



**Ikinya v Kimemia (Civil Appeal E257 of 2022)  
[2024] KEHC 13946 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13946 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E257 OF 2022  
BK NJOROGE, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**DAVID MURAGE IKINYA ..... APPELLANT**

**AND**

**EVANTUS MWANGI KIMEMIA ..... RESPONDENT**

**JUDGMENT**

1. This Appeal is against the decision of Hon. G. Omodho (P.M) sitting at Kiambu. The trial Court proceeded to award general damages of Kshs.2 Million. An award of special damages of Kshs.366,850/- was made, while the claim for future medical expenses was dismissed. The successful Plaintiff was awarded the costs of the suit.
2. Dissatisfied with the decision, the Appellant (who was the original Defendant before the trial Court), filed this Appeal challenging both the Trial Court’s decision on liability and quantum.

**Background facts**

3. The Respondent filed the original suit claiming damages for injuries arising out of road traffic accident.
4. The Respondent was said to have been a pillion passenger on a motor cycle. While it was being driven along the Kiambu – Ruiru Road near Kamiti Corner, it was involved in an accident. The Respondent blamed the Appellant’s driver servant, employee and or agent for causing the said accident.
5. The Respondent sustained injuries for which he was treated and recovered with some residual disabilities. He claimed special damages arising out of the treatment as well as general damages for the injuries sustained.
6. The Respondent wholly blamed the Defendant for the accident.



7. The Appellant on the other hand denied the accident, the recklessness or negligence attributed to the Respondent's driver or employee, or in any way being liable for the accident. He also denied the Respondent's injuries. He attributed any injuries suffered by the Respondent, to his failure to wear protective gear as a Pillion Passenger. Thus, contributory negligence was sought.
8. The matter proceeded for a full trial where the Respondent testified. A Police Officer was also called to produce the Police Abstract.
9. The Appellant neither filed any witness statements nor called any witnesses at the trial. The Respondent was subjected to a second medical examination and thereafter the parties agreed to produce the Medical Reports by contents.
10. It is on the basis of this evidence that parties filed their respective submissions and the Trial Court proceeded to render its decision dated 28/09/2022.
11. Dissatisfied with the said decision, the Appellant has filed an eight ground Memorandum of Appeal challenging both the liability and quantum. The Trial Court appraisal and evaluation of evidence is also challenged.
12. In this Appeal, parties took directions to dispose of the Appeal by way of written submissions. The Appellant has filed written submissions dated 1<sup>st</sup> September, 2023 with authorities attached. The Respondent has also filed his written submissions dated 11<sup>th</sup> September, 2022 with authorities attached. The Court has considered the written submissions and the authorities cited which have been helpful to the Court.
13. On 3<sup>rd</sup> June, 2024 the matter was listed before this Court for the Rapid Result Initiative (RRI) for the month of June 2024. Miss. Ndung'u appeared holding brief for Mr. Njuguna for the Respondent.
14. The firm of Ochieng Omollo Company Advocates were not present for the Appellant. The notice for the hearing having been served by the Court via email to Counsels, the Court proceeded to hear the matter. As all submissions had been filed, the Court reserved this matter for Judgement.

### **Issues for determination**

The Court frames two issues for determination as follows;

- a. Whether the case was proved before the Trial Court to the required standard?
- b. What orders should be as to costs?

### **Analysis of evidence**

15. This being a first Appeal, this Appellate Court is bound to re-evaluate the evidence and consider it a fresh and arrive at its own condition. This is as was held in *Selle & another -vs- Associated Motor Boats & others* [1968] E.A 123.
16. This Court therefore proceeds to analyse the evidence and determine the two issues in seriatim as follows;

#### **a. Whether the case was proved before the trial court to the required standard?**

17. There can be no fault without liability or put in other words for there to be liability there has to be some fault.



18. The duty to prove the liability, in this case in form of the particulars of negligence pleaded in the Plaintiff with the Respondent.
19. Section 107 of the [Evidence Act](#) states the law on Court procedures that he/she who alleges must prove.

### **On Liability**

20. The Plaintiff led evidence that he was a pillion passenger on a motor cycle. The motor cycle was hit by the Defendant's motor vehicle which was overtaking on the right. The narrative can be gleaned from the cross examination of the Respondent by Owenga Advocate. Initially the Respondent said he did not know who to blame for the accident.
21. He went on to state that the motor vehicle was on the right side. It had gone on the wrong side. In both examination in chief and during the cross examination, the Respondent maintained that the Appellant's motor vehicle was overtaking.
22. The Appellant did not call any witness to challenge the Respondent's version of events.
23. Failure to call any witness means that the defence filed remains a mere averment. The opposing party's evidence goes pretty much unchallenged.
24. The Trial Court's observation and conclusion was that as a general rule, the driver of the vehicle overtaking has to take extra care of the other road users.
25. The Court cannot fault the Trial Court for this observation. The highway code supports this observation.
26. Equally, the Court cannot fault the Trial Court for reaching the conclusion that the Respondent's evidence was unchallenged by the Appellant.
27. This Court notes that the Respondent was a Pillion Passenger, as such he had no control over the motor cycle he was riding upon
28. The Appellant did not take-out Third-Party proceedings to seek to apportion blame against the owner or driver of the motor cycle KMEZ 6711Z.
29. On contributory negligence, the Respondent maintained he wore a helmet on the material date. The Appellant did not go further to seek to extract some contribution in negligence. From the evidence on record, this Court is unable to find the Respondent liable in contributory negligence.

In the circumstances this Court finds and upholds the Trial Court's findings on liability against the Appellant at 100%

### **On Quantum**

30. The main thrust of the Appellant's complaint is that the Trial Court relied on the medical report by Dr. F.S. Kinama. That this was a non-existent medical report as the medical reports were prepared by other Doctors, other than Dr. F.S Kinama. That the Trial Court then went ahead to set out injuries other than those suffered by the Respondent.
31. That guided by such a non-existent medical report and erroneous injuries the Trial Court fell into error and awarded excessive general damages. The Appellant thus invites this Court to interfere with the award.



32. The Court's view is that the short route to resolve this question is to look at the medical reports produced by consent. A perusal of the Respondent's submissions does not yield much to support or discredit the Appellant's contention.
33. A perusal of the Record of Appeal reveals two medical reports.
34. The Respondent's (Plaintiff's) medical report by Dr. G.K. Mwaura dated 11/1/2024 which reveals the following injuries.
  - i. Swollen painful, tender right thigh.
  - ii. Fracture – right femur permanent incapacity at 10 %
35. The Appellant's (Defendant's) medical report usually referred to as a 2<sup>nd</sup> medical report is by Dr. Fredrick S. Kinama dated 28.06.2022.
36. It reveals the following injuries;
  - i. Fracture of the right femur mid -shaft.
  - ii. Fracture of the right lower limb fibular bone.  
Permanent disability assessed at 3%
37. This Court having looked at the Judgement of the Trial Court, notes that, it correctly captures the claim as well as the injuries in its initial paragraph 4.
38. As it proceeded to assess the damages the Trial Court attributed the medical report by Dr. Kinama to the Respondent whereas this was the Medical Report obtained at the behest of the Appellant. It was therefore incorrect for the Trial Court to state that the Defendant (the Appellant herein) did not avail a Medical Report for comparison.
39. What is not clear is whether the Trial Court had the benefit of considering the Medical Report by Dr. G.K Mwaura obtained at the behest of the Respondent. The Respondent has not raised any issue on this point.
40. The Court therefore finds that the Trial Court incorrectly attributed the Medical Report by Dr. F.S Kinama to the Respondent instead of the Appellant.
41. The questions this Court proceeds to contend with is firstly, whether such an error or mistake interfered with the Trial Court's decision in awarding damages. That such an error or mistake led to an excessive award of general damages.
42. Secondly, whether the Medical Report by Dr. F.S Kinama was produced as an exhibit by consent?
43. The second question has an easier answer. A perusal of the Trial Court's proceedings shows that the Respondent did not produce the Medical Report of Dr. G.K. Mwaura during the Plaintiff's case. Parties agreed that the Respondent undergoes a 2<sup>nd</sup> Medical examination. The Medical Reports were produced by consent just before the close of the Defence Case. Parties agreed that the Reports be attached to the written submissions.
44. It is therefore incorrect to refer to Dr. F.S Kinama's Medical Report dated 28.6.2022 as non-existent. It is very much part of the record of the Trial Court as well as the Record of Appeal.
45. Medical Reports as with any other expert opinion are never binding upon the Trial Court. They remain opinions. The Court considers them but is not bound by the findings or opinions therein.



46. It cannot be said that the Appellant was prejudiced because the Trial Court only considered a Medical Report obtained by the Appellant and produced by him. It is reasonable to expect that the Appellant produced a medical report by Dr. F.S Kinama because it was favourable to him. The Court would expect the Respondent to be the one to be complaining that Dr. G.K Mwaura's Medical Report was not considered, yet it was produced by consent.
47. The Honourable Court is of the considered view that the Appellant was not prejudiced by this error or mistake and that there was no substantial miscarriage of justice. The reason being that the injuries revealed in the said medical report reflect the opinion of the Appellant's own Medical Doctor.
48. The Answer to the first question on whether the award of damages of Kshs.2,000,000/- is excessive, lies in looking at comparables in relation to similar injuries.
49. This Court proceeds to consider the following comparables.
- a) John Mwangi Munyiri & another v Paul Wachira Njuguna [2020] eKLR where an award of Kshs.950,000/= was made for similar injuries.
  - b) James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR where an award of Kshs.1,500,000/= was made for similar injuries.
  - c) Okello v Kombwayo [2023] eKLR where an award of Kshs.1,500,00/= was made.
  - d) Benard Ondieki v Boniface Ndege Orayo [2020] eKLR where an award of Kshs.1,750,000/= was made for more severe injuries.
  - e) Edward Kitsau Karabu & another v John Sifa Baya [2021] eKLR general damages assessed at Kshs.700,000/=.
  - f) Kimani *v Mwangi & 2 others (Civil Appeal E071 of 2023)* [2024] KEHC 6744 (KLR) (6 June 2024) (Judgment) general damages assessed at Kshs.550,000/=.
  - g) Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR general damages assessed at Kshs.800,000/=.
50. The comparables reveal that general damages for similar injuries range from Kshs.550,000/= to Kshs.1,750,000/= depending on the severity of the injuries.
51. In Butt vs. Khan [1977] 1 KLR, the Court held as follows-
- “An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.
52. The Appellant submits that similar injuries should attract an award of Kshs.900,000/=. He invites the Court to interfere and reduce the award. On the other hand, the Respondent submits that the Trial Court properly exercised its discretion, hence this Court should not interfere with the award.
53. The Court is guided by the following guiding principles set out by our Courts.



54. Looking at the case of Daniel Kosgei Ngelechi vs Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR, the Court therein cited with approval the case of Kigaragari vs Aya [1982-88] 1 KAR 768 where it was stated as follows:

“Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee .....

55. The Court also considers the case of P N Mashru Limited v Omar Mwakoro Makenge [2018] eKLR, where the Court stated as follows-

“In assessing general damages, courts must have presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A plaintiff’s compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents.”

56. This Court must warn itself that money cannot fully compensate the Respondent for the injuries and that similar injuries should attract similar awards. Any outlier awards will be subject to review by this Court.

57. To this Court the award of Kshs.2,000,000/= is excessive even for more serious injuries. The Court is of the view that an award of Kshs.1,200,000/= would be sufficient compensation for the injuries sustained.

### **On proof of Special Damages**

58. The law remain that special damages must not only be expressly stated but must be specifically proved.

59. The Court has perused Plaintiff’s exhibit No. 5. It is the receipt from Jesse Kay Children Hospital. It is titled Patient’s Receipt. It contains his name. it bears the Hospital’s stamp and date. It indicates that the Respondent paid a sum of Kshs.363,399/- as medical expenses.

60. At the Pre-Trial stage there was no objection to the production of this document.

61. The Court has perused both the original record of the Trial Court, the list of exhibits received prepared by the Court, as well as the original exhibits admitted into the record.

62. Though this receipt for Kshs.363,300/- is indicated as No. 10 on the Plaintiff’s list of exhibits, it was produced as part of the Plaintiff’s bundle No. 5. It is indeed marked as Plaintiff’s exhibit No. 5. The Appellant did not oppose its production at the Trial. It is now late in the day to raise the complaint about this document which was produced and received as an exhibit.

63. The proceedings of the Trial Court do not indicate that the Respondent was confused about the production of his exhibits. This Court is unable to delve much into such an issue that it is unable to verify from the record of proceedings. Confusion of a witness while on the witness dock is an issue to be perceived and inferred by the Trial Court. It goes to the demeanour. This Court did not have the benefit of seeing any witnesses testify.

64. The upshoot is that this Court has resolved the first issue by interfering with the assessment of general damages to reducing them to Kshs.1,200,000/= declining to interfere with the award for special damages. The Appeal therefore partially succeeds



**b. What orders should be as to costs.**

65. Costs follow the event. The successful Appellant should have the costs of this appeal. Since the appeal succeeds only in part the Court awards the Appellant a half of the costs of this Appeal.

**Determination**

66. The Court proceeds to allow the Appeal in part in the following terms:

67. The Judgement of the Trial Court is hereby set aside and replaced with a Judgement in favour of the Respondent as follows

- i. Liability remains at 100% in favour of the Respondent.
- ii. General Damages are awarded at Kshs.1,200,000/=.
- iii. Special damages remain Kshs.363,300/=
- iv. Total Kshs.1,563,300/=
- v. The Appellant is awarded half the costs of this Appeal while the Respondent is still awarded the costs of the suit before the trial Court. Interest on costs at Court rates, until payment in full.
- vi. The award on general and special damages is to attract interest at Court rates from the date of Judgement until payment in full.

68. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**NJOROGE BENJAMIN. K**

**JUDGE**

In the presence of: -

..... for the Appellant

..... for the Respondent

Court Assistant: .....

