



**Kibue v Ochieng (Civil Appeal E1132 of 2023)  
[2025] KEHC 1521 (KLR) (Civ) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1521 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1132 OF 2023**

**H NAMISI, J**

**FEBRUARY 7, 2025**

**BETWEEN**

**FRANCIS MUNGAI KIBUE ..... APPELLANT**

**AND**

**MAURICE OUMA OCHIENG ..... RESPONDENT**

*(Being an Appeal from Judgement and Decree of Hon. Ruguru N. Senior Principal Magistrate in Milimani CMCC NO. 11995 of 2021 delivered on 29 September 2023)*

**JUDGMENT**

1. This appeal arises from a suit filed by the Respondent against the Appellant for:
  - i. General damages for pain and suffering and loss of amenities;
  - ii. Special damages of Ksh 16,620/=;
  - iii. Costs and interest
2. The particulars of the suit are that on 4 March 2021, the Respondent was lawfully riding a motorcycle registration number KMER 345N as a pillion passenger, along James Gichuru Road in Nairobi. A road traffic accident occurred involving motor vehicle registration number KBV 418E, which belonged to the Appellant. As a result of the said accident, the Respondent sustained injuries involving fracture left distal radius (wrist), fracture left 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> metacarpal bones and deep cut wound lower lip.
3. The Appellant entered appearance and filed a Statement of Defence dated 17 November 2021, denying the allegations by the Respondent. The Appellant averred that the accident occurred purely out of and as a result of the negligence of the motor cycle rider, and therein issued notice to institute third



party proceedings against the motorcycle rider. However, the Appellant did not institute the said third party proceedings.

### **The Respondent's Case**

4. At the hearing, PW1, CPL George Ratemo from Muthangari Police Station, produced an Abstract dated 24 March 2021 vide Occurrence Book entry No. 06/04/03/2021. It was his testimony that the accident occurred on the material day and that the motor vehicle registration number KBC 418E, which was owned by the Appellant, was blamed for the accident.
5. On cross examination, PW1 confirmed that he was not the Investigating Officer. The Investigating Officer had been away for quite some time. He further confirmed that the name of the motor cycle rider was not indicated on the Police Abstract.
6. PW2, the Respondent, adopted his witness statement dated 3 March 2021 and produced a bundle of documents in support of his claim. On cross examination, the Respondent indicated that he did not know the name of the motorcycle rider, though the driver of the motor vehicle was to blame for the accident. He testified that the motor vehicle joined the road to St. Mary's without waiting for the motorcycle to clear the road.
7. The Respondent produced several documents, including Medical Report by Dr. G.K. Mwaura, various receipts, medical Summary from Maria Immaculate Hospital, copy of motor vehicle records, Medical Examination Report (P3 Form) and Police Abstract.
8. The Respondent filed submissions on the issues of quantum of damages and liability.

### **The Appellant's Case**

9. The Appellant, DW1, adopted his witness statement dated 3 February 2022.
10. From the Record of Appeal, I note that there is a Supplementary List of Documents filed by the Appellant, although the document mentioned is not contained in the Record of Appeal. Further, from the proceedings, there is no indication that the Appellant produced any documents at the hearing.
11. In its judgement, the trial court observed that the Respondent produced a Police Abstract which indicated that the Appellant was to blame for the accident. The Appellant did not enjoin the motorcycle rider. Thus, the trial court held that it could not apportion liability if at all to a person who was not a party to the suit.
12. The trial court entered judgement in favour of the Respondent as against the Appellant as follows:  
Liability - Defendant 100%  
General Damages for Pain & Suffering - Kshs 900,000/=  
Special Damages - Kshs 16,620/=  
Total - Kshs 916, 200/=  
Costs and interest at court rates with interest running from the date of judgement till payment in full.
13. Being aggrieved by the judgement, the Appellant lodged this appeal on the following grounds:
  - i. That the trial Magistrate erred in fact and in law in assessing liability at 100% against the Appellant yet the Appellant has adduced evidence of negligence by the Respondent and the motor cycle rider on whose motor cycle the Respondent was a pillion passenger;



- ii. That the trial Magistrate erred in law and in fact in coming to the conclusion that it could not apportion liability on the rider of the motor cycle on which the Respondent was a pillion passenger for the reason that the rider was not a party to the suit;
- iii. That the trial Magistrate erred in law and fact in relying on the Police Abstract as conclusive evidence as to the Appellant being the cause of the accident without further evidence from the Investigating Officer or the Occurrence Book;
- iv. That the trial Magistrate erred in law and in fact by failing to take into consideration what part of the motor vehicle was damaged from the accident in evidence as to who hit who;
- v. That the trial Magistrate erred in law and in fact in assessing liability at 100% against the Appellant while the Respondent had not discharged its burden of proof to the required standard as to the negligence of the Appellant;
- vi. That the trial Magistrate erred in law and in fact by not taking into consideration who had the right of way at the point where the accident occurred;
- vii. That the trial Magistrate erred in law and in fact in awarding general damages to the Respondent at an inordinately high and excessive sum of Kshs 900,000/= contrary to the precedents and submissions argued before him;
- viii. That the trial Magistrate erred in law and in fact in relying on the assertion that Dr. Wambugu's Medical Report awarded the Respondent 5% degree of permanent incapacity whereas in fact it awards him 4% degree of permanent incapacity;
- ix. That the trial Magistrate erred in law and in fact in misdirecting himself and failing to consider, appreciate and uphold the Appellant's defence and submissions and subsequently entered judgement for the Plaintiff against the Defendant in terms therein.

14. The appeal was canvassed by way of written submissions.

### **Analysis and Determination**

- 15. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. This was set out in the case of *Selle & Another V Associated Motor Boat Company Limited*, [1968] EA 123.
- 16. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles.
- 17. I have keenly read the contents of the Record of Appeal and the submissions by the respective parties. The appeal herein is on two issues; liability and quantum of damages.

### **Liability**

- 18. It is not in dispute that the accident occurred. Neither is it disputed that the Respondent was a pillion passenger. Authorities have held time and again that there is nothing a pillion passenger could do to prevent an accident from occurring since the passenger does not have control over the motor cycle. Some of the authorities that support this view are *Kubai Kithinji Kaiga* (Suing as the legal representative



of the estate of John Kaiga (Deceased) vs Kenya Wildlife Service (Civil Appeal No. 136 of 2019) and David Kiprotich Bor v Kassim Maranga & another (Civil Appeal No. 94 of 2011 [2017] eKLR.

19. In the case of Rosemary Mwasya vs Steve Tito Mwasya & 2 Others (2018) eKLR, the Court of Appeal held:

“Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident.”

20. The Appellant was at liberty to join the motor cycle rider to the suit as a third party for the trial court to be able to apportion liability. In the circumstances, liability cannot be apportioned against a passenger even if the investigations would have revealed that the Appellant was not to blame for the accident.

21. This Court finds no reason to disturb the findings of the trial Court on liability.

### **Quantum of Damages**

22. On the issue of damages, I am guided by the celebrated case of Kemfro Africa Limited T/a Meru Express Service Gathogo Kanini -versus- A.M. Lubia & Olive Lubia (1982-1988)KLR 727, where the Court of Appeal held:

“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 wither that 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 to inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

23. In the case of Power Lighting Company Ltd & Anor -vs- Zakayo Saitoti Naingola & Anor [2008] eKLR, the Court held:

“On quantum, the court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages:

1. Damages should not be inordinately too high or too low;
2. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered;
3. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts;
4. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of Kenyan Shilling, then at the time of the judgement...”

24. It was the Appellant’s submission that the trend for damages for comparable injuries is Kshs 350,000/=. The Appellant relied on the cases of Jaldessa Diba t/a Dikes Transporters & Anor -vs- Joseph Mbithi Isika [2013] eKLR and Gogni Construction Company Ltd -vs- Francis Ojuok Olewe [2015] eKLR.

25. On the other hand, the Respondent argued that the sum awarded of Kshs 900,000/- was sufficient and in tandem with previous decisions by the Court. The Respondent relied on the cases of Pestony Ltd



& Anor -vs- Samuel Itonye Kagoko [2022] eKLR and Ndungu & Anor -vs- Munene (civil appeal no. 31 of 2020).

26. The Medical Report by Dr. Mwaura confirmed the injuries sustained by the Respondent and assessed the permanent degree of incapacity at 5% in the left arm.
27. I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. I have taken into consideration the authorities cited by both parties. I note that those cited by the Respondent are more recent than those cited by the Appellant. Considering the span of time between the two sets of authorities cited, I am convinced that the trial court's assessment of damages herein was proper.
28. I, therefore, find that the appeal is unsuccessful. The same is dismissed with costs to the Respondent assessed at Kshs 50,000/=.

**DATED AND DELIVERED AT NAIROBI THIS 7 DAY OF FEBRUARY 2025.**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered virtually in the presence of:

Ms. Muthama..... for the Appellant

Ms Kisiangani..... .. for the Respondent

Libertine Achieng .....Court Assistant

