



REPUBLIC OF KENYA



**Kamaliki v Paul (Civil Appeal E004 of 2021)
[2023] KEHC 2540 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E004 OF 2021
RL KORIR, J
MARCH 29, 2023**

BETWEEN

ALLAN ANUSU KAMALIKI APPELLANT

AND

CHERUIYOT KOECH PAUL RESPONDENT

(Being an Appeal from the Judgment of the Senior Resident Magistrate, Omwange J. in the Magistrate's Court at Sotik, Civil Suit Number 18 of 2019 delivered on 9th March 2021)

JUDGMENT

1. The plaintiff (now respondent) sued the defendant (now appellant) for general and special damages arising out of an accident that occurred on August 1, 2018 between Motor Vehicle Registration Number KCB 523L and Motor Cycle Registration Number KMDP 633H which he was riding.
2. In its Judgment delivered on March 9, 2021, the trial court found the appellant (then defendant) wholly liable for the accident and further awarded the respondent general and special damages of Kshs 859, 540/= plus costs and interest of the suit.
3. Being dissatisfied with the judgment of the trial court, the defendant/appellant appealed to this court through the memorandum of appeal dated March 22, 2021. He raised the following grounds:-
 - I. That the learned trial Magistrate erred in law and in fact in failing to dismiss the respondent's case.
 - II. That the learned trial Magistrate erred in law and in fact in failing to apportion liability against the respondent in view of the evidence on record.
 - III. That the learned trial Magistrate erred in law and in fact in adopting the wrong principles in making a determination on the damages payable to the respondent thereby arriving at an erroneous decision.



- Iv That the learned trial Magistrate erred in law and in fact in failing to take into account relevant issue(s) and/or factors in making a determination as to the damages payable thereby arriving at an erroneous decision.
- v That the learned trial Magistrate erred in law and in fact in failing to take into consideration and/or to be guided by relevant authorities and/or precedents with comparable injuries like the ones sustained by the respondent thereby arriving at an excessive amount payable for the General Damages.

The plaintiff's/respondent's case

- 4. Through the pleadings and his evidence in the trial court, the respondent stated that he was involved in a road accident on August 1, 2018 between Motor Cycle Registration Number KMDP 633H and Motor Vehicle Registration Number KCB 523L. That the appellant was either the registered, insured, equitable or beneficial owner of the said Motor Vehicle Registration Number KCB 523L.
- 5. It was the respondent's case that the appellant was negligent in the accident. The particulars of the negligence were stated in paragraph 4 of the pleadings.
- 6. That as a result of the accident, he suffered the following injuries:-
 - a. Left radius fracture.
 - b. Left ulna fracture.
 - c. Deep cut wound on the chin.
- 7. The respondent prayed for special and general damages against the appellant.

The respondent's submissions.

- 8. The respondent Submitted that the driver of Motor Vehicle Registration Number KCB 523L crossed the road from the right side and hit him when he was in his rightful lane. That PW2 testified and confirmed his assertion and further stated that the driver of the said vehicle (appellant) was to blame for the accident.
- 9. It was the respondent's submission that the appellant did not call any witness in support of his case hence his evidence on the circumstances of the accident was not rebutted. That the appellant's allegations of negligence on the respondent's part were not proved. He relied on *Michael Matonye Munyao & Another v JNK (suing as the legal administrator of the estate of JOA)* (2019) eKLR to support this submission. It was his further submission that the trial court did not err when it found the appellant solely liable for the accident.
- 10. The respondent submitted that Dr. Peter Morebu and Dr. Gaya confirmed the injuries he suffered as a result of the accident. That the respondent was exposed to the risk of early osteoarthritis of his left arm. It was his further submission that the injuries he suffered interfered with his work as a mason as he could not work the way he used to.
- 11. It was the respondent's submission that the trial court was correct in awarding Kshs 850,000/= having considered the injuries he suffered. He relied on *Clement Gitau v GKK* (2016) eKLR and *John Muli Kasike & Another v Samuel Gitau Waweru* (2020) eKLR as comparative cases.



The defendant's/appellant's case.

12. In his statement of defence, the Defendant (now appellant) denied the occurrence of the accident on August 1, 2018 involving Motor Cycle Registration Number KMDP 633H and Motor Vehicle Registration Number KCB 523L. The appellant further denied being the insured, beneficial or registered owner of the aforementioned Motor Vehicle.
13. It was the appellant's case that if the accident occurred then it was caused by the negligence and carelessness of the respondent. The particulars of negligence of the respondent were contained in paragraph 6 of the defence.

The appellant's submissions.

14. The appellant submitted that the trial court did not consider his evidence when it found that the respondent had proved his case. That the burden of proof lay with the respondent and the fact that he did not avail any witness to testify on his behalf did not impute negligence on his part. It was his further submission that the trial court erred when it found him 100% liable for the accident.
15. It was the appellant's submission that the accident occurred on the respondent's lane and that the respondent had to prove the appellant's negligent act. That the trial court ought to have scrutinized the circumstances that led to the accident. He relied on *Statpack Industries Ltd v James Mbiti* (2005) eKLR to support this submission.
16. The appellant submitted that PW1's testimony was contradictory as it was not clear from his evidence and testimony whether he was hit while negotiating a corner to the police station or when joining the highway. That PW1 lied under oath when he stated that he was not carrying pillion passengers yet the abstract he produced contradicted him. It was his further submission that the trial court ought to have treated PW1's evidence with a lot of caution.
17. It was the appellant's submission that the respondent did not produce an Insurance Certificate and a valid driving licence to show that the motorcycle was in a good condition and that he was qualified to ride it. That the respondent failed to take any evasive action yet he owed a duty of care towards himself and other road users.
18. The appellant submitted that PW2's evidence was hearsay as she confirmed that she was not the investigating officer. That the circumstances leading to the cause of the accident were not proved at all. He further submitted that the police abstract produced as P.Exh 3 did not blame anyone for the accident as the matter was still under investigation. He relied on *Kennedy Nyangosa v Bash Hauliers* (2016) eKLR and *Peter Kanithi Kimunga v Aden Guyo Haro* (2014) eKLR to buttress this submission.
19. It was the appellant's submission that his testimony was not subjected to cross examination and that he had indicated that the rider was riding the motor cycle without lights. That if the rider had not been speeding, he would have seen the motor vehicle and taken evasive measures. It was his further submission that the mere fact that a collision occurred did not mean that he was wholly to blame. He relied on *Emmaculate Kanini v Daniel Maguru Irungu* (2019) eKLR to support this submission.
20. The appellant submitted that the award of Kshs 850,000/= was on the higher side and that an award of Kshs 250,000/= to Kshs 300,000/= would have been sufficient in the circumstances. He relied on *Samuel Ndirangu Ng'ang'a v Lucy Wambui Wachira* (2013) eKLR, *Maselus Eric Atieno v united Services Limited* (2017) eKLR and *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* (2019) eKLR as comparative cases.



21. The duty of the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to its 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 v John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR.
22. I have read through and considered the Memorandum of Appeal dated March 22, 2021, the appellant's Written Submissions dated June 8, 2022 and the respondent's Written Submissions dated July 4, 2022 and there are two issues for my determination:
 - i. Whether the respondent proved his case to the required standard.
 - ii. If the answer in (i) is in the affirmative, what are the damages payable.

Whether the respondent proved his case to the required standard.

23. It is trite law that the burden of proof in civil cases is on a balance of probabilities. Section 107 of the *Evidence Act* describes the burden of proof as follows:-
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
24. The *Halsbury's Laws of England*, 4th Edition, Volume 17, describes such burden of proof as:-

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?

25. In the Court of Appeal case of *Mbutbia Macharia v Annab Mutua Ndwiga & Another* (2017) eKLR stated that:-

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”

(See also *Ahmed Mohammed Noor v Abdi Aziz Osman* (2019) eKLR)



26. The respondent, Cheruiyot Paul Koech (PW2) stated that he was involved in a road accident on August 1, 2018 when he was hit by Motor Vehicle Registration number KCB 523L while riding a Motor Cycle Registration Number KMDP 633H. It was his testimony that the said motor vehicle hit him when it joined the main road without giving way to him. PW2 produced a Police Abstract dated August 23, 2018 that confirmed the occurrence of the said accident. The same was marked as P.Exh 2
27. The respondent stated that he suffered injuries as a result of the accident and he produced a Medical Report by Dr. Morebu Peter Momanyi which confirmed the same. The Report was marked as P.Exh 4. The respondent also produced a copy of Motor Vehicle Records which indicated that the Motor Vehicle Registration KCB 523L belonged to the appellant. The same was marked as P.Exh 1.
28. It is salient to note that the authenticity of P.Exh 1, 2 and 4 were not challenged and the trial court properly admitted them into evidence.
29. No. 107569 PC Gladwel Kerubo (PW2) testified as to the circumstances of the accident by referring to the Occurrence Book extract. When accidents are reported to the police, they are recorded in an occurrence book. The fact that PW2 testified based on the events recorded in the occurrence book shows that indeed an accident occurred.
30. The appellant adopted his witness statement as his evidence in the trial court. The appellant stated that on August 1, 2018 at around 7 p.m., he was lawfully driving Motor Vehicle Registration Number KCB 523L along Sotik –Kaplóng road facing the general direction of Kaplóng when suddenly, a motor cycle without lights appeared from the opposite direction and hit his motor vehicle causing it damage. It was his further evidence that he took the rider to hospital. The appellant’s testimony points to the occurrence of an accident between Motor Vehicle Registration Number KCB 523L and Motor Cycle Registration Number KMDP 633H.
31. The appellant produced a Medical Report by Dr. Z. Gaya who performed a second medical examination on the respondent. The same was marked as D. Exh 1. The Report stated that the rider, Paul Koech Cheruiyot (respondent) had suffered a deep cut wound on the chin and fractures to the left radius and left ulna. These were the same injuries that the respondent claimed to have suffered as a result of the accident which according to the plaint were a deep cut wound and fractures on the left radius and ulna. From the analysis above, there is a clear link between the said accident and the injuries suffered by the respondent.
32. Flowing from the above, it is my finding that the respondent proved that he suffered a deep cut wound and fractures to the left radius and ulna as a result of the accident. The occurrence of the said accident was not disputed as it was confirmed by the testimonies of the appellant and respondent.

If the answer in (i) is in the affirmative, what are the damages payable.

33. On the issue of liability, the trial court held that the appellant tendered no evidence to controvert the respondent’s evidence thereby finding the appellant entirely liable for the accident. I respectfully disagree with this position.
34. Both parties testified as to the occurrence of the accident with each party blaming the other. Neither party procured an additional witness to help the court determine who was to blame for the accident. In any event, PW2 who based her testimony on the Occurrence Book testified on cross examination that no one was to blame for the accident.



35. In the case of *Farah v Lento Agencies* (2006) 1 KLR 124,125, the Court of Appeal held that:-

“Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame”.

36. I am also persuaded by the case of *Platinum Car Hire and Tours Limited v Samuel Arasa Nyamesa & Another* (2019) eKLR, where Majanja J. held that:-

“Given that there were two versions that the emerged from the testimony of PW 1 and PW 2 that left open the possibility that either party was to blame, neither the appellant nor 2nd respondent took the opportunity to call any evidence to support its case. No doubt in coming to the conclusion that both parties were to blame the trial magistrate had in mind the decision of the Court of Appeal in *Berkley Steward Limited v Waiyaki* [1982-1988]1 KAR where it cited with approval the decision in *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472, 1476 where Denning LJ., observed inter alia as follows:

Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them”

37. In the absence of clear evidence as to the circumstances surrounding the accident, I find that the appellant and respondent were equally to blame for the accident. I therefore apportion liability at 50:50.

38. On the issue of general damages, the respondent stated in paragraph 5 of the plaint that he suffered the following injuries:-

- a. Left radius fracture.
- b. Left ulna fracture.
- c. Deep cut wound on the chin.

39. In the case of *Kigaragari v Aya* (1982 - 1988) I KAR 768, it was stated:-

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large 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 for insurance or increased fees.

40. In the case of *Spin Knit Limited v Benard Kiplangat Cheruiyot* (2022) eKLR, Matheka J. quoted the case of *Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 (1998) eKLR where it was held that:-

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court



has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

41. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd. v Musingi Mutia* (1985) KLR 730 where it was held that:-

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and 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 and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably 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...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

42. In considering the damages payable, I am guided by the principles emerging from the precedent above. Therefore the award should reflect the nature and gravity of the injuries and that comparable injuries should as far as possible be compensated by comparable awards.
43. The respondent suffered bone fractures on his arm and a deep cut wound on the chin. I have found the following cases quite helpful in terms of comparison:-
- i. *Daniel Otieno Owino & Another v Elizabeth Atieno Owuor* (2020) eKLR where the court gave an award of Kshs.400, 000/= for a compound fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg.
 - ii. *Kennedy Ago Lidweye v Steel Plus Ltd* (2012) eKLR where the respondent had sustained a compound fracture of the right distal radial ulna and the award of Kshs. 400,000/= was upheld.



- iii. *Peris Mwikali Mutua v Peter Munyao Kimata* (2008) eKLR in which the plaintiff sustained marked pain and tenderness on the left hip joint, marked swelling and severe tenderness of the left forearm, bruises on the left forearm and fracture of the ulna of the left distal forearm. The court confirmed the award of Kshs 450,000/=.
44. In the case of *Jane Chelagat Bor v Andrew Otieno Onduu* (1988-92) 2 KAR 288; (1990-1994) EA 47, the Court of Appeal held that:-
- “In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”
45. Guided by the aforementioned case law and the injuries suffered by the respondent, I find that the Kshs 850,000/= awarded as General Damages by the trial court excessive. It was not comparable to decided cases that had almost similar injuries. Taking into consideration the inflation, I substitute the award of Kshs 850,000/= with the award of Kshs 650,000/=.
46. With regards to the special damages, the respondent particularized them as follows:-
- Treatment Expenses Kshs 4,390/=
- Cost of preparation of Medical Report Kshs 6,500/=
- Registration of demand Kshs 100/=
- Doctors charges to attend court Kshs 550/=
- Cost of anticipated 2nd Medical Examination Kshs 2000/=
47. The respondent produced a bundle of receipts marked as P.Exh 6 a, b and c from Kaplong Mission Hospital indicating that he had paid a total of Kshs 2,700/=, a bundle of cash deposit slips marked as PExh 7 e and f indicating that he had paid a total of Kshs 1,740/=, a receipt for the Medical Report marked as PExh 5b where he paid Kshs 5,000/=, a receipt from Postal Corporation of Kenya for Kshs 100/=. I am satisfied that the respondent pleaded and proved his claim for special damages and the same is awarded at Kshs 9,540/=.
48. I make the final award follows:-
- General Damages Kshs 650,000
- Less 50% Kshs 325,000
- Kshs 325,000
- Add Special Damages Kshs 9,540
- Kshs 334,540
49. As the appeal has partially succeeded, each party shall bear their costs of the appeal, while the respondent shall get the costs awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF MARCH, 2023



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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms.Nyabuto for the appellant, Ms. Kusa for the respondent and Siele
(Court Assistant)

