



**Highland Creamers & Food Ltd v Ngetich (Civil Appeal 040 of 2023)  
[2024] KEHC 11128 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11128 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL 040 OF 2023  
RL KORIR, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**HIGHLAND CREAMERS & FOOD LTD ..... APPELLANT**

**AND**

**RONALD NGETICH ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Principal Magistrate, K. Kibelion  
at the Principal Magistrate's Court at Bomet, Civil Suit Number 128 of 2019)*

**JUDGMENT**

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for general and special damages when he was involved in a road traffic accident on 16th May 2019. That he was a pillion passenger in Motor Cycle Registration Number KMDV 149C which was hit by Motor Vehicle Registration Number KCT 036T that allegedly belonged to the Appellant.
2. The trial court conducted a hearing where the Respondents produced four witnesses and the Appellant produced one witness.
3. In its Judgment dated 29th March 2023, the trial court found the Appellant 100% liable for the accident and awarded Kshs 4, 160, 854/= to the Respondent (then Plaintiff).
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 24th May 2023 appealing against the quantum of damages and relied on the following grounds:-
  - I. That the learned Magistrate erred in law and fact in holding the Appellant 100% liable for the accident and ignoring the set laws and principles of traffic and decided cases.
  - II. That the learned Magistrate erred in law and fact in reaching a determination that the Appellant's motor vehicle was being driven at a high speed at the time of the accident.



- III. THAT the learned Magistrate erred in law and fact in relying on the evidence of the police officer who was not the investigating officer noting that the Police Abstract produced by the said Police Officer does not blame the Defendant's driver for the accident since it indicates that the matter is pending under investigations.
  - IV. That the learned Magistrate erred in law and fact in relying on the evidence and testimony of the Respondent despite admitting that he was drunk at the time of the accident as per the Discharge Summary filed by the Respondent.
  - V. That the learned Magistrate erred in law and fact in failing to consider the doctrine of *volenti non fit injuria* noting that the Respondent admitted to not wearing any protective gear and being drunk at the time of the accident.
  - VI. That the learned Magistrate erred in law and fact in failing to consider the testimony of the Appellant's witness.
  - VII. That the learned Magistrate erred in law and fact in reaching its decision while apportioning liability.
  - VIII. That the learned Magistrate erred in awarding the Respondent Kshs 3,500,000/= as general damages which award was excessive in the circumstances considering the injuries sustained by the Respondent.
  - IX. That the learned Magistrate erred in law and fact in awarding the Respondent Kshs 420,000/= as costs for hiring a helper despite PW3's testimony that the Respondent was in a fairly healthy state at the time the Respondent was being re-examined.
  - X. THAT the learned Magistrate erred in law and fact in failing to consider the Appellant's submissions.
  - XI. THAT the learned Magistrate erred in law and fact in failing to find that the Respondent had failed to discharge their burden of proof to the required standard against the Appellant.
5. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR*

**The Plaintiff's/Respondent's case.**

6. Through its Amended Complaint dated 6th July 2021, the Respondent stated that he was a pillion passenger in motorcycle registration number KMDV 149C when it was hit by Motor Vehicle Registration Number KCT 036T along Bomet-Kaplong road.
7. The Respondent stated that the Appellant being the owner of Motor Vehicle Registration Number KCT 036T, was negligent in causing the accident and particularized the negligence in paragraph 5 of the Amended Complaint.
8. That as a result of the accident, he suffered 100% disability as a result of the following injuries:-
  - a. Communitated left tibia and fibula fractures leading to above knee amputation of the leg.
  - b. Right communitated iliac wing of the pelvis.
  - c. Fracture mid shaft femur.



- d. Fracture lateral condyle of the right femur.
  - e. Fracture Schatzker I tibia plateau of the right tibia.
  - f. Fracture distal end of the right tibia.
  - g. Multiple fractures of the right radius and ulna.
  - h. Loss of 4 upper incisor teeth and one upper canine tooth.
  - i. Blunt injury to the anterior chest wall leading to right hemathorax.
9. The Respondent's claim against the Appellant was for special and general damages as a result of the accident.

### **The Appellant's/Defendant's case**

10. Through its Amended statement of defence dated 24th August 2021, the Appellant denied that it was the registered owner of Motor Vehicle Registration Number KCT 036T and further denied that the said motor vehicle was under its management and control.
11. The Appellant denied the particulars of negligence levelled against it. That if any accident happened, it was caused solely by the negligence of the Respondent. It particularized the negligence in paragraph 7 of its Defence.
12. The Appellant stated that it would seek indemnity and contribution from the estate of the deceased for the alleged accident and enjoin them as a third party in the suit.
13. The Appellant denied that the Respondent suffered 100% permanent disability and that his diagnosis did not arise out of the accident. That his complication arose due to medical negligence.
14. On this Appeal, parties were directed to file submissions to canvass the Appeal.

### **The Appellant's submissions.**

15. In submissions dated 30th May 2024, the Appellant submitted that the burden of proof was on the Respondent and he ought to have proved that the driver of the lorry (registration number KCT 036T) was negligent in causing the accident which they failed to do. It relied on *Dharmagma Patel & another vs T. A (a minor suing through the mother and next friend HH) (2014) eKLR* and *Stanley vs Gypsun Mines Limited (2) (1953) A.C 663*.
16. The Appellant submitted that he did not see the lorry being driven at high speed and that he was informed by another person and this person was not called to testify thereby making PW1's evidence to be hearsay.. The Appellant relied on *Kenya Commercial Bank Ltd vs Thomas Wandera Oyallo (2005) eKLR*.
17. It was the Appellant's submission that the Respondent admitted to have taken two bottles of alcohol. That he was under the influence of alcohol at the time of the accident and his judgement was impaired. It was the Appellant's further submission that he found two bottles of alcohol at the scene.
18. It was the Appellant's submission that the Police Abstract did not blame it for the accident and that the police officer (PW2) did not produce a sketch map to show how the accident occurred. That PW2 was not the investigating officer and he neither visited the scene nor witnessed the accident. It was the Appellant's further submission that PW2's evidence did not carry any weight in terms of determining



- liability. The Appellant relied on Catherine Mbithe Ngina vs Silker Agencies Ltd (2021) eKLR and Mercy Ben & another vs Mt. Kenya Distributors & another (2022) eKLR.
19. The Appellant submitted that he rider and the Respondent were drunk and the rider encroached on the lorry's lawful lane while carelessly overtaking another motor vehicle constraining the lorry's driver to swerve right in an attempt to avoid a head on collision. That this explained why the lorry was found on the right side of the road and the motorcycle was found on the left side.
  20. It was the Appellant's submission that his testimony was buttressed by the motor vehicle inspection report which indicated that the lorry's rear and battery housing was damaged.
  21. The Appellant submitted that the deceased was the author of his own misfortune as he rode the motorcycle under the influence of alcohol and had impaired judgement. That the holding of 100% liability against it was not supported by evidence. The Appellant further submitted that this court should find that the Respondents failed to prove their case against it. It relied on Treadsetters Tyres Ltd vs John Wekesa Wepukhulu (2010) eKLR.
  22. It was the Appellant's submission that the Discharge Summary confirmed the Respondent's injuries save for the number of lost teeth. It also confirmed that the Respondent's head, neck, thorax, vertebral column and abdomen were in normal condition.
  23. The Appellant submitted that the Respondent sustained multiple fractures with an amputated leg. That the award of Kshs 3,500,000/= was excessive and should be set aside. The Appellant relied on Mbasu *vs another vs Swaka (Civil Appeal E061 of 2022)* [2024] KEHC 2210 (27 February 2024) (Judgment) and Yobesh Makori vs Elmerick Mobisa Bota (2021) eKLR where the awards ranged between Kshs 2,000,000/= to Kshs 2,500,000/=.
  24. It was the Appellant's submission that the trial court erred when it awarded Kshs 200,000/= as future medical expenses and the same had not been proved. It was the Appellant's further submission that the trial court awarded Kshs 420,000/= for hiring a helper and the same was not strictly proved as it was a special damage. It relied on Monyoro Mong'are Shem & another vs Rose Kebaki (2021) eKLR.
  25. Regarding special damages, the Appellant submitted that the Respondent only availed receipts totalling Kshs 20, 854/= and the same was awarded by the trial court.

#### **The Respondent's submissions.**

26. Through his submissions dated 17th June 2024, the Respondent submitted that the deceased (Aron Kipngeno Mutai) was lawfully riding his motor cycle when the driver of the Appellant's lorry carelessly overtook another car and knocked him causing him fatal injuries. That this testimony was corroborated by the police officer (PW2) and the doctors (PW3) and (PW4) who all testified under oath and produced a Police Abstract and a Medical Report. He further submitted that the Appellant called one witness who was its' security officer and who did not witness the accident and therefore could not explain the circumstances of the accident.
27. It was the Respondent's submission that the Appellant failed to call a witness who would rebut his testimony. He relied on Linus Nganga & 3 others vs Town Council of Kikuyu (2012) eKLR.
28. The Respondent submitted that he could not be penalized for the poor control of the lorry as he was only a pillion passenger on the deceased's motor cycle.
29. It was the Respondent's submission that it was the legitimate expectation of all road users to be vigilant and careful while using the roads and to strictly adhere to the traffic rules and other road users. That



- the driver of the lorry was either careless or reckless when he overtook another vehicle and should be held 100% liable.
30. The Respondent submitted that he was a pillion passenger on the motorcycle and it had not been demonstrated how he contributed to the occurrence of the accident. He relied on *Rose Makombo Masanju vs Night Flora alias Nightie Flora & another [2016], Civil Appeal 2 of 2015* and PAS vs George Onyango Orodí (2020) eKLR.
  31. The Respondent submitted that the two doctors confirmed that the injuries he sustained were severe and would require future medical attention. That the injuries were classified as grievous harm. He further submitted that the trial court's award of Kshs 4,160,854/= was reasonable taking into account the injuries he sustained. That he would spend the remainder of his lifetime in a wheelchair and that his employment was under risk as he could be dismissed on medical grounds.
  32. It was the Respondent's submission that they had proven their case on a balance of probability and that the trial court did not err when it held the Appellant 100% liable for the accident.
  33. I have gone through and carefully considered the Record of Appeal dated 15th March 2024, the Supplementary Record of Appeal dated 29th April 2024, the Appellant's written submissions dated 30th May 2024 and the Respondents' written submissions dated 17th June 2024. The two issues for my determination were:-
    - i. Liability
    - ii. Quantum

### **Liability**

34. This court has already determined liability on this matter when it held the Appellant 100% liable in the sister file Bomet High Court Civil Appeal No. E039 of 2023; Highland Creamers & Food Ltd vs Richard Kimutai Koech & Betty Chelangat Koech (suing as the legal representatives of the estate of Aron Kipngeno Mutai).
35. The two suits arose out of the same road traffic accident as the deceased (Aron Kipngeno Mutai) was the rider of the motorcycle registration number KMDV 149C and the Respondent (Ronald Ngetich) was the pillion passenger and they were hit by the lorry (motor vehicle registration number KCT 036T).
36. In any event, the Respondent bore no liability as he was a pillion passenger and had no control of the motorcycle. I agree with Gitari J. in *Ndatbo vs Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment)* where she held:-

“.....As pillion passenger, the respondent had no control of the motorcycle and could not have done anything to cause or avoid the accident.....”
37. Similarly, in *West Kenya Sugar Co Limited vs Lilian Auma Saya (2020) eKLR*, Njagi J. held:-

“The respondent was only a passenger on the motor cycle. A passenger cannot be held liable when a vehicle he/she is travelling in is involved in accident.....”
38. Flowing from the above, it is my finding that the Appellant was 100% liable for the cause of the accident.



## Quantum

39. As per the Amended Plaintiff, the Respondent suffered the following injuries:-
- a. Communitated left tibia and fibula fractures leading to above knee amputation of the leg.
  - b. Right communitated iliac wing of the pelvis.
  - c. Fracture mid shaft femur.
  - d. Fracture lateral condyle of the right femur.
  - e. Fracture Schatzker I tibia plateau of the right tibia.
  - f. Fracture distal end of the right tibia.
  - g. Multiple fractures of the right radius and ulna.
  - h. Loss of 4 upper incisor teeth and one upper canine tooth.
  - i. Blunt injury to the anterior chest wall leading to right hemathorax.
40. The Respondent stated that his left leg was amputated and his other leg was fractured. That his right hand was injured and deformed and that life had become hard for him as he was now unable to go to the bathroom and toilet alone. He further stated that he underwent many surgeries and still required physiotherapy.
41. Dr. Obed Omuyuma (PW3) stated that he examined the Respondent on 19th August 2019. That after examining him he assessed permanent disability at 70% and that the Respondent would require Kshs 200,000/= as future medical expenses for the removal of the implant. PW3 classified the injuries as grievous harm. He produced a Medical Report as P.Exh 7. I have looked at the Report and it buttressed PW3's testimony. It also confirmed the injuries sustained by the Respondent.
42. When PW3 was cross examined, he confirmed the fractures sustained by the Respondent on his hand and right leg. That the Respondent was paraplegic and had a spinal injury which lead to paralysis. PW3 further stated that the Respondent's left leg was amputated as the fractures were beyond repair.
43. Dr. Nixon Mutai (PW4) stated that he examined the Respondent on 16th July 2019 and noted that the Respondent's head and neck were normal and had a scar of a chest tube used to remove blood from the chest. That he had a shattered right elbow joint fracture and his right lower limb had been amputated. He produced a P3 Form as P.Exh 3, Discharge Summary as P.Exh 2 and a Medical Report as P.Exh 6. I have looked at the exhibits and they all confirm that the Respondent suffered fractures on his lower limb and an amputation to his left leg.
44. When PW4 was cross examined, he confirmed the injuries sustained by the Respondent. That he classified the injuries as grievous harm. He further stated that the patient had bed sores on the day he examined him. The Appellant did not present any defence in regard to the injuries sustained by the Respondent.
45. It is therefore my finding that the Respondent suffered the injuries as listed in the Amended Plaintiff.
46. For this court to interfere with an award, it must be satisfied that the trial magistrate misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice.



47. In the case of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Munyao Kioko (2006) eKLR*, the Court of Appeal stated that:-

“It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in *H. West & Son Ltd vs. Shephard [1964]AC 326* at page 353- ‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of 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 of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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.’”

48. In the present case, the Appellant submitted on the issue of general damages that the award of Kshs 3,500,000/= was inordinately high and they proposed an award of between Kshs 2,000,000/= to Kshs 2,500,000/=. On the other hand, the Respondent asked this court to uphold the award of Kshs 3,500,000/= as it represented a fair award.

49. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards.

50. The Respondent suffered a fractures to his elbow, hand and right leg. He also suffered an amputation to his left leg. I have found the following cases quite helpful in terms of comparison:-

- I. In *Joseph Seremani & Julius Otachi vs Stella Bosibori Moreka (2019) eKLR*, the court upheld an award of Kshs. 2,500,000/= where the Respondent had multiple fractures and an amputation of the left leg.
- II. In *Akwaba Olubuliera Nicodemus v Dickson Shikuku (2020) eKLR*, the court upheld general damages of Kshs. 2,000,000/= where the Plaintiff had suffered a fracture of the right clavicle leading to internal fixation of the clavicular fracture; crush injury to the right leg leading to below knee amputation of the right leg and sprained left elbow joint.
- III. In *Edwina Adhiambo Ogol vs James Kariuki (2020) eKLR* the Plaintiff sustained a fracture of left humerus; Compound (open) fractures of the left tibia and fibular; Amputation of the left leg above the knee; and Intra uterine foetal death at 32 weeks (as per ultra sound). The degree of incapacity on her amputated leg was assessed at 50%. The trial court awarded her general damages of Kshs.1, 500,000/= which award was reversed by the High Court on appeal and substituted it with an award of Kshs.2, 200,000/=.
- IV. In *Abdi Werdi Abdulahi vs James Royo Mungatia (2019) eKLR*, the Respondent sustained multiple fractures on the right lower limb leading to amputation of the right lower limb; multiple fractures and bruises on the upper right limb leading to affixation of two metal plates; injury to the right eye leading to impaired vision; compressed burst L4 vertebra with retro pulsed fracture fragments; and other soft tissue injuries. The court awarded the respondent therein Kshs 3,500,000/= as general damages.



51. In Mbasu *Œ another v Swaka (Civil Appeal E061 of 2022)* [2024] KEHC 2210 (KLR) (27 February 2024) (Judgment), Ougo J. held that:-

“The current awards by courts for below-the-knee amputation range between Kshs 2,000,000/- to Kshs 2,500,000/-.....”

52. I have considered the authorities above and the nature of the injuries suffered by the Respondent. I have also considered the current inflation rates and I find that the award of Kshs 3,500,000/= was reasonable and just in the circumstances. I uphold the same.

53. The Appellant pleaded future medical expenses of Kshs 200,000/=. Dr. Obed Omuyuma stated that the Appellant would require Kshs 200,000/= to remove the implant. A prayer for future medical expense is not an ordinary prayer that a court can grant in its discretion but it is a special award that must be pleaded specifically and proved. In the case of *Tracom Limited & another vs Hassan Mohamed Adan* (2009) eKLR, the Court of Appeal stated: -

“...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd vs. Gituma* (2004) 1 EA 91, this Court, stated:

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“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person’s legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”

54. Further, in *Bonham Carter vs. Hyde Park Hotel Ltd.* (1948) 64 T.R. 177, it was stated:-

“The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages. They have to provide it.....”

55. Flowing from the above and in the exercise of my discretion, it is just that the Appellant be granted future medical expenses to remove the implant in his right leg. It is therefore my finding that the trial court did not err when it awarded Kshs 200,000/= for future medical expenses.



56. With respect to the award of hiring the assistant or a help, the award fell under general damages and it was not to be awarded independently. Therefore, the trial court erred when it awarded Kshs 420,000/=. The same is denied.
57. With regards to the special damages, both parties submitted that the award of Kshs 20,854/= awarded by the trial court was proper. I consequently uphold the award of Kshs 20,854/= as special damages.
58. The final computation is as below:-
- i. General Damages Kshs 3,500,000/=
  - ii. Add Special damages Kshs 20,854/=
  - iii. Add Future Medical Expenses Kshs 200,000/=
- Total Kshs 3,720,854/=.
59. In the end, the Memorandum of Appeal dated 24th May 2023 partially succeeds to the extent that the trial court's award of Kshs 4,160,854/= is substituted with Kshs 3,720,854/=.
60. The Appeal having partially succeeded, each party shall bear their costs whole costs in the suit remain as awarded by the trial court.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of Ms Omala for the Appellant N/A for the Respondent and Siele (Court Assistant).

