



Rongai Workshop & Transport Limited v Kamau & another (Civil Appeal E045 of 2021) [2024] KEHC 7687 (KLR) (Civ) (24 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7687 (KLR)

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

CIVIL

CIVIL APPEAL E045 OF 2021

WM MUSYOKA, J

JUNE 24, 2024

BETWEEN

RONGAI WORKSHOP & TRANSPORT LIMITED APPELLANT

AND

JOHN KARUNGU KAMAU 1ST RESPONDENT

KIARIE MICHAEL NJUGUNA (DECEASED) 2ND RESPONDENT

(An appeal arising from the judgment of Hon. PN Gesora, Chief Magistrate, CM, delivered on 28th May 2020, in Milimani CMCCC No. 86 of 2007)

JUDGMENT

1. The suit at the primary court was initiated by the 1st respondent, against the appellant, for compensation, arising from a road traffic accident, which allegedly happened on 6th December 2001. The appellant was a pedestrian along the Nairobi-Mombasa Road, at Sultan Hamud. His case was that he was hit from behind, by motor vehicle registration number and mark KPL 297/ZB 3698, owned by the appellant, and driven by the 2nd respondent. The 1st respondent suffered serious injuries. He attributed negligence on the appellant and the 2nd respondent. The appellant and the 2nd respondent filed a joint defence, in which they denied everything pleaded in the plaint, save the accident, which they pleaded was caused by the sole negligence of the 1st respondent, or he contributed to it.
2. A trial was conducted, wherein 2 witnesses testified for the appellant and the 2nd respondent, while 2 testified for the 1st respondent. Judgment was delivered on 28th May 2020. Liability was resolved at 100%. On damages, the court awarded Kshs. 5,000,000.00 general damages, Kshs.50,875.00 special damages, lost earnings Kshs. 648,000.00 and future medical expenses Kshs. 200,000.00.



3. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 4th February 2021, revolve around liability being attributed between the appellant and a party who was dead, the 2nd respondent herein; liability had not been proved to the required standard; the evidence tendered by the 1st respondent was contradictory and not in tandem with his pleadings; the court erring by relying on police records on the point of impact; the trial court relied on conjecture and speculation; the judgment of the trial court not being reasoned; the submissions by the appellant were not taken into account; liability was not apportioned between the appellant and the 1st respondent; the special damages awarded had not been proven; a previous decision of the court on special damages had been wrongly overturned; the award of future medical expenses was wrong, for it had not been pleaded, nor proven; the award of lost earnings was not proven; the award of general damages was excessive; and the Kenyan economy cannot sustain such high awards.
4. Directions were given on 26th September 2023, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
5. The appellant has collapsed his 14 grounds into 3: whether a claim could be maintained against a dead party; whether the appellant could be held liable without vicarious liability being pleaded; and whether the quantum of damages was properly assessed.
6. On liability, the issue is about the 2nd respondent, who was a driver employed by the appellant, and who died during the pendency of the matter at the trial court. Having died before the suit was concluded, it is submitted that he should have been substituted, otherwise the claim against him abated. It is also submitted that the 1st respondent ought to have pleaded the doctrine of *res ipsa loquitur*, as he claimed that he had been hit from the rear by the appellant's lorry. It is submitted that the evidence on liability was not properly evaluated and analysed. Section 33(b) of the *Evidence Act*, Cap 80, Laws of Kenya, is cited. It is submitted that if there was uncertainty, as to how the accident happened, then the trial court ought to have apportioned liability at 50%:50% as between the appellant and the 1st respondent. *Erick Oluoch Msango vs. Raphael Gakura Ng'ang'a & another Nairobi HCCC No. 2336 of 1990 (Osiero, J)(unreported, J)*, *Joyce Mumbi Mugi (administrator of the estate of Celestine Mugi Maingi (deceased)) vs. the Cooperative Bank of Kenya & 2 others (Omolo, Waki & Aluoch, JJA) and William Momanyi vs. Zipporah Kwamboka Abunda [2010] eKLR (Musinga, J)* are cited.
7. On damages, it is submitted that the special damages of Kshs. 50,875.00 were not proved, to the extent that stamp duty on them was not paid, despite leave being granted for regularisation. On the general damages of Kshs. 5,000,000.00, it is submitted that the same was not supported by caselaw. *Joyce Moraa vs. Hussein Diary [2016] eKLR (Okwany, J)* and *Nelson Njihia Kimani vs. David Marwa & another [2017] eKLR (J. Mulwa, J)*, where there were amputations of the lower limbs, with permanent disability assessed at 40%, and awards made of Kshs. 1,300,000.00 and Kshs. 1,500,000.00, respectively, are cited. *Peter Mogaka vs. Zipporah Gesare Omuya [2022] eKLR (Ougo, J)*, where permanent disability was at 75% to 80%, general damages were awarded at Kshs. 2,000,000.00 is also cited. *Crown Bus Services Limited & 2 others vs. BM (minor suing through his mother & next friend SMA) [2020] eKLR (Muriithi, J)* is also mentioned. It is submitted that the claim for loss of earnings was not pleaded, and no evidence was led on it. It is argued that had evidence been tendered, the appellant would have conceded to the Kshs. 648,000.00 awarded, as it was close to the Kshs. 500,000.00 that it had proposed at the trial court. On the future medical expenses, it is submitted that the same was not pleaded, and that the trial court had just plucked a figure from the air.
8. On his part, the 1st respondent identifies 3 issues for determination: whether liability was apportioned properly, whether the 1st respondent discharged his burden of proof, and whether the quantum of damages awarded was excessive.



9. On liability, he cites *Rentco East Africa Limited vs. Dominic Mutua Ngonzi* [2021] eKLR (Odunga, J), to submit that where the trial court had made a determination on liability, the appellate court ought not disturb that finding, except in exceptional circumstances, where there is some error in principle. It is submitted that the trial court properly assessed liability at 100%, given that the 2nd respondent was dead, as at the date of the assessment, which he submits would not fall within the exception. On discharge of burden of proof, he cites *Wareham t/a AF Wareham & 2 others vs. Kenya Post Office Savings Bank* [2004] 2 KLR 91 (O’Kubasu, Onyango-Otieno & Ringera, JJA), to submit that he adduced adequate evidence to support the findings by the trial court on both liability and quantum. He cites *Christine Kalama vs. Jane Wanja Njeru & another* [2021] eKLR (Nyakundi, J) on the determinants of negligence. *Catherine Mbithe Ngina vs. Silker Agencies Limited* [2021] eKLR (Odunga, J) and *Wambua Katiti vs. Obed Mose Nyagaka* [2021] eKLR (DK Kemei, J), on proof of negligence and the failure to get the police officer who investigated the matter to testify.
10. On quantum, *David Kimilu Mutinda vs. Masinde Wamela Samuel* [2021] eKLR (DK Kemei, J) is relied on the matter of proof of the profession or qualification of a person, not being merely done on the basis of certificates. *Crown Bus Services Limited & 2 others vs. BM (minor suing through his mother & next friend SMA)* [2020] eKLR (Muriithi, J), on the frequency of changing of prosthetics, as between a minor and an adult. *AMK (suing as the mother & next friend of JMK-minor) vs. Kenya Power & Lighting Company Limited* [2020] eKLR (Mabeya, J) is mentioned, with respect to an award of Kshs. 4,000,000.00, for an amputation of the right limb.
11. There are 2 issues for determination: apportionment of liability and assessment of damages.
12. On liability, there are several sub-themes: vicarious liability, the effect of the death of the 2nd respondent during the pendency of the suit, and the point of impact.
13. I will deal first with the issue of vicarious liability. The case by the 1st respondent was that the 2nd respondent was the driver of the accident vehicle, which belonged to the appellant. That averment was made in the plaint, at paragraph 3, in the following terms:

“The first defendant was at all times the registered owner of motor vehicle registration number KPL 297/ZB 3698 which motor vehicle was being driven by the second defendant who at all material times was acting in the course of his employment and within the scope of his authority.”
14. Appearance was made jointly, for both defendants, the appellant and the 2nd respondent herein, vide a memorandum of appearance, dated 15th January 2005. A joint statement of defence was also filed, for both defendants, the appellant herein and the 2nd respondent, dated 25th January 2005. The fact of the occurrence of the suit accident was acknowledged in the joint defence, the only contention was on negligence being attributed on the part of the 2nd respondent, in driving the subject vehicle. The defence did not make an issue of the fact that the accident vehicle was being driven by the 2nd respondent, neither was it made an issue that, in driving it, he was acting in the course of his employment, and within the scope of authority from the appellant. Indeed, paragraph 3 of the plaint, was expressly admitted in paragraph 3 of the joint defence.
15. For avoidance of doubt, paragraphs 3 and 4 of the defence were framed as follows:
 - “3. The Defendants admit the contents of paragraph 3 of the Plaint.
 4. SAVE that an accident occurred on 6th December 2001 along Nairobi-Mombasa Road involving the Plaintiff and motor vehicle registration number



KPL 297/ZB 3698 the Defendants deny that the same occurred as a result of negligence on the part of the 2nd Defendant driving motor vehicle registration number KPL 297/ZB 3698 as alleged and put the Plaintiff to strict proof thereof.”

16. So, what is the effect of those 2 paragraphs of the defence? In them, it is conceded that the accident, the subject of the suit, occurred, involving the 1st respondent and a vehicle belonging to the appellant, which was being driven by the 2nd respondent, who was an employee of the appellant, driving the vehicle within the course of that employment, and with the authority of the appellant. That pleading was supported by the oral testimony of the witness that the appellant presented at the trial. That was DW1, Vanessa Evans, who testified on 14th November 2019. She was the Managing Director of the appellant. She testified that the 2nd respondent was in the employment of the appellant. She stated:

“Michael Njuguna Kiarie was our driver and was very stable... The driver died in 2009. I have the burial permit ... The driver was permanently employed.”

17. The 2nd respondent was an employee of the appellant, and was driving the accident vehicle in that capacity, with the authority of the appellant. In that respect, his acts bound the appellant. I note that it was not pleaded that the appellant was vicariously liable for the acts of the 2nd respondent, but vicarious liability would naturally flow from conduct of an employee, in the course of that employment, and with authority, as was the case here. As the fact of the employment, and of the accident happening while the 2nd respondent was handling the accident vehicle in that capacity, and with authority, were not contested by the appellant, it naturally followed that the appellant would be vicariously liable for the acts or conduct of the 2nd respondent. Having conceded to that, in the pleadings, and in testimony in open court, the appellant cannot now, that the 2nd respondent is dead, renounce him. I agree, of course, that the trial court ought not have held the appellant and the 2nd respondent jointly and severally liable. For one, the 2 were in an employer/employee relationship, where the appellant was vicariously liable for the acts of the 2nd respondent, and the issue of their liability being joint and several did not arise, and, especially upon the demise of the 2nd respondent. See Kenya Bus Services Limited vs. Dina Kawira Humphrey [2003] eKLR (Omolo, Tunoi & Githinji, JJA) and Tabitha Nduhi Kinyua vs. Francis Mutua Mbuvi & another [2014] eKLR (Visram, Koome & Odek, JJA).

18. On the second sub-theme, the effect of the death of the 2nd respondent during the pendency of the case, it is suggested, by the appellant, that the suit against the 2nd respondent abated. That is true. Upon the said death, the 1st respondent could have substituted the 2nd respondent with the administrator of his estate, or his personal representative. Was the failure to do so fatal to the claim? I do not think so. The 2nd respondent did not own the accident vehicle. It belonged to the appellant. He was a mere employee. It was the appellant that the 1st respondent looked up to for recompense, on the principle of vicarious liability. To the extent that there was no dispute that the 2nd respondent was an employee of the appellant at the material time, there was no need for the 1st respondent to bring in the personal representative of the 2nd respondent into the suit. It would have added no value to it. Liability could be apportioned on the appellant, as owner of the accident motor vehicle, even in the absence of the 2nd respondent, to the extent that it was conceded and understood that the 2nd respondent handled the vehicle as employee and authorised agent of the appellant.

19. The third sub-theme was the point of impact. That would be crucial, for it would be on it that the court would assess liability, and especially apportion the same between the 2 actors, the appellant and the 1st respondent. The allegation in the plaint, at paragraph 4, was that the 1st respondent was hit from behind. The defence blamed the 1st respondent, saying that he wholly caused the accident, by his



negligence, or that he contributed to it. The allegation in the particulars was that he jumped onto the road, into the path of the accident vehicle.

20. When the 1st respondent testified on 17th November 2011, he stated that he was hit from behind by the vehicle. He never saw it coming, and that he just found himself on the road. He could not tell which part of the vehicle hit him. He said that he was walking 3 metres off the road, the vehicle was big, he could not tell whether it left the road, he did not see it, he heard it brake, and it stopped 50 metres away. The 2nd respondent had died by the time the matter went to oral hearing, and, therefore, the trial court could not benefit from his own first-hand version of what transpired. The appellant presented its Managing Director, who gave an account of what transpired, according to what the 2nd respondent had reported to the appellant. Her case was that the 1st respondent jumped onto the road. She explained that the vehicle was heavily laden with cargo. She stated that the 2nd respondent was not charged with any traffic offence. The appellant called a police officer, who produced the investigation file. The said officer did not investigate the matter, and he was not even attached to the relevant police station, or traffic patrol base, at the time. He gave an ambiguous account. He stated that according to the police record, that he had brought to court, the 1st respondent was to blame, for he crossed the road abruptly from a bush, and that the accident occurred on the road. He stated that the driver was driving at moderate speed, as he was not over-speeding. He said that the 2nd respondent had said that the 1st respondent wanted to die, while a pedestrian said that the vehicle was being driven in a zigzag manner. He stated that the 2nd respondent was to blame, for he never hooted, and did not appear to have had applied brakes, for there were no brake marks on the road. He said that the report indicated that the vehicle had a speed governor, and the driver attempted to avoid hitting the 1st respondent by swerving to the right lane. He said that the point of impact was on the road, adding that the vehicle did not go off the road, and pointing out that the pedestrian was crossing the road.
21. The police file was produced as a defence exhibit. I have perused it. The covering report indicates that the accident happened when the 1st respondent emerged from the side of the road and attempted to cross. The findings were that the 1st respondent was to blame for the accident, for when interviewed he had said that he did not know how he was knocked down. It was noted that he said that he was looking for a lorry to carry sand for him, and he appeared to be so engrossed on that that he did not take precautions for his own safety, when walking along or crossing the road. He was said to have dashed into the road, and that the 2nd respondent attempted to take evasive action. The recommendation was for the police file to be closed, for the pedestrian was to blame. There is a statement by the 2nd respondent. He recorded that the 1st respondent dashed into the road, as if he wanted to die. He was hit by the front side of the lorry, and fell on the road, and was ran over by the left front tyre. When he interviewed him, after he had stopped the truck, the 1st respondent said he did not know what made him jump onto the road. A statement was also taken from the 1st respondent. He recorded that he was walking along the road, looking for a lorry to transport sand for him. Suddenly, he found himself in the middle of the road, and he did not hear nor know how he was knocked down. He saw the vehicle which knocked him down stop ahead of him, and he knew it was the one that hit him as he had seen it moving in a zigzag manner.
22. Faced with that evidence, the trial court concluded that the appellant and the 2nd respondent were 100% to blame for the accident. This is how the trial court expressed itself on the matter of liability:

“I have had the occasion of carefully considering the pleadings herein and the evidence adduced herein. There is no dispute that the accident which is the subject matter of these proceedings occurred. The same was along Nairobi-Mombasa road, near Sultan Hamud town. It would appear that the ill-fated motor vehicle hit the plaintiff off the road. The



vehicle stopped 29.4 meters from the point of impact and there were no sketch marks thereon. DW2 concluded that the driver of the vehicle was to blame for the accident as he hit him on the wrong side of the road.

I accordingly enter judgment on liability at 100% against the defendants jointly and severally.”

23. The question to be addressed is whether the conclusion of the trial court on liability was aligned to the evidence that was placed before the court. I am alive to the position stated in *Rentco East Africa Limited vs. Dominic Mutua Ngonzi* [2021] eKLR (Odunga, J), that appellate courts should be slow to interfere with findings of the trial court on liability. However, there is an exception to that general rule, to effect that the appellate court could, in exceptional circumstances, interfere, where there is some error in principle.
24. My understanding of the verdict by the trial court is that the 2nd respondent was to blame for the accident, because DW2 blamed him for it, for the point of impact was on the wrong lane. Relying on the testimony of DW2 is unsettling. Why? DW2 was a police officer, who was called by the appellant to produce the police file on the subject accident, ostensibly as the 2nd respondent had died as at 2011 when the trial started in earnest. He conceded that he never investigated the accident. He was not even, at the time, attached to Sultan Hamud Police Station, which handled the investigations. He, therefore, had nothing to do with the investigations. His role in the trial was to simply bring the police file to court, and produce it, for the trial court to consume its contents. As he was never involved in the investigations, he could not provide any other material on the accident, save for producing the police file. The trial court, therefore, fell in error when it relied on his opinion on who was to blame for the accident, when he never investigated it, and never interacted with the key actors in the matter at the material time. His opinion on the matter could not outweigh the findings of the police officers who investigated it, and interacted with the matter shortly after the accident happened. Their conclusion was that the 1st respondent was to blame for the accident, based on the interviews they conducted, with the 2 key players, the 2 respondents, and when they visited the scene when the accident vehicle was still on site. That conclusion cannot possibly be contradicted by a police officer who did not conduct any investigations on the accident, did not visit the scene after it happened, and did not interact with the 2 respondents shortly thereafter. Such an officer would have no knowledge of the states of mind of the 2, nor their demeanours when interviewed on what had transpired. The accident happened in 2001, the police file was closed in 2008, while DW2 got involved with it in 2019. Surely, there was no way DW2 could have superior knowledge or information on the said accident to that of the officers who actually investigated the matter.
25. The trial court did not interrogate the contents of the police file, which was produced as an exhibit by DW2. The court did not recite the contents of that file. It did not seek to explain why it found the opinion of DW2 superior to that of the officers who actually investigated the matter. Of particular importance should be the position taken by the 1st respondent, regarding how the accident happened. He was consistent all through, in his statement to the police, as appears in the police file, as well as in the oral testimony in court at the trial, that he did not know how the accident happened, and that he just found himself on the road. The trial court did not comment about that evidence. What did that evidence mean? The claim against the appellant was founded on negligence. The duty to prove negligence was on the 1st respondent, but here he was, saying that he could not tell how it happened, for he just found himself on the road. Clearly, he did not discharge the burden of proving negligence, to the extent that he said he did not know how it happened. See *Statpack Industries vs. James Mbiti Munyao* [2005] eKLR (Visram, J).



26. It should be of note, that the 1st respondent testified that he was walking off the road, when he was hit. He said that he did not know if the vehicle left the road, because he did not see it. He said in evidence in chief: "I was walking off the road. I was about three meters off the road...I don't know if the vehicle left the road I didn't see it." During cross-examination, he said: "I blame the driver of the vehicle because I was hit while off the road herein." That should be juxtaposed with what DW2 informed the court, based on the police file that he had been called to produce. He said, in evidence in chief: "The plaintiff was blamed for the accident. He crossed the road from a bush abruptly. I have the statement of the pedestrian and driver. The road traffic accident occurred on the road." During re-examination, he said: "The plaintiff stated that he could not recall how he was hit. The point of impact was on the road. The motor vehicle did not go off the road. The pedestrian was crossing the road."
27. I find it difficult to understand why the trial court found the appellant 100% liable, with that sort of evidence. The case by the 1st respondent was that he was walking 3 metres off the road when he was hit. That suggested that the vehicle swerved off the road, and hit him while he was off the road. If that was so, then the driver of the vehicle must have been negligent. However, the police records, as presented by DW2, painted a different picture, that the vehicle never was off the road, and that the point of impact was on the road, not off the road. That would mean that the 1st respondent was not walking off the road as he claimed. The point of impact aligned with the version by the 2nd respondent, that the 1st respondent was on the road, not walking along it, as he claimed, but actually crossing it. The version that the trial court believed was that by the 2nd respondent, that the 1st respondent was not walking off the road, and he was not hit off the road, but on the road. Curiously, despite not believing the version of events as narrated by the 1st respondent, the trial court still found the appellant liable 100%. The negligence impliedly alleged by the 1st respondent was that the vehicle veered off the road and hit him off the road, but he did not explain, if that was so, how he ended up on the road. Obviously, the 1st respondent did not prove negligence, given that his version was not supported by the police evidence, and there was obviously no basis for the trial court to conclude that the appellant was 100% to blame. The trial court did not base its conclusions on the testimony by the 1st respondent, that he was hit off the road; but relied on that by the appellant that the point of impact was on the road, as the 1st respondent had dashed into the road, as claimed by the 2nd respondent, but the court turned the evidence around to blame the 2nd respondent.
28. Part of what was considered to apportion blame on the 2nd respondent was the fact that the vehicle stopped some 29 metres, or so, from the point of impact, and that there were no sketch marks. It is not clear what sketch marks would entail, but I suppose it was meant to be skid marks, as evidence that the driver either braked or did not apply brakes. The description of the scene of the accident suggested that it was not in a busy urban area, it was out of town, there were no independent witnesses, and the crowd appears to have gathered only after the collision. The scene was a highway, a busy road, connecting Nairobi and Mombasa, the 2 key towns in Kenya. On a highway, vehicles move fairly fast. DW2 suggested, as he was not at the scene, that the accident vehicle might have been moving at 30 to 50 kilometres per hour. That would not have been unusual. The 1st respondent described it as a big vehicle. The 2nd respondent, in his statement in the police file, described it as a semi-trailer. DW2 called it a prime-mover. DW1 said that it was laden with cargo. So, for all practical purposes, it was a big heavy vehicle. If it was cruising along the road, at the average speed mentioned by DW2, it would not have braked instantly, if it encountered an obstruction, such as where a pedestrian was to dash into the road, and it would not be as easily manoeuvrable as a small car, in terms of ability to swerve to avoid obstacles. Therefore, it was not unusual that the vehicle came to a stop some 30 or so metres away, and that it did not leave the sort of skid marks that DW2 was talking about. The most authoritative persons to interpret that scenario would have been the traffic police officers who handled the matter in 2001,



- and not the officer handling the file 18 years later in 2019. In view of the information and knowledge that they had, the officers in 2001 attributed blame on the 1st respondent, and not the 2nd respondent, hence no charges were preferred against 2nd respondent, and the file was closed instead.
29. Of the 4 witnesses who testified, the only one who was at the scene, was the 1st respondent. His testimony of what transpired was not helpful. He claimed that he did not know what happened, as he just found himself on the ground, on the road. Yet again he said he was off the road, and was hit while 3 metres off the road. He then said that he saw the vehicle moving zigzag just before it hit him. His shifty testimony could not provide any sort of basis for assessing liability against the appellant. That left the police records as the only credible source of information to resolve the matter. That record was done in 2001, by the police officers who were working at the vicinity then, and was presented in court in 2019, by another police officer who was not involved in the initial investigation. The police record blamed the 1st respondent for the accident. The twist or spin by DW2, which attempts to lay blame on the 2nd respondent, can only be treated with some measure of circumspection. My conclusion would be that the 2nd respondent was not 100% liable for the accident.
30. So, if the appellant was not 100% liable for the accident, did he contribute to it? As indicated above, the only credible source on what transpired is the police record. According to the 1st respondent the collision happened off the road. That was proved inaccurate by the police records. It would appear that was an attempt by the 1st respondent to absolve himself from blame, by suggesting that he was swept by the vehicle when he was way out of its path. The more plausible explanation was that by the 2nd respondent, as borne out by the police records, that the 1st respondent suddenly entered the road, on the face of oncoming traffic, and was hit in that process. It would appear that it was so sudden that not much evasive action could be taken to avoid collision. Walking suddenly into the path of a huge heavy vehicle can only be described as reckless. The admission that he did not see it or hear it before the collision, would suggest that he was absent-minded. Indeed, he stated that he was looking for another lorry to transport sand for him, and he was also worried about his son. His state of mind appears to suggest that he was absent-minded, or distracted, hence he did not lookout for his own safety, and put himself in harm's way, by walking into the path of a huge heavy vehicle, which was in motion, in a major highway. He must have contributed to the collision by his own negligence, and the trial court ought to have taken that into account.
31. What would have been his contribution? The police blamed him for the accident, and chose not to charge the 2nd respondent with any traffic offence. His own version of events does not help his case. He states that he does not know what happened. Then he says he was walking off the road, when the vehicle hit him, suggesting that the vehicle was being driven off the road. Then he says that it was being driven in a zigzag manner. My inclination is to find that he bore the greater percentage of blame. However, I note that the appellant proposes liability be apportioned at 50%:50%. I would have assessed a higher degree of contribution by the respondent, but I shall abide by what the appellant proposes. The trial court should have assessed contribution by the 1st respondent., and I find that its finding on liability was wrong.
32. On quantum, the appellant has issues with the general damages, the special damages, lost earnings and future medical expenses.
33. On general damages, it is submitted, by the appellant, that the same was on the higher side. The appellant has not come out clearly on what it considers to be the adequate quantum, but the authorities that it cited are in the region of Kshs. 1,300,000.00 to Kshs. 2,000,000.00. At the trial, it had suggested Kshs. 1,500,000.00. The 1st respondent urges the court to stick with the Kshs. 5,000,000.00 and cites



- AMK (suing as the mother & next friend of JMK-minor) vs. Kenya Power & Lighting Company Limited [2020] eKLR (Mabeya, J) where Kshs. 4,000,000.00 was awarded for comparable injuries.
34. Assessment of general damages for personal injury is pegged on the injuries sustained by the claimant, measured against comparable awards by the courts for similar injuries. The 1st respondent relied on a medical report by Dr. RP Shah, who testified on 30th November 2009, as PW1. He produced a medical report, dated 6th September 2004. The injuries noted are loss of right leg above the knee, fracture of the medial condyle of humerus bone at the right elbow region. He was off work for 1 year 7 months, was not able to walk long distances, and to do hard work. Movement of the right elbow was restricted. Permanent disability was assessed at 20%. No other medical report, or medical examination, was mentioned at the trial. I note that the trial court did not cite any caselaw when it awarded Kshs, 5,000,000.00
35. I have looked through a number of decisions for comparable injuries, to ascertain whether the award on general damages falls within range, or whether it is excessive as pleaded by the appellant. The principal injury was the amputation or loss of the right leg above the knee. The other injury was a fracture of the medial condyle of the humerus bone at the right elbow region. In *Crown Bus Services Ltd & 2 others vs. BM (minor suing through his mother & next friend SMA)* [2020] eKLR (Mureithi, J), an award of Kshs. 2,500,000.00 was made for loss of the right leg above the knee amputation. In *Akwaba Olubulieva vs. Dickson Shikuku* [2020] eKLR (Njagi, J), the court awarded Kshs. 2,000,000.00, for an amputation of the right leg. In *Monyoro Mong'are Shem & another vs. Timothy Nyagaka Nyagaka* [2021] eKLR (Maina, J), there was an amputation of the right leg above the knee, together with multiple soft tissue injuries, and an award of Kshs. 3,500,000.00 was made. In *Abdi Werdi Abdullahi vs. James Royo Mungatia & another* [2019] eKLR (C. Kariuki, J), the amputation of the right lower limb was accompanied by other serious injuries, such as multiple fractures of the right lower and upper limbs, multiple fractures and bruises on the upper right limb leading to affixation of 2 metal plates and multiple soft tissue injuries to various parts of the body, and an award of Kshs. 3,500,000.00 was made.
36. From the review of the decisions above, it should be obvious that the award of Kshs. 5,000,000.00 was on the higher side. An award in the region of Kshs. 2,500,000.00 to Kshs. 3,500,000.00 would have been more reasonable, after taking into account the effect of inflation on the Kenya shilling. I note that these decisions date between 2019 and 2021, and there a second fracture, to the humerus bone, in addition to that of the lower limb, which led to the amputation.
37. On special damages, the court awarded Kshs. 50,875.00. The appellant raised issue with that on grounds that the special damages, or costs were not proven. The claim was in respect of the medical report, police abstract, medical bills, transport and costs of artificial leg. The law on special damages is that the same must not only be specifically pleaded, they must also be specifically proved. See *Ahn vs. Singh* [1985] KLR (Kneller, Nyarangi JJA & Chesoni Ag JA). When PW1, Dr. Shah, testified, he produced, as P. Exhibit 2, a receipt for the medical report at Kshs. 3,500.00 and his court attendance at Kshs. 6,000.00. When the 1st respondent testified, he had a number of receipts marked for identification, but none of them were produced as exhibits as at the time the trial closed. The only special damages proved amounted to Kshs. 9,500.00, and that is the only amount that the court should have awarded.
38. On future medical expenses, the concern by the appellant is the same was not specifically pleaded, nor specifically proven. The legal position, on future medical expenses, was stated in *Tracom Limited & another vs. Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA)), that future medical expenses are in the nature of special damages, but claimed within general damages. Being special damages, they ideally ought to be specifically pleaded and proven. However, it would suffice where the plaintiff pleads that there would be need for further medication or treatment, and hence



future medical expenses would be necessary, but the plaintiff would not need to specifically state the future medical expenses, as they may be uncertain, and may depend on a number of variables, including the places where the future treatment would be undertaken, the strength of the currency or currencies involved, and the turn of the injury. It was pointed out that what could be pleaded, if at all, would be an approximate sum of the money that the future medical expenses would require.

39. So, what happened here? In the plaint filed herein, there was no pleading that future medical expenses could or would be required. I have not seen proof that the said plaint was ever amended. When Dr. Shah testified, he did not mention the need for any future medical treatment, which may necessitate incurring future medical expenses. The 1st respondent himself did not testify on the same. I have read through the judgment of the trial court, and I have been unable to find justification for the making of that award. The award of Kshs. 200,000.00 was not justified, and it should not have been made.
40. The last concern was with the award for lost earnings. I note from the plaint, that it was pleaded that the 1st respondent was no longer able to work as a driver. One of the prayers in the plaint is for loss of earnings due to the loss of the leg. There was, therefore, basis for consideration of an award under this heading. However, when the 1st respondent testified, he led no evidence on what he did for a living prior to the accident, what he earned from that, as a basis for assessing what he lost. It does not suffice to merely plead, but adduce no evidence on the item pleaded. Basis ought to be laid, and where none is laid, the trial court would have no justification for making any award. In making the award of Kshs. 648,000.00, for lost earnings, the trial court noted that the 1st respondent was a driver, and went on to work out a figure. Although it is pleaded in the plaint, that the 1st respondent was a driver, when he testified he made no mention of that. A pleading is not evidence, whatever is pleaded must be breathed life into by oral evidence, or documentation. The 1st respondent did not breathe any life into the pleading on lost earnings as a driver, and, therefore, there was no basis for the award made. The trial court used a multiplicand of 9,000. I am unable to tell where that multiplicand came from, for it was not pleaded, and the 1st respondent did not testify on it, and the trial court did not give an indication of where it got the figure from. The entire award of Kshs. 648,000.00 should not have been made.
41. In view of everything that I have said above, I find and hold that the appeal herein has merit, and I will allow it. I will set aside the apportionment of liability at 100% against the appellant, and I hereby substitute it with an order that liability is assessed at 50%:50%. After reviewing the current trends with regard to general damages, I will set aside the award of Kshs. 5,000,000.00, and replace it with Kshs 3,500,000.00. The awards on loss of earnings and future medical expenses are set aside, as they were either not pleaded or proven, nor was for basis for them laid. The award of Kshs. 50,875.00, special damages, is hereby set aside, and substituted with Kshs. 9,500.00. Each party shall bear their own costs. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 24TH DAY OF JUNE 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Ombonya, instructed by Ombonya & Company, Advocates for the appellant.

Ms. Njomo, instructed by Magare Musundi & Company, Advocates for the 1st respondent.

