



REPUBLIC OF KENYA



**Kimanga v Mukhamara (Civil Appeal E023 of 2023)  
[2025] KEHC 3199 (KLR) (20 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 3199 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E023 OF 2023  
JK NG'ARNG'AR, J  
JANUARY 20, 2025**

**BETWEEN**

**FRANCIS KIMANGA ..... APPELLANT**

**AND**

**FRANCIS ASEMBO MUKHAMARA ..... RESPONDENT**

*(Being an appeal on from the judgment of Hon. C.L. Adisa (SRM) dated 25th January 2023)*

**JUDGMENT**

1. Vide plaint dated 3/3/2022, the respondent filed the suit before the lower court on grounds that on 13/2/2022, he got into an accident along Links Road near Links Plaza at around 5:00 am when he was riding motor cycle KDMW 868L when motor vehicle registration no. KBR 222G owned and driven by the appellant suddenly and irrationally overtook an oncoming vehicle from the opposite direction and hit the respondent thus occasioning him severe body injuries.
2. The appellant filed a statement of defence dated 31/3/2022 denying liability and blamed the respondent for the accident and sought orders that the suit be dismissed with costs.
3. The matter proceeded for hearing.

**Respondent's/Plaintiff's case**

4. The respondent called three witnesses.
5. PW1 was Dr. Darius Wambua Kiema. He produced a report dated 21/1/2022 detailing the injuries sustained by the plaintiff. He stated that the respondent's disability was assessed at 4%. He produced the report and payment receipt as PEXB 1 and 2 respectively. On cross-examination, he testified that he estimated medical future expenses of Kshs. 3,000/- per month for six months as one tablet of the painkiller was Kshs. 60/= . That physiotherapy was not prescribed. On re-examination, he testified



that the respondent had suffered a fracture wherein the bone came out of the skin and at the time of discharge, he had a cast and bruises. That he was still in pain at the time of examination and physiotherapy was to reduce stiffness and increase mobility.

6. PW2 was PC Kennedy Onyina from Nyali Police Station. He testified that the accident occurred on 13/2/2022 at 4:30am along Links Road involving the subject motor vehicle KBR 222 Lexus and motor cycle KMDW 868L which was being ridden by the respondent herein. That the two were on opposite directions and as the driver of the subject motor vehicle was overtaking, he collided with the rider and both the respondent and the pillion passenger were injured. That both the motor vehicle and motor cycle were towed to the station. PW2 produced the P3 and police abstract as exhibit PEXB 3 and 4 respectively. On cross-examination, he testified that he was not the investigating officer but was among the officers that visited the scene. That he did not produce any sketch plan but stated that the point of impact was at the respondent's lane and the driver of the motor vehicle was blamed for the accident. That he was overtaking while driving from Kenol to Mombasa town and in the process he collided head on with the rider.
7. PW3 was the respondent. He relied on his witness statement and produced the list of documents as PEXB 5-8. He testified that he tried to swerve when he saw the motor vehicle overtaking but the accident still occurred. He maintained his case as pleaded and blamed the appellant and denied any allegations that he was speeding. That the appellant left the scene of the accident after it occurred whereas he was taken to premier hospital for treatment.
8. On cross-examination, he testified that he was hit on his lane as he tried to swerve and has carried his son on their way to church. He denied that he was overspeeding and testified that the appellant was forced to take him to premier hospital and later to the general hospital.

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

9. The appellant called one witness to support his defense.
10. DW1 was Michael Chege Kimanga, the appellant's son. He testified that on 13/2/2022, he was driving from Nyali when a motorcyclist appeared abruptly into the road and hit his side mirror. That he had tried signalling the rider by flushing the headlights but he did not stop. DW1 further testified that the respondent tried to swerve and he hit the side mirror of the vehicle. That he stopped at total petrol station and took the respondent and his son to hospital. That he had not been charged with any traffic offense after the accident and he thus blamed the respondent for failing to check whether the road was clear, and for failing to wear safety gears.
11. On cross-examination, DW1 testified that the subject motor vehicle was registered in his father's name. That he had a driving license at the time of the accident. That he was overtaking a tuktuk and he stopped immediately after the accident.
12. Vide judgment delivered on 25/1/2023, the trial court entered liability at 85:15 in favour of the respondent and awarded the respondent Kshs. 900,000/= as general damages relying on *Kennedy Nyaga Mboi vs Mash Bus Services Limited* (2015) eKLR where the plaintiff was awarded Kshs, 500,000/= for fracture tibia and fibula and *Damaris Ombati vs Moses Mogoko Lewis & Another* (2019) Eklr where the plaintiff was awarded Kshs. 300,000/= for fracture on the navicular bone.
13. The respondent was also awarded special damages of Kshs. 29,000/= and future medical expenses of Kshs. 44,000/=.
14. The appellants were dissatisfied with that judgment and filed the memorandum of appeal dated 13/2/2023.



## The Appeal

15. The appellants filed the memorandum of appeal on 10 grounds including that the trial court erred in; finding that the appellant was to blame for the accident, failing to consider the appellant's evidence, failing to consider that the respondent did not have a driving licence and was not qualified to ride the motor cycle which was un-insured, failing to consider the 2<sup>nd</sup> medical report dated 25/10/2022, awarding future medical costs that were unsupported, awarding damages of Kshs. 900,000/= which were excessive, failing to consider the written submissions and all evidence before court, failing to give reasons supporting the award for damages, and failing to consider all facts and evidence in her decision.
16. The appeal was canvassed by way of written submissions. The appellant's were dated 22/7/2024 and were limited to three grounds being liability, quantum and future medical costs. The respondent's submissions were dated 21/8/2024. I have considered those submissions alongside the entire record of appeal.

## Analysis and Determination

17. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for *East Africa in Peters –vs- Sunday Post Limited* [1958] EA 424.
18. 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 where the court held that: -

“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.”

## Whether the court erred in its apportionment of liability

19. It is not in dispute that an accident occurred on 13/2/2022 between motor cycle KMDW 868L and motor vehicle KBR 22G. There was indeed on record the police abstract issued on 31/2/2023 confirming that the accident was between the motor cycle and motor vehicle as alleged. The police abstract on record was proof that the occurrence of the accident was reported, and it also sheds light on the motor vehicle involved and the injured person. In the case of *Z O S & C A O (Suing as the Legal Representatives in the Estate of S A O (Deceased) v Amollo Stephen* [2019] eKLR the court expressed itself as follows: -

“The Police Abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information or a report of occurrence of an accident, would investigate and establish circumstances under which such an accident occurred...”



20. As to the occurrence of the accident, both PW2 and PW3 testified that the respondent was in his rightful lane and the subject motor vehicle was overtaking another vehicle when the accident occurred. PW2 who visited the scene confirmed that the point of impact was at the respondent's lane. DW1 who was the driver of the motor vehicle also admitted that he was overtaking a Tuk Tuk when the accident happened.
21. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say: -

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”
22. On a balance of convenience, the respondent's averments were more likely to have occurred in light of the appellant's admission that he was overtaking another vehicle when the accident occurred. The driver of the subject motor vehicle had a duty to confirm that the oncoming lane was clear before attempting to overtake any other vehicle. Having found the respondent in his own lane, the appellant cannot then run away from liability as he caused the accident.
23. I see no reason to interfere with the trial's courts finding on liability.

**Whether the award of Kshs. 900,000/= for general damages was inordinately high.**

24. This Court is called to assess whether the award was inordinately high. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR where the Court of Appeal held: -

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
25. The appellant submitted that the medical report by Dr. Sheth dated 25/10/2022 was not considered, I note that the trial court considered that report as found that it confirmed the injuries sustained by the respondent and assessment of permanent disability at 4% and that it confirmed that the respondent's injuries had life changing effects on the respondents ability to function. The appellant's allegations on this ground were therefore unmerited.
26. The appellant submitted that Kshs. 900,000/= was too high for the injuries suffered and submitted that Kshs. 300,000/= was sufficient. The Court was referred to the case of *Damaris Ombati vs Moses Mogoko Leviws & Another* (2019) where the plaintiff was awarded Kshs. 300,000/= for fracture of the navicular bone amongst other injuries.
27. As per the treatment notes, P3 form and medical report by Dr. Kiema dated 21/2/2022, the respondent sustained a compound open fracture of the navicular bone right foot, and bruises on the cheek, forearms and knee as well as blunt trauma on the right chest and pelvis. Disability was assessed at 4%. The second medical report by Dr. Seth dated 25/10/2022 similarly confirmed the injuries and at that time, the respondent was still walking with a stick and his right foot was swollen. He was still in pain and movement of the toes were mildly restricted. The Dr. similarly assessed permanent disability at 4%.



28. In assessing whether the award was inordinately high or low, I rely on the following cases: -

*Elijah Kinyua Mwangi v Haggai Ikelo Wanangasa & another* [2020] eKLR

Where the court awarded damages of Kshs. 250,000/= where the appellant had sustained a fracture of the left malleolus and dislocation of the left ankle. There was however no permanent disability or future complications and the appellant had healed with no residual effects.

*Parodi Giorgio v John Kuria Macharia* [2014] eKLR

where the plaintiff who sustained fracture of the navicular bone, left foot, blunt trauma on the right hip and blunt trauma on the left femur with permanent incapacity of 2% was awarded Kshs. 200,000/=

29. From the above and taking into consideration the time lapse and changing economic circumstances between when the authorities were delivered and now, and further taking into consideration that no amount can reconstitute the claimant to exactly how he was before the accident occurred or even take away his pain and suffering, and also taking into account the assessment of permanent disability assessed at 4%, I find that an award of Kshs. 500,000/= was sufficient in the circumstances. The award of Kshs. 900,000/= was inordinately high and was not commensurate with the injuries and circumstances of the case and the same is upheld.

#### **Whether the award of Kshs. 44,000/= for future medical costs was justified.**

30. The appellants submitted that the award of Kshs. 44,000/= was unsupported by evidence. That the medication was not prescribed at the hospital where the respondent was treated.
31. As regards future medical expenses, I note that the same were specifically pleaded in the plaint dated 3/3/2024 at paragraph 8 and supported by documentary evidence being the medical reports filed by each party. Authorities are agreed that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. Ringera, J (as he then was) in *Jackson Wanyoike vs. Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC NO. 297 of 2002* held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of Appeal in *Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo* Civil Appeal No. 154 of 1993, held that cost of future medical operation is special damages, which must be pleaded. See also *Mbaka Nguru & Another vs. James George Rakwar* Civil Appeal No. 133 of 1998 [1995-1998] 1 EA 246.
32. Dr. Kiema in his reported indicated that the respondent was likely to suffer from post-traumatic arthritis and stiffness of the right foot as well as recurring pain especially when walking and in cold weather. He also indicated that the respondent would require future medical expenses for painkillers estimated at Kshs. 3,000/= per month and 40 sessions of physiotherapy each at Kshs. 650/=. Indeed, the second medical report confirmed that the respondent was still in pain and the right foot toes were stiff. As held in *Forwarding Company Limited & Anor vs Kisilui Glawel* Civil Appela 344 of 2018 (2022) KECA 96, the recommendation of a medical report was sufficient for consideration of costs for future medical expenses.
33. I do find that the award for future medical expenses was merited and the same was not excessive and thus upheld.



## **Conclusion**

34. In the end, I find that the appeal is partially successful and I proceed to order as follows: -

1. The appeal against the judgment and decree in Mombasa CMCC No. E306 of 2022 is allowed to the extent that the award of Kshs. 900,000/= as general damages is set aside and substituted with an award of Kshs. 500,000/=. The sum shall attract interest from the date of judgment before the subordinate court.
2. The appellant shall have costs of the appeal which I assess at Kshs. 50,000/= exclusive of any court fees.

It is so decreed.

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**J.K. NG'ARNG'AR, HSC**

**JUDGE**

**DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 20<sup>TH</sup> DAY OF JANUARY, 2025**

