



**Milgo alias Henry Kiprono Milgo v Kigen (Civil Appeal
E041 of 2022) [2025] KEHC 40 (KLR) (13 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 40 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E041 OF 2022
RL KORIR, J
JANUARY 13, 2025**

BETWEEN

HENRY MILGO ALIAS HENRY KIPRONO MILGO APPELLANT

AND

VICTOR KIPLANGAT KIGEN RESPONDENT

*(Being an Appeal from the Judgment of the Senior Resident Magistrate,
Omwange J. at the Magistrate's Court at Sotik in Civil Suit Number 62 of 2020)*

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for general and special damages arising out of a road traffic accident on 16th June 2020. That he was riding motor cycle registration number KMFC 764V which was hit by motor vehicle registration number KCT 341D that allegedly belonged to the Appellant.
2. The trial court conducted a hearing where the Respondent called four witnesses and the Appellant called one witness.
3. In its Judgment dated 14th January 2022, the trial court apportioned liability in the ratio of 80:20 in favour of the Plaintiff/Respondent. The trial court further awarded net damages of Kshs 204,435.20/= to the Plaintiff/Respondent.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 21st October 2022 appealing against the whole Judgment and relied on the following grounds:-
 - i. That the learned Magistrate erred in law and fact in finding the Appellant 80% liable in negligence to the Respondent in view of the evidence adduced and the statement of defence filed.



- ii. That the learned Magistrate erred in law in finding that the Plaintiff was only 20 % liable to blame for the accident.
 - iii. That the learned Magistrate erred in law and fact and completely misapprehended the principles governing an award of general damages and thus arrived at a figure that was inordinately high.
 - iv. That the learned Magistrate erred in law and fact by failing to take into account the Defendant's submissions and the binding authorities cited in regard to principles and law governing both liability and quantum and thus arrived at an erroneous conclusion.
 - v. That the learned Magistrate erred in law and fact by giving a contradictory Judgement.
 - vi. That the learned Magistrate erred in law and fact in failing to consider the weight of evidence adduced by the Defendant.
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 I 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 his Plaint dated 19th August 2020, the Respondent stated that he was riding motorcycle registration number KMFC 764V when he was hit by motor vehicle registration number KCT 341D along Mogogosiek-Litein road.
- 7. The Respondent stated that the Appellant being the owner of motor vehicle registration number KCT 341D, was sued vicariously for negligence in causing the accident. The particulars of the negligence were particularized in paragraph 5 of the Plaint.
- 8. That as a result of the accident, he suffered soft tissue injuries on his forehead, upper lip, nose, left hand and left knee joint.
- 9. The Respondent's claim against the Appellant was for special and general damages.

The Appellant's/Defendant's case

- 10. Through his statement of defence dated 4th September 2020, the Appellant denied that he was the registered owner of motor vehicle registration number KCT 341D and further denied that the said motor vehicle was under its management and control.
- 11. The Appellant denied the particulars of negligence levelled against him. That if any accident happened, it was caused solely by the negligence of the Respondent. He particularized the negligence in paragraph 7 of his Defence.
- 12. On this Appeal, parties were directed to file submissions to canvass the Appeal.

The Appellant's submissions.

- 13. In submissions dated 30th May 2024, the Appellant submitted that the trial court erred when it apportioned liability in the ratio of 80:20 in favour of the Respondent. He submitted that the trial court failed to consider that the Respondent had overloaded his motor cycle by carrying two pillion passengers. That the motorcycle became unbalanced and hard to control. He further submitted that



the Respondent did not wear any protective gear and according to the testimony of PC Geoffrey Sang (PW4), the Respondent did not have a driving license and that the Respondent's motor cycle was not insured. He relied on Joyce Mumbi Mugi vs The Co-operative Bank of Kenya Limited & 2 others Civil Appeal No. 214 of 2004 and Chao vs Dhanjal Brothers Ltd & 4 others (1990) KLR 482.

14. It was the Appellant's submission that there was no evidence adduced to indicate that he was solely to blame for causing the accident. That had the Respondent worn protective gear, he would have sustained minimal injury. It was his further submission that this was a clear indication of contributory negligence and he relied on MacDrugall App vs Central Railroad Co. Rbr 63 Cal 431.
15. On the issue of general damages, the Appellant submitted that the award of Kshs 250,000/= was excessive and erroneous. That in reaching an appropriate award, the court should consider the value of the shilling and the state of the economy. He relied on Kigaraari vs Aya (1982-88) 1 KAR 786 and Jabane vs Olenja (1986) KLR 661.
16. It was the Appellant's submission that the Respondent's injuries were soft tissue injuries which amounted to harm. That an amount of Kshs 100,000/= would be sufficient compensation. He relied on Ephraim Wagura Muthui & 2 others vs Toyota Kenya Limited & 2 others (2019) eKLR.

The Respondent's submissions.

17. Through his submissions dated 22nd July 2024, the Respondent submitted that the trial court apportioned him 20% liability because he carried two pillion passengers. He further submitted that upon cross examination, he confirmed that he had worn a reflector jacket and a helmet.
18. It was the Respondent's submission that the Appellant failed to show the steps that he (Appellant) took in trying to avoid the accident. It was his further submission that that PC Wangila (PW4) indicated that the driver of the motor vehicle was turning right towards the petrol station without due care and that the driver was blamed for causing the accident as per the Police Abstract.
19. The Respondent submitted that the trial court upon considering all the facts and evidence did not err when it apportioned liability in the ratio of 80:20 in his favour. That this court should uphold the same.
20. It was the Respondent's submission that the trial court did not err when it awarded him Kshs 250,000/= as general damages. That he suffered soft tissue injuries to his forehead, upper lip, left hand and knee joint. It was his further submission that the clinical officer (PW2) and Dr. Omuyoma (PW3) examined him and classified the injuries he suffered as harm.
21. The Respondent submitted that the award on general damages should not be disturbed. He relied on Equity Bank of Kenya Limited vs David Githuu Kuria (2020) eKLR where the court reduced an award of Kshs 400,000/= to Kshs 250,000/= for blunt injury (tender) anterior chest wall, cut wounds left knee and swollen tender left knee.
22. I have gone through and carefully considered the Record of Appeal dated 21st October 2022, the Appellant's written submissions dated 1st November 2023 and the Respondent's written submissions dated 22nd July 2024. The two issues for my determination are:-
 - i. Liability
 - ii. Quantum



i. Liability

23. The Respondent (PW1) testified that on the material day, he was riding his motor cycle heading towards Litein and the Appellant's car which was driven by Mark Cheruiyot Rono (DW1) and which was ahead of him made a sudden right turn without warning and hit him causing him and his two pillion passengers' injuries. When the Respondent was cross examined, he stated that he could not swerve to avoid the accident as the motor vehicle turned abruptly. He further stated that he was not over speeding.
24. No. 87608 PC Geoffrey Wangila (PW4) testified that DW1 knocked down the Respondent and his two pillion passengers when he turned right without due care. PW4 further testified that he blamed DW1 for causing the accident. He produced a Police Abstract as P.Exh 5 which indicated that the driver of the Appellant's motor vehicle (DW1) was to blame for the accident. When PW4 was cross examined, he reiterated that DW1 was to blame for causing the accident. He testified that he also interviewed the witnesses at the scene who attributed blame to the driver of the motor vehicle.
25. The Respondent submitted that the Appellant failed to show the steps that he (Appellant) took in trying to avoid the accident. It was his further submission that that PC Wangila (PW4) indicated that the driver of the motor vehicle was turning right towards the petrol station without due care and that the driver was blamed for causing the accident as per the Police Abstract. He further submitted that the trial court was correct in apportioning liability at the ratio of 80:20 in his favour.
26. On the other hand, Mark Cheruiyot Rono (DW1) who was the driver of motor vehicle registration number KCT 341D stated that on the material day, as he was driving along Mogogosiek road, he slowed down, indicated and waited for oncoming vehicles to pass before turning right. That as he turned right, motor cycle registration number KMFC 764V that was heading towards Litein bumped into the motor vehicle.
27. It was DW1's testimony that he blamed the Respondent as the Respondent failed to exercise care while crossing the road. That the Respondent rode carelessly without being on the lookout.
28. When DW1 was cross examined, he stated that he was ahead of the motorcycle and the point of impact was on the vehicle's right side.
29. The Appellant submitted that there was no evidence to indicate that he was to solely blame for causing the accident. That had the Respondent worn protective gear, he would have sustained minimal injury. He further submitted that the Respondent was guilty of contributory negligence.
30. From the above, it was clear that both the motor vehicle and the motor cycle were headed in the same direction with the motor vehicle being ahead of the motor cycle. It was also clear from the testimonies of PW1, PW4 and the driver (DW1) that the point of impact was the motor vehicle's front right part. The point of divergence was whether PW1 or DW1 was negligent in causing the accident.
31. The Respondent (PW1) stated that DW1 turned abruptly without warning to the road and in the process hit him. This was corroborated by No. 87608 PC Geoffrey Wangila (PW4) who after interviewing witnesses blamed DW1 for causing the accident. The same information was contained in the Police Abstract (P.Exh 5). DW1 testified that he indicated that he wanted to turn on his right side and that PW1 was negligent as he was not on the lookout therefore causing the accident.
32. In my view, DW1 bore more responsibility or duty of care to ensure the road was clear before attempting to join the road. His motor vehicle was outside the road as indicated by PW1 and PW4. On a balance of probabilities, I am persuaded by the testimony of the Respondent, whose testimony was



corroborated by PW4 that the driver of motor vehicle registration number KCT 341D was to blame for causing the accident.

33. However, it was an undisputed fact that the Respondent (PW1) carried two pillion passengers and that was against the law as the motor cycle was overloaded. The National Transport and Safety Authority (Operation of motorcycles) regulations 2015. Regulation 7(1) provided: -

Responsibilities of a Passenger

- (1) Every passenger in a motorcycle shall —
- (a) properly wear a helmet and reflective jacket whenever being carried on a motorcycle;
 - (b) not board or be carried on a motorcycle that already has a passenger except as provided by Regulation 7 (2) (a);
 - (c) not board or be carried on a motorcycle that is carrying any load;
 - (d) sit astride in the seat fixed behind the rider’s seat.”

34. The Traffic Act Cap 403 Laws of Kenya provided for the law relating to traffic on the road. Section 68(3) of the Traffic Act provides:-

A failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

35. Section 60 (1) of the Traffic Act provides that:-

It shall not be lawful for more than one person in addition to the driver to be carried on any two-wheeled motorcycle, nor shall it be lawful for any such one person to be so carried otherwise than sitting astride the motorcycle and on a proper seat securely fixed to the motorcycle behind the driver’s seat.

36. I am persuaded by Odunga J. (as he then was) in the case of Rentco East Africa Limited vs Dominic Mutua Ngonzi (2021) eKLR, where he held that:-

“The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law, the Respondent exposed himself to danger. Such conduct cannot go un-condemned and it should not be rewarded.”

37. The Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others (2009) eKLR held that:-

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

‘To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case.....’



38. The Respondent and his pillion passengers exposed themselves to risk when they boarded and rode and overloaded motor cycle. It was proper and just that they assume some form of risk. It is my finding that the trial court's apportionment of 20% liability for the Respondent as sufficient and I uphold the same.

Quantum

39. As per the Plaint, the Respondent suffered soft tissue injuries on his forehead, upper lip, nose, left hand and left knee joint.
40. Kipkorir Duncan Bii (PW2) who was a clinical officer stated that he examined the Respondent and found that he had bruises on his neck, head and upper limbs and classified the injuries as harm. Dr. Obed Omuyoma (PW3) testified that the Respondent had suffered soft tissue injuries on his face, head, upper limb, nose, left hand and on his left knee joint.
41. The Appellant submitted that the Respondent's injuries were soft tissue injuries which amounted to harm. That an amount of Kshs 100,000/= would be sufficient compensation and he relied on Ephraim Wagura Muthui & 2 others vs Toyota Kenya Limited & 2 others (2019) eKLR.
42. On the other hand, the Respondent submitted that the award on general damages should not be disturbed. He relied on Equity Bank of Kenya Limited vs David Githuu Kuria (2020) eKLR where the court reduced an award of Kshs 400,000/= to Kshs 250,000/= for blunt injury (tender) anterior chest wall, cut wounds left knee and swollen tender left knee.
43. From the above, it was evident that there was no dispute as to the type and nature of the injuries suffered by the Respondent. The injuries as described by the Respondent, PW2 and PW4 were soft tissue injuries.
44. 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.
45. 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.’”

46. 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. I have found the following cases quite helpful in terms of comparison:-



- i. In Equity Bank of Kenya Limited vs David Githuu Kuria (2020) eKLR, the court reduced an award of Kshs 400,000/= to Kshs 250,000/= for blunt injury (tender) anterior chest wall, cut wounds left knee and swollen tender left knee.
 - ii. In Kiruma vs Chege [2024] KEHC 5998 (KLR), the court upheld an award of Kshs 250,000/= for bruises on the right hand, left knee, right side of the chest and on the right ear.
 - iii. In Michael Okello vs Prisca Atieno (2021) eKLR the court awarded Kshs. 250,000/= for blunt injury to the head, blunt injury to the forehead, blunt injury to the neck, blunt injury to the chest with fracture of the 1st anterior rib, bruises and blunt injury to the left shoulder, bruises to the left shoulder, bruises and blunt injury to the left upper limb, bruises and blunt injury to the right upper limb, cut wound and blunt injury to the right lower limb.
 - iv. In ENA Investment Limited vs Onduso (Civil Appeal E092 of 2021) [2023] KEHC 23549 (KLR) (5 October 2023) (Judgment), the Respondent suffered right sub-conjunctival haemorrhage, deep cut wound to the face, deep cut wound to the right leg, deep cut wound to the left leg, chest contusion, bruises on the neck, bruises on the right elbow, blunt trauma on the lower back, blunt trauma on the right elbow, blunt trauma on the right knee and loss of one tooth. The appellate court upheld the award of Kshs 250,000/=.
47. 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 250,000/= was reasonable and just in the circumstances. I uphold the same.
48. With regards to the special damages, the Respondent particularized the same as follows:-
- i. Medical Report Kshs 5,000/=
 - ii. Motor Vehicle Search Kshs 550/=
 - iii. Medical Expenses Kshs 440/=
49. The Respondent produced receipts for Medical Expenses as P.Exh 2 totalling to Kshs 440/= and a receipt for the Medical Report for Dr. Obed Omuyoma as P.Exh 4b. There was no receipt for the Motor Vehicle Search. The total amount of special damages was Kshs 5,440/= which I uphold.
50. In the final analysis, I have found no reason to interfere with the award of the trial court as the award was just and fair.
51. In the end, the Memorandum of Appeal dated 21st October 2022 has no merit and is dismissed with costs to the Respondent. The costs in the main suit shall remain as awarded by the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY, 2025.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the absence of the Parties. Siele (court Assistant).

