



**John v Mutua (Civil Appeal E084 & E099 of 2022 (Consolidated))
[2025] KEHC 6311 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E084 & E099 OF 2022 (CONSOLIDATED)**

RC RUTTO, J

MAY 19, 2025

BETWEEN

JULIUS MUTINDA JOHN APPELLANT

AND

BENJAMIN MUSEMBI MUTUA RESPONDENT

(Being an appeal and cross- appeal from the judgment of the Honourable M. A Otindo (PM) delivered on 17th May 2022 in Machakos CMCC No. E171 of 2020)

JUDGMENT

1. This judgment pertains, Civil Appeal No. E084 of 2022 filed by the Appellant and Civil Appeal No. E099 of 2022 filed by the Respondent. By an order issued on 24th October 2023, the two files were consolidated, with E084 of 2022 designated as the main appeal and E099 of 2022 as the cross-appeal.
2. The appeal arises from the judgment delivered in Machakos Chief Magistrate Civil Court No. E171 of 2020, Julius Mutinda John v. Benjamin Musembi Mutua (hereinafter referred to as "the suit"). In that matter, the Appellant sued the Respondent for negligence following a road traffic accident involving the Respondent's motor vehicle registration number KCM 375V. As a result of the accident, the Appellant sustained bodily injuries and sought general damages, damages for diminished earning capacity, special damages amounting to Kshs.9,605/=, costs of the suit, and interest on the special damages and the entire claim.
3. In his defence, the Respondent herein denied liability and on a without prejudice basis, averred that if such an accident happened, that the Appellant was entirely to blame for negligence.
4. The suit was heard and vide a judgment rendered on 17th May 2022, the court entered judgment in favour of the Appellant in the following terms;
 - a. Liability – 50:50%



- b. General damages for pain and suffering – Kshs.2,300,000/=
 - c. Damages for diminished earning capacity – Kshs.18,926/=
 - d. Special damages- Kshs.9,606/=
 - e. Costs of the suit and interest
Less 50% contribution- Kshs.1,245,766/=
- TOTAL = Kshs.1,245,766/=
5. Both parties were aggrieved by the judgment of the court. Julius Mutinda John filed the main appeal (hereinafter referred to as “the Appellant) and Benjamin Musembi Mutua (hereinafter referred to as the respondent/cross appellant filed a cross appeal.
 6. The Appellant’s appeal is premised on the grounds that the learned Trial Magistrate erred in law and in fact in by apportioning liability at the rate of 50:50% against the evidence placed before the Honourable Magistrate; by reaching a conclusion on liability that is contrary to the evidence before him, the established principles on assessment of liability and the appellant’s submissions; in all circumstances of the case, the findings of the Learned Magistrate were characterizes by misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion.
 7. The Appellant prayed that the appeal be allowed, the impugned judgment on liability be set aside and the court to determine the Defendant’s liability at 100%. Also, the Appellant prayed for costs of the appeal and the trial court with interest from the date of filing the trial court matter.
 8. The Cross Appellant’s appeal is premised on the grounds that the Learned Trial Magistrate misdirected herself and erred in law and fact by awarding general damages for pain and suffering that are manifestly excessive as to be erroneous vis a vis the injuries sustained by the Respondent; in failing to consider the medical reports on record and hence arrived at an award that was not supported by the doctor’s findings and hence arrived at an erroneous award that is so manifestly excessive as to be erroneous; by not properly considering the severity of the Respondent’s injuries and hence arrived at a wrong assessment of damages that are so manifestly excessive as to be erroneous and by totally failing to consider the cross appellant’s submissions on record thus arrived at an erroneous finding on quantum that is so manifestly excessive.
 9. The Cross- appellant urged the court to allow the cross appeal, and set aside the judgment on quantum delivered on 17th May 2022 and to assess the proper damages payable to the Appellant herein by substantially reducing the lower court award. The cross appellant also sought for the costs of the appeal.
 10. Both the appeal and the cross appeal were canvassed by written submissions.

Appellant’s Submissions

11. The Appellant’s submissions are dated 19th February 2024. He provided a brief overview of the facts of the case and proceeded to address three key issues: the duty of the court on a first appeal, the issue of liability, and, in response to the cross-appeal, whether the damages awarded were manifestly excessive in view of the injuries sustained and proved in court.
12. On the duty of the court as a first appellate court reliance was on the authority of Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & Another [2004] eKLR. The Appellant submitted that the appellate court is duty bound to re-evaluate the evidence presented before the trial court and arrive



- at its own independent conclusions. However, the Appellant acknowledged that the extent of such review must be approached with caution, particularly in respect to the trial court's findings of fact, given that the appellate court did not have the benefit of observing the demeanour of witnesses.
13. On the issue of liability, the Appellant submitted that the Cross-Appellant did not call any witness to support the defence filed. He further contended that he called a police officer who produced a police abstract confirming that an accident had indeed occurred, and that the scene of the accident located in a busy urban area with significant vehicular and pedestrian traffic necessitated low speed driving by motorists. The Appellant submitted that the defence admitted to hitting him while he was walking along Grogon area in Machakos town, and that the Cross-Appellant had been driving at a high speed, veered off his lane, and struck him as he stood waiting for the road to clear in order to cross.
 14. He argued that the trial court's observation that it was unclear whether he was crossing the road or standing off it was erroneous, particularly because the Cross-Appellant failed to produce any evidence contradicting the Appellant's account that he was standing beside the road at the time of the accident. The Appellant maintained that no credible evidence was presented to attribute contributory negligence on his part.
 15. In support of this position, the Appellant relied on the decisions in *Francis K. Righa v. Mary Njeri* (Suing as the Legal Representative of the Estate of James Kaeiuki Nganga) [2014] eKLR, and *Mary Njeri v. Peter Macharia & Another* [2016] eKLR, to argue that the driver of a motor vehicle owes a heightened duty of care to pedestrians. He also relied on the case of *Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya)*, HCC No. 68 of 2007, submitting that a defence on record cannot inform the trial court's assessment of liability where no witness was called to testify in support of the averments contained therein. Accordingly, the Appellant argued that the trial court erred in apportioning liability at 50:50 and urged this Honourable Court to overturn that finding and hold the Respondent 100% liable for the accident.
 16. With respect to the issue of quantum raised in the cross-appeal, the Appellant submitted on the award of general damages for pain and suffering. He argued that the award was proper and grounded on judicial decisions involving comparable injuries. In support of his claim, he referenced the pleadings dated 11th November 2020, the P3 Form, the discharge summary from Machakos Level 5 Hospital, and a medical report prepared by Dr. Titus Ndeti Nzina all of which were produced in evidence.
 17. The Appellant further submitted that, although the defence filed a statement of defence, it neither filed nor produced any medical report or other documentary material to challenge the nature and extent of injuries he sustained, or the resulting permanent disability. He contended that he suffered severe soft tissue injuries and multiple bone fractures which resulted in immense pain, blood loss, prolonged morbidity, and physical suffering. The trial court, relying on the case of *Mary Wanjah Gachombah v. Josinta Adhiambo Ogana* [2021] eKLR, awarded him a sum of Kshs. 2,300,000/= as general damages for pain and suffering. The Appellant maintained that the award was appropriate, just, and in line with established legal principles.
 18. In conclusion, the Appellant submitted that the cross-appeal lacked merit and urged the court to dismiss it in its entirety.

Respondent's/Cross-appellant's submissions

19. The Cross-Appellant's submissions are dated 5th April 2024. The cross appellant submitted on two issues that is, on liability as raised by the Appellant and quantum as raised by it in the cross appeal.23. On the first issue, the Cross-Appellant submitted that there were material contradictions in the Appellant's account regarding what he was doing at the time of the accident. In his plaint, the



Appellant stated that he was carefully walking along Grogon area when he was hit by the Cross-Appellant's vehicle. However, in his testimony, he claimed that he was hit while crossing the road. Further, when adopting his witness statement during examination in chief, he stated that he was standing by the roadside waiting to cross. The Cross-Appellant argued that these inconsistencies are significant and cannot be disregarded, as they form the foundation of the Appellant's case.

20. Additionally, the Cross-Appellant pointed out that the police officer who testified under cross-examination confirmed that the area where the accident allegedly occurred had no posted speed limits, and there was no indication that the vehicle was being driven at an excessive speed. Accordingly, the Cross-Appellant submitted that the Appellant's assertion that the vehicle was speeding is false and was intended to mislead the court.
21. The Cross-Appellant further submitted that during examination-in-chief, the Appellant stated that he was standing off the road waiting to cross when he was struck by the side mirror of the Respondent's vehicle, and that there was a lorry positioned beside him at the time. The Cross-Appellant contended that if the Respondent's vehicle had indeed veered off the road, as alleged, it would logically have also collided with the said lorry a scenario that was never reported to have occurred.
22. Additionally, the Cross-Appellant pointed out that during re-examination, the Appellant stated he slipped on a banana peel after being hit, which caused him to fall back onto the road. Relying on the cases of Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others [2014] eKLR and Mukhwana v. Mulilu & Another (Suing as the Legal Representatives of the Estate of the Late Johnson Mulilu Shiangalangwa), Civil Appeal 137 of 2018 [2022] KEHC 15497 (KLR) (Civ) (17 November 2022), the Cross-Appellant argued that the Appellant's case is riddled with uncertainties and contradictions arising from both his pleadings and oral testimony. Consequently, the Cross-Appellant submitted that the Appellant failed to discharge the burden of proof as required by law.
23. The Cross-Appellant also invoked the equitable maxim that "he who comes to equity must come with clean hands," arguing that the Appellant approached the court with the intention of misleading and hoodwinking it into finding the Respondent negligent based on theatrical and inconsistent narratives that do not withstand scrutiny. In support of this argument, the Cross-Appellant relied on the decisions in Gideon Ndungu Nguribu & Another v. Michael Njagi Karimi [2017] eKLR and Commercial Transporters Limited v. Registered Trustees of the Catholic Archdiocese of Mombasa [2015] eKLR. He submitted that the Appellant's version of events was riddled with contradictions, thereby failing to meet the requisite standard and burden of proof. The Cross-Appellant concluded on the issue of liability by urging the court to dismiss the Appellant's appeal with costs.
24. On the issue of quantum as raised in the cross-appeal, the Cross-Appellant submitted that the trial court failed to consider his submissions and instead relied on a precedent involving more severe injuries than those sustained by the Appellant. He argued that, as a result, the trial magistrate misdirected himself in making an excessive award.
25. The Cross-Appellant further submitted that the Appellant relied solely on the medical report prepared by Dr. Titus Ndeti Nzina to support his claimed injuries. He noted that during cross-examination, the doctor confirmed that the Appellant had sustained two bone fractures, but that the soft tissue injuries highlighted in the plaint were not recorded in the discharge summary from the treating hospital. Accordingly, the Cross-Appellant contended that the Appellant exaggerated his injuries by including additional ones not sustained in the accident. Moreover, the doctor admitted during cross-examination that the alleged deformity on the Appellant's lower limb was not physically visible and that no X-ray had been conducted to verify its existence.



26. The Cross-Appellant also submitted that the trial court failed to account for the fact that the medical re-examination was conducted six months after the accident, during which time the additional injuries noted in the report could have been sustained elsewhere. He emphasized that the discharge summary prepared by Machakos Level 5 Hospital where the Appellant was treated should have been the primary basis for assessing the injuries. This summary, he argued, formed the foundation of the doctor's report. Relying on the decisions in *Gladys Lyaka Mwomber v. Francis Namatsi & 2 Others* [2019] eKLR, *S.D.V. Transami (K) Limited v. Scholastic Nyambura* [2012] eKLR, and *Simon Mutisya Kavii v. Simon Kigutu Mwangi* [2013] eKLR, the Cross-Appellant submitted that an award of Kshs. 500,000 would have been adequate compensation for the injuries sustained by the Appellant.
27. In conclusion, the Respondent submitted that the cross appeal on quantum be allowed and be substituted with an award of Kshs 500, 000/= on general damages for pain and suffering and dismiss the appeal on liability.

Analysis and Determination

28. This being a first appeal, The court is guided by the court of appeal decision in *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123. I have carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the Appellant and cross appellant together with all the authorities cited. Having done so, two key issues arise for my determination;
- a. Whether the trial court erred in apportioning liability at 50:50 between the Appellant and the Respondent
 - b. Whether the award of general damages of Kshs 2, 300, 000 was manifestly high
- Whether the trial court erred in apportioning liability at 50:50 between the Appellant and the Respondent
29. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as;
- “Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
30. In this appeal, the dispute is on who was to blame for the accident. The scope and extent of the fundamental legal principles on this subject are settled. In the cases of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR the Courts on this issue held that:
- “In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides same answer adequate to displace that inference.”
31. The Appellant's position is that the Respondent never called any witnesses or evidence to contradict his version of how the accident occurred and who is to blame. He submitted that the accident occurred while he was waiting off the road and that the driver, the Respondent herein had a higher duty of care. The Respondents/cross appellant's position is that the Appellant contradicted himself on where he was because at one point, he stated that he was walking at another he was standing and at another



that he was crossing the road. The cross appellant submitted that the police officer did not confirm speeding and if the vehicle had veered off the road, it should have hit a lorry which the appellant stated was nearby.

32. In examining the evidence presented before the trial court, the Appellant in his plaint alleged that he was walking along Grogon area when he was hit by the Cross-Appellant's vehicle. In his witness statement, which he adopted as his evidence-in-chief, he stated that he was walking on a pavement designated for pedestrians. During the hearing, the Appellant testified as PW3 and on cross-examination stated that there was a lorry beside him, which was off the road and in the process of offloading, and that he was standing beside it. However, during re-examination, he stated that he had stood on the road intending to cross when the Respondent's vehicle, which was being driven on the wrong lane knocked him.
33. PW1, a police officer, testified that the accident was reported on 25th March 2020 and that, according to the report, the Appellant was hit while crossing the road from the right to the left side. During cross-examination, PW1 stated that there were no clear indications of speed limits in the area and that while the vehicle was said to be speeding, he was not certain about the exact point of impact.
34. On the Respondent's part, he closed his case without calling any witnesses but he maintained in his defence that the Appellant was to blame for the accident. This absence of clear, corroborated evidence on either side made it challenging for the trial magistrate to assign full liability on the Respondent.
35. The honourable magistrate in analysing the evidence provided found that both parties were to blame for the accident. The trial court in the judgment observed;

“ At Paragraph 4 of the Plaint, the Plaintiff averred that on the material day he was walking carefully along the Gregon area when he was hit by the Defendant's Motor Vehicle, his testimony, PW3 testified that the Plaintiff was hit while crossing the road. This is a clear contradiction at the point of impact. The plaintiff alleged that the Defendant was over speeding there was no evidence to persuade the court on this, as much as the defendant did not controvert, the plaintiff had a duty too sufficiently proof these allegations. The Plaintiff further testified that the Defendant moved from his rightful lane, again no sketch maps were presented before court to proof this. Counsel submitted that on the principle of res ipsa loquitor, the Defendant had a burden of proof to give an explanation. I totally agree that in the circumstances of this case, where the accident appears to have happened suddenly and the Defendant did not tender any evidence against the Plaintiff then res ipsa loquitor arises however the facts as presented by the Plaintiff do not speak for themselves, the evidence and pleadings are not at par. The questions that are not clearly answered is at which point did the accident happen? Was the Plaintiff crossing or was waiting to cross?.....

I am persuaded to find that both parties are to blame for the accident and shall proceed to apportion liability at 50;50%.”

36. Having gone through the record, it is undisputed that the accident occurred on 25th March 2020, involving the parties in this case, as corroborated by the police officer's testimony and the police abstract. However, the investigation remains incomplete, leaving the exact details and conclusions of fault unresolved. With both parties attributing blame to each other and without conclusive evidence on either side, the court is compelled to assess the accident's circumstances based on the available particulars.
37. Given this lack of definitive evidence and the absence of eyewitness testimony, it was reasonable for the trial court to apportion liability equally between the parties. This approach reflects a fair and balanced



resolution given the inconclusive nature of the findings. . I agree with the trial court’s application of logic in reaching this decision.

38. I am guided by the Court of Appeal decision in the case of Stephen Obure Onkanga v Njuca Consolidated Limited (2013) eKLR where the Court of Appeal when faced with similar situation held that;

“ Accordingly, in the instant appeal, as there was no concrete evidence to distinguish between the blameworthiness or otherwise of the Appellant or the Respondent, both should be held equally to blame.”

39. To this end, I am satisfied that the learned trial magistrate correctly apportioned liability between the parties in the manner that was done, and I see no need to interfere with the finding on liability. To this extent, the appeal fails.

Whether the award of general damages of Kshs.2,300,000 was manifestly high

40. The principles upon which this court can interfere with an award of damages made by the trial court are well settled. In *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. (Emphasis mine).

41. Additionally, the Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated as follows: -

“ Comparable injuries should attract comparable awards”.

42. In the present suit, I note that the only sub set of quantum in contention is the sum of general damages. PW2 confirmed the injuries suffered by the Appellant but confirmed that soft tissue injuries were not indicated in the Discharge summary issued at Machakos Level 5 Hospital, where the primary and initial treatment is said to have occurred. In that regard, with the exception of soft tissue injuries, the injuries suffered as was stated at Paragraph 6 of the Appellant’s plaint dated 11th November 2020 are; blunt injuries to the right side of head, blunt injuries to the anterior chest wall, blunt injuries to the left elbow, segmented fracture proximal right tibia bone, segmented fracture proximal right fibula bone, fractured distal right tibia, deformity on the right lower limb, scars on the right limb, occasional pain on the injured site, inability to walk without support, functional permanent incapacity at 10%.

43. This court has considered the award of Kshs.2,300,000/= granted by the Trial court which was based on the authority of *Mary Wanja Gachombash versus Josinta Adhiambo Ogana* [2021] eKLR. It is noted that the trial court relied solely on the authority referenced by the Appellants in their submissions before the trial court.

44. I have considered other comparative cases where awards for leg fractures and permanent incapacity were made as follows:



- a. In Nyoro & another v Thande (Civil Appeal E438 of 2022) [2024] KEHC 9059 (KLR) (Civ) (26 July 2024) (Judgment), where the Plaintiff suffered Fracture of the tibia/fibula with 10% permanent incapacity, the court awarded general damages of Kshs 1, 200, 000/=
 - b. In Mwangi v Kahoro (Civil Appeal E360 of 2023) [2024] KEHC 10577 (KLR) (23 July 2024) (Judgment) where the Plaintiff suffered Fracture of the right fibula, severe blunt trauma, bruises on the elbow, and blunt trauma on the wrist, the court awarded the Plaintiff general damages of Kshs.750, 000/=
45. Considering the foregoing referenced authorities, I am persuaded that the general damages amounting to Kshs.2,300,000/= was excessive and proceed to set it aside. Consequently, I award Kshs.1,500,000/= as general damages for pain and suffering, factoring in the severity of the Appellant’s injuries— which exceed those in the previously cited cases— the duration of recovery, and prevailing inflation trends
46. Since the award of special damages has not been contested, I will not address it.
47. From the foregoing therefore I find no merit in the Appeal and proceed to dismiss it. The cross appeal succeeds in the following terms;
- a. Liability – 50:50% is upheld
 - b. General damages for pain and suffering of Kshs.2,300,000/- is set aside and replaced with an award of Kshs.1,500,000/=
 - c. Damages for diminished earning capacity – Kshs.18, 926/=
 - d. Special damages- Kshs.9, 606/=
Less 50% contribution- Kshs.764, 266/=
Total = Kshs.764, 266/=
 - e. Costs of the suit and interest of the lower court case is awarded to the appellant
 - f. Each party shall bear its own costs of the appeal and cross appeal.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....For Appellant

.....For Respondent

Sam Court Assistant

