not submitted on the other grounds of appeal agitated by the appellant, including assessment of general damages.
 12. The appellant placed on record a medico-legal report, by Mr. WM Wokabi, dated 6th October 2015. The injuries noted were fractures on the right leg, being of the femur, tibia and fibula. No mention was made of permanent disability, but it was proposed that Kshs. 120,000.00 would be required for the removal of the K-nail on the femur. The appellant was seen by Mr. Joab Bodo, for a second medico-legal report, and one was placed on record, dated 5th October 2017, where the same injuries were noted, with no residual permanent disability.
 13. The injuries, in *Dorcas Wangithi Nderi vs. Samuel Kiburu Mwaura & another* [2018] eKLR Muchemi, J), were a lot more serious than the injuries suffered in the instant case, for the claimant, in that case, had fractures of the tibia and fibula bones on both legs, and a fracture of the ulna and radius of the left leg. That meant that she had 4 fractures, 3 on the same leg and 1 on the other. The fractures, in *Michael Murage vs. Dorcas Atieno Ndwala* [2019] eKLR (Muchemi, J), were also on both legs, being of the tibia and fibula bones of the left leg, and of the right femur. The injuries in the instant case only affected one leg, on the right side. The effect of an injury to one limb, would not be the same as injury to both limbs.



14. The trial court did not cite any authority, to indicate what guided it to come to the assessment of Kshs. 1,000,000.00.
15. I have reviewed a number of authorities. In *James Okong'ong v Elmat Sagwe Ogega* [2021] eKLR (Ougo, J), there were fractures of the right tibia and fibula bones, and the right femur, and Kshs. 900,000.00 was awarded. In *Gichure & another v Muthengi* [2023] KEHC 26769 (KLR)(Majanja, J), the claimant suffered a compound fracture of the left tibia and fibula, a fracture of the midshaft of the left femur, a crush injury to the left foot, a laceration on the left eyebrow, and bruises on the left elbow, and Kshs. 500,000.00 was awarded. In *Elijah v Nyabuto* [2024] KEHC 1119 (KLR) (Magare, J), an award of Kshs. 1,000,000.00 was made for a compound communitated fracture of the right femur, an un-displaced fracture of the right fibular proximal 3rd, a fracture of the right scapula, a cut wound on the knee, and a laceration on the right shoulder.
16. In *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR (Muchemi, J), Kshs. 1,000,000.00 was awarded for fractures of the tibia and fibula, with multiple soft tissue injuries. In *George Raini Atungu v Moffat Onsare Aunga* [2021] eKLR (Ougo, J), Kshs. 650,000.00 was awarded for a fracture of the right tibia and fibula bones, a fracture of the left radius and ulna, and contusions to the chest and the pelvis. In *Daneis Heavy Trucks & another v Chrispine Otieno* [2022] eKLR (Aburili, J), the injuries were fractures of the left tibia and fibula bones, and of the pelvis, and Kshs. 800,000.00 was awarded. In *Batti v Katana* [2023] KEHC 21300 (KLR)(SM Githinji, J), Kshs. 1,000,000.00 was given for fractures of the left leg and the left hand, a cut wound on the face and blunt injury. In *Kerandi & another v Okong'o* [2024] KEHC (KLR)(Okwany, J), it was fractures of the right tibia and fibula bones, fractures of 3 ribs, dislocations of the shoulder and ankle joint, cut wounds, contusions of the scalp and chest; and the court awarded Kshs. 450,000.00.
17. In view of these decisions, reviewed above, the trial court cannot be said to have acted on a wrong principle, when it assessed general damages at Kshs. 1,000,000.00, for I find the award to be within range of what is currently being awarded.
18. The trial court declined to award special damages and future medical expenses, on the basis that the appellant was not entitled to the same, given that he bore the greater degree of liability for his loss. However, no authority was cited for that. The court acted on wrong principle, for that argument also ought to have applied to the award of general damages, for if he was not entitled to compensation for what he incurred on medical care and related expenses, then he ought not, also, be entitled to compensation for pain and suffering. The trial court ought to have considered these 2 heads, and, if it awarded them, thereafter subjected them to contribution.
19. Special damages were pleaded at Kshs. 183,953.00, being in respect of medical care, copy of records and medico-legal report. At the trial Mr. Wokabi produced a receipt for Kshs. 2000.00 for the medical report. The documents on the medical expense were not produced, for the appellant merely referred the court to the documents in the list of documents, dated 11th March 2016. There was, therefore, no strict proof of the medical expenses. No mention was made of the copy of records. That then meant that the only expense proved was that relating the medico-legal report. Mr. Wokabi and the police witness indicated that they had been paid to attend court, and produced receipts. Unfortunately, the expense relating to witness expenses had not been pleaded, and, therefore, it would not be available for awarding. Special damages must not only be specifically pleaded, they must also be specifically proved. The only special damage that was specifically pleaded, and specifically proved, was the Kshs. 2,000.00, paid to Mr. Wokabi, for the medico-legal report, and that ought to have been awarded.



20. The future medical expenses were not pleaded. I note that the plaint is dated 11th March 2016, and was filed on 20th April 2016. The future medical expense, of Kshs. 120,000.00, was mentioned in the medico-legal report by Mr. Wokabi, dated 6th October 2015. The medico-legal report predated the plaint and its filing, meaning that the appellant knew of the future medical expenses before he went to court. He should have specifically pleaded them. I note that Mr Wokabi talked about that future expense, when he took to the witness stand, but that could not cure the anomaly that was the omission to plead it. As the future medical expenses were not pleaded, they were not available for awarding, despite the same being specifically proved.
21. On costs, the principle is that costs follow the event. They are awarded to compensate the party who is deemed to have succeeded in his claim, for the expenses incurred in pursuing it. The trial court found that the appellant bore the grater responsibility for the accident. He was the person principally to blame for the litigation, and not the 1st respondent. Indeed, I would agree with the 1st respondent, that the costs should have been awarded to the party bearing the least blame, that is to say him. However, as costs are awarded at the discretion of the trial court, I find that there was proper exercise of discretion, and I shall not interfere. After all, the 1st respondent did not cross-appeal.
22. The appeal herein only partially succeeds, with respect to award of special damages of Kshs. 2,000.00, on the medico-legal report, which award shall be subject to contribution. Each party shall bear its own costs. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 26TH DAY OF JUNE 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Kaburu, instructed by Nelson Kaburu & Company, Advocates for the appellant.

Mrs. Tindi, instructed by Tindi Munyasi & Company, Advocates for the 1st respondent.

