



**Association for the Physically Disabled v Nyamari (Civil Appeal  
E153 of 2021) [2023] KEHC 1741 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1741 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E153 OF 2021  
REA OUGO, J  
FEBRUARY 28, 2023**

**BETWEEN**

**ASSOCIATION FOR THE PHYSICALLY DISABLED ..... APPELLANT**

**AND**

**KELVIN KENANI NYAMARI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon N. Lutta Chief  
Magistrate in KISII CMCC NO 167 OF 2019 delivered on 27th October 2021)*

**JUDGMENT**

1. The respondent before the subordinate court sued the appellant for general and special damages, interest and costs of the suit after sustaining injuries following a road traffic accident. According to the respondent, on December 17, 2018 he was riding on a motor cycle when the appellant's vehicle registration No xxxx hit the motor cycle and the respondent sustained the following injuries: left butterfly tibia fracture; degloving injury on the face; bruises both hands, right leg and left foot.
2. The appellant in response denied the occurrence of the accident and that the respondent sustained injuries. It was also pleaded in the alternative that if the accident occurred, the same was occasioned by the respondent or the manner in which the motor cycle was controlled. The trial magistrate in his judgment entered liability in the ratio of 90:10 in favour of the respondent. He also entered the following award in favour of the respondent:
  - a. General damages of Kshs 500,000/-
  - b. Special Damages of Kshs 5,500/-
  - c. Cost plus interest from the date of judgment
3. The appellant is dissatisfied with the judgment of the subordinate court and has preferred this appeal on the following grounds:



1. The Learned Trial Magistrate erred in law and in fact by finding the appellant 90% to blame when there was sufficient evidence adduced by the parties that the Respondent was an excess pillion passenger contrary to the express provisions of the Traffic Act and therefore contributed to the accident.
  2. The Learned Magistrate erred in law and in fact by ignoring the authorities submitted by the Appellant in their submissions when arriving at his decision in apportioning liability between parties.
  3. The Learned Magistrate erred fact and in law in failing to consider the doctrine of precedent and as a result the (sic) and as a result arrived in unjustified decision.
  4. The Learned Magistrate erred in fact and law in failing to consider the Appellant's submissions and more specifically on the quantum by completely disregarding the submissions and authorities of the appellant and as a result arrived at an unjustified decision on quantum.
  5. In arriving at his decision, the Trial Magistrate did so in a speculative and cursory manner not guided by any set of principles and failed to exercise his discretion within the applicable principles of assessment of damages and his failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.
4. This being the first Appellate Court there is need consider the evidence adduced before the lower court afresh bearing in mind that I had no benefit of seeing or hearing the witnesses as they testified. (See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, 126).
  5. Kelvin Kenani Nyamari (Pw2) adopted his statement as his evidence in chief. He testified that the appellant's vehicle xxxx hit the motor cycle while trying to overtake another vehicle. He sustained injuries and was treated at Kisii Teaching and Referral Hospital. He later reported the accident at Kisii Central Police Station and was issued with a P3 form. On cross examination, he testified that he received treatment as an outpatient client. Dr Morebu Peter Momanyi (Pw1) who prepared the medical report testified that Pw2 sustained a left butterfly fracture, degloving injury on the face and bruises on the hands and legs. On cross examination he testified that he works at Kisii Teaching and Referral Hospital and was present when Pw2 was treated. No xxxx PC Moses Kasera (Pw1) testified that there was an accident on December 17, 2018 at 3:00 pm involving xxxx Toyota Hilux and a motor cycle. Although he did not find the motor cycle at the scene, the pillion passengers were injured. He visited them at the hospital and took their statement. He produced the police abstract as Pexh1.
  6. Shem Onserio Arasa (Dw1) adopted his statement as his evidence. He testified that on the material day he was driving at 40km/hr keeping on the left along the two-way traffic road. After driving past Bobaracho, at a section featuring several sharp bends he encountered several oncoming motor cycles leading a convoy of mourners heading to Keroka Town. Suddenly the motor cycle which was ferrying 2 passengers and moving at high speed, attempted to overtake 2 motor cycles at a go but the rider was unable to navigate the sharp corner on the road and in the process lost control and encroached to his lane. He avoided hitting the motor cycle by applying emergency brake, hooting and flashing lights but it was too late. The motor cycle rammed into the front corner of his pick up and due to the impact, the passengers fell on the tarmac road. He blamed the passengers for being more than one in the motor cycle and failing to wear helmets. On cross examination he testified that it was the motor bike that caused the accident as he was overtaking on a continuous yellow line. He testified that he could not swerve because there was a cliff on the left side.
  7. The appeal was canvassed by way of written submissions and the parties have filed their rival submissions. The appellant submits that in the Rosemary Kaari Murithi v Benson Njeru Muthitu



[2020] eKLR the court found that an excess pillion passenger should be held 40% liable for the accident. In Paul Lawi Lokle v Auto Industries Limited & Another (2020) eKLR, the court upheld the trial magistrate's decision which found an excess pillion passenger at 50% contributory negligence and dismissed the appeal. It urged the court to re-assess the issue of liability and find that the respondent was 50% liable. On the injuries sustained by the appellant, it was submitted that no evidence was produced by the respondent on the nature and treatment of alleged fracture. It urged the court to find that the respondent sustained soft tissue injuries and an award in the range of Kshs 60,000/- to Kshs 100,000/- would be appropriate. It relied on the cases of HB (A minor suing through father & next friend NKM v Jasper Nchonga Magari & another [2021] eKLR and FM (Minor suing through the mother and next friend MWM) v JNM & Another [2020] eKLR.

8. The respondent submitted that the he was a pillion passenger and there is no way he would have contributed to the accident. It relied on the case of Gerald Odera Omollo v Rose Anyango Rayola [2022] eKLR where the court held as follows:

' The argument of the appellant is that the weather was clear and the rider of the suit motorcycle was able to see; that he swerved to avoid hitting another motorcyclist, hence liability should be apportioned as the motorcyclist of the suit motorcycle also had a duty to avoid being hit. This argument would only stand against the motorcyclist and not a passenger who had no control over how the motorcycle was being ridden. For the argument of the appellant to be sustained, he was at liberty to join the motorcyclist as a third party to the suit for the trial court to be able to apportion liability. Thus, liability cannot be apportioned against a passenger even if the investigations revealed that the appellant was not to be blamed. The appellant shall bear 100% liability.'

9. Similarly, in Barongo Sevelius Yopben v Jared Ndemo [2020] eKLR the court held that it was not shown that failure to wear a helmet or the fact that there were two pillion passengers on the motorcycle would have contributed to the occurrence of the accident.
10. The respondent submitted that both the medical report and P3 form were sufficient evidence to show that the respondent sustained the injuries listed on the plaint. The appellant did not adduce any evidence to counter the medical evidence by the respondent. They urged the court to find that the injuries enumerated in the plaint were sufficiently proved in evidence.
11. On the issue of quantum, he submitted that the award of Kshs 500,000/- cannot be said to be excessive. In Gerald Odera Omollo (supra) the court awarded Kshs 600,000/- to a plaintiff with fractured right femur, contusion on the pelvis, blunt trauma to the chest and lacerations on the left leg.

### **Analysis and Determination**

12. The appellant submitted that the trial magistrate ought to have found the respondent 50% liable for the accident for reasons that the motorcycle carried an excess pillion passenger. My finding on the issue is that a passenger cannot be held liable for an accident. Pw2 testified that the appellant was trying to overtake when the accident occurred. Although the appellant blames the driver of the motor cycle for the accident, he did not institute any third party proceedings. Dw1 testified that the motor cycle ferrying 2 passengers was moving at high speed, attempted to overtake 2 motor cycles at a go but the rider was unable to navigate the sharp corner on the road and in the process lost control. In my view, I do not see how the respondent contributed to the accident as it was the motor cycle rider that was driving in high speed without taking into consideration other road users. Pw2 blamed the appellant for causing the accident while trying to overtake. The appellant must therefore have been driving at a high speed when the accident occurred. Although Dw1 testified that he was driving at 40 km/hr, I find that



this was not plausible as he was not able to bring the car to a stop and thereby hitting the motor cycle causing the respondent to fall down. There is no way the respondent would have contributed to the accident in the circumstances and I agree with the decision of *Viviane Anyango Onyango & another v Charity Wanjiku [2017] eKLR* where the court held that passengers cannot be held liable for accidents. The court stated:

- ' 12. It is my very strong view, and supported in numerous court decisions, that a passenger cannot be held liable when a vehicle he is travelling in is involved in an accident. See Rosemary Wanjiru Kungu -vs- Francis Mutua Mbuvi & Another (2014). Unlike in the Court of Appeal decision in Civil Appeal No 11 of 2014. The Chairman St. Teresa's Nyangusu Girls Secondary School - vs- Jackline Monari, the deceased cannot be said to have had a hand in the occurrence of the accident.'
13. I therefore find no reason to interfere with the apportionment of liability as awarded by the trial magistrate.
14. I now turn to consider the award of damages by the trial court. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a 'Meru Express Services (1976)' & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR* thus:
- 'The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.'
15. The first issue for consideration is whether the respondent proved that she suffered the injuries pleaded in his plaint. The respondent went to Kisii Teaching and Referral Hospital for treatment based on the clinic card. The appellant was required to go back to the hospital for a complete pop Dr Morebu who prepared the medical report that the respondent sustained left butterfly tibia fracture, degloving injury on the faces and bruises on both his hands and legs. The evidence by the respondent point to the fact that he sustained a left butterfly tibia fracture, degloving injury on the face and bruises on both hands and legs. I therefore reject the submissions by the appellant that the respondent only sustained soft tissue injuries when the contrary had been proved. The trial magistrate made an award of Kshs 500,000/- on general damages. The respondent in his submissions supported the award by the trial magistrate. In *Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR* the court reduced an award of Kshs 600,000 to Kshs 400,000/= for compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose and blunt chest. The award of Kshs 500,000/- on general damages is therefore found to be excessive and substituted with an award of Kshs 400,000/-. Special damages were pleaded and proved and I find no reason to interfere with the trial magistrate's award.
16. In the end, the appeal is partially successful and the appellant is awarded ½ of the cost of the appeal.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF FEBRUARY 2023.**



**R.E. OUGO**

**JUDGE**

**In the presence of:**

Miss Ayieka For the Appellant

Respondent Absent

Aphline/ Wilkister C/A

