Polo v Mungei (Civil Appeal E013 of 2023) [2025] KEHC 6770 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6770 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E013 OF 2023

BM MUSYOKI, J

MAY 23, 2025

BETWEEN

CRESENCIA ACHIENG POLO .... APPELLANT

AND

JAMES MOKUA MUNGEI .... RESPONDENT

(Being an appeal from the judgment and decree of Hon. S. N. Telewa (SRM), delivered on the 16th December 2022 in Kisumu CMCC No. 324 of 2018)

JUDGMENT

1. The appellant and the respondent were dissatisfied with the entire and part of the judgement of the trial court respectively. The appellant disputed the finding on both liability and quantum while the respondent was not satisfied with award of general damages for pain and suffering and the court's failure to award damages for loss of earning capacity.
2. The appellant's memorandum of appeal dated 24th January 2023 raises the following grounds;
    1. That the learned trial Magistrate erred in law and fact in failing to dismiss the respondent's suit as he had not proved his case on a balance of probability.
    2. That the learned trial Magistrate erred in law and fact in failing to hold the Respondent wholly and/or substantially liable for the accident.
    3. That the learned trial Magistrate erred in law and fact in holding the appellant 100% liable for the accident when there was no sufficient evidence to support that finding.
    4. That the learned trial Magistrate erred in law and fact in over relying on the evidence of the respondent which was not corroborated.
    5. That the learned trial Magistrate erred in law and fact in misapprehending the evidence on record hence arriving at an erroneous decision.

6. That the learned trial Magistrate erred in law and fact in shifting the burden of proof on a balance of probability to the respondent.

7. That the learned trial Magistrate erred in law and fact in awarding the Respondent a sum of Kshs. 450,000= as future medical expenses without any justification and/or proof.

8. That the learned trial Magistrate erred in law and fact by failing to evaluate evidence and the injuries sustained by the respondent as evidence in the medical documents.

9. That the learned trial Magistrate erred in law and fact in awarding the respondent a sum of Kshs. 1,500,000= as general damages for pain and suffering that was not proved to the required standard in law.

10. That the learned trial Magistrate erred in law and fact in awarding the respondent a sum of Kshs. 1,500,000/= which was inordinately too high in the circumstances.

11. That the learned trial Magistrate erred in law and fact in failing to consider the appellant's submissions and legal authorities relied upon in support to the defence thereof.

12. That the learned trial Magistrate erred in law and fact by over relying on the respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.

13. That the learned trial Magistrate's decision albeit a discretionary one, was plainly wrong.

3. The respondent in turn filed a memorandum of cross appeal which raises the following grounds;

    1. That the trial Magistrate erred in law and fact in awarding the plaintiff general damages of Kshs 1,500,000/=.

    2. That the trial Magistrate erred in law and fact by refusing to award the plaintiff appropriate award under the ambit of general damages for loss of earning capacity.

    3. That the trial Magistrate erred in law in his finding by failing to properly analyse the exhibits produced before her, the evidence presented before her and the plaintiff's submissions and thereby arriving at the wrong judgment on quantum.

    4. That the trial Magistrate erred in law and fact in failing to give the plaintiff general damages and loss of earning capacity that are commensurate and consistent with the recent decisions from the superior courts.

5. The gist of the matter is that the respondent herein filed suit in the subordinate court against the appellant by way of a plaint dated 9th July 2018 seeking general damages, special damages, costs of the suit and interest thereon following a road traffic accident that allegedly occurred on 5-06-2018 involving motor vehicle registration number KCG 750X (hereinafter referred to as 'the vehicle') and motor cycle registration number KMDU 180H (hereinafter referred to as 'the motor cycle') along Kisumu-Ahero road.

6. The respondent alleged that on 5-06-2018, he was a lawful rider of motorcycle along Kisumu-Ahero road and on reaching Kobura area, the appellant's motor vehicle was carelessly, negligently and/or recklessly driven, managed and/or controlled that it lost control and knocked the respondent as a result of which he sustained serious bodily injuries. The appellant denied responsibility and the matter proceeded to full hearing and the court in its judgment delivered on 16th December 2022 found the

appellant 100% liable and awarded the respondent Kshs 1,500,000.00 in general damages for pain and suffering and Kshs 450,000.00 for future medical expences, costs and interest.

7. This being a first appeal this court is expected to revisit, re-evaluate and re-analyse the evidence of the parties as produced during the trial at the lower court and come to its own independent conclusion but make allowance for the fact that it did not take the evidence of the parties or have a chance to observe the demeanour of the witnesses. This duty was reiterated in the case of Susan Munyi v Keshar Shiani [2013] KECA 472 (KLR) where the Court of Appeal held that;

> " As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

8. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them.'

9. The respondent's case started with the testimony of one George Mwita a senior clinical officer at Ahero Sub-County hospital. He confirmed that he attended to the respondent who had been involved in an accident on 5-06-2016 and on the same day and referred him to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH). He produced a P3 form he confirmed to have filled which showed that the respondent had sustained chest pain, back pain, lacerations of the left hand, amputated left leg below the knee joint and fracture of the femur.

10. The respondent testified as the second witness and stated that on 5-06-2016, he was lawfully riding the motor cycle along Ahero-Kisumu road while on his lawful lane towards Kisumu. At Kobura area, there were two vehicles coming from the opposite direction and the one behind attempted to overtake the one ahead without proper look out as a result of which it collided into the motor cycle which caused him to suffer serious injuries. He further stated that the vehicle was at a high speed and was wavering on the narrow road. He stated that it was not safe for the vehicle to overtake and that the speed at which the vehicle was moving prevented the driver from controlling it or avoiding the accident.

11. He was rushed to Ahero Sub-County hospital and then referred to JOOTRH and later to Moi Teaching and Referral Hospital (MTRH). He claimed to have suffered injuries to the head, pain in the neck, tenderness in the chest, backache, tenderness and lacerations on the left hand, amputated right leg below the knee joint, degloving injury to the right thigh and fracture of the right femur. He stated that the injuries left him with permanent injuries. The accident was reported at Ahero police station. The respondent produced treatment records and police abstract, copy of records and demand letters as exhibits in his case.

12. He claimed to have incurred medical costs of Kshs 7,647.00 but did not have receipts for the same. He claimed that at the time of his testimony, he had not healed as he still had pains on his right leg, back and chest. He stated that he used to work as a security guard before the accident and that he could no longer perform those duties. He has to use crutches which he did not use before the accident.

13. In cross-examination, he stated that there were other motor vehicles coming from the opposite direction. He maintained that the appellant's motor vehicle was trying to overtake before hitting him

and that the accident was on the yellow line. He denied that he was heading to a car wash. He also admitted that he did not have a driving licence or insurance cover and that added that he was wearing a helmet and a reflector jacket. He also stated that there was a trailer ahead of him which was moving very fast.

14. Hellene Amollo was the third witness for the respondent. She stated that she was a senior health information manager at JOOTRH. She confirmed that the respondent was admitted to the said hospital on 5th June 2016 after having been involved in an accident. She produced a discharge summary dated 16-06-2019, invoice and Xray report dated 23-05-2016. She however admitted that she did not attend to the patient and she was not a doctor. She added that the patient never visited the hospital after the discharge.

15. PC William Rono the fourth witness told the court that he was performing general duties at Ahero police station. He stated that he was in court to produce an abstract in respect of the accident in question. He stated further that the case was pending under investigations and that the investigations officer had been transferred to a different station. He produced the abstract as the plaintiff's exhibit 8.

16. He stated that he did not visit the scene of the accident and he had no idea on how the accident occurred. He identified another abstract dated 16-06-2021 which was marked as DMFI1 and confirmed that it showed that the rider was to blame. He added that position could have bearing on the case as the investigations were not complete although the same was not legible.

17. Doctor Rono who stated that he was a medical practitioner testified as the fifth witness for the plaintiff. He was working at MTRH. He testified that he was conversant with the handwriting of the doctors who attended to the respondent who he identified as Paragoha and Lusheti. He confirmed that the respondent suffered severe injuries on the foot, fracture of the femur and tibia. He added that the respondent had undergone amputation of the left leg from the knee due to the fracture of the tibia and had the fracture of the femur fixed with a metal. The respondent was last seen in the hospital on 13-09-2016. The witness added that the respondent was discharged on 4th August 2016. He added that the respondent needed an artificial leg.

18. The plaintiff's sixth and last witness was Doctor Olel Onyango a surgeon practising in Kisumu. He testified that he compiled a report on the respondent on 11-05-2018. In doing so, he relied on documents from Ahero Sub-County hospital and JOOTRH. According to him, the respondent suffered communited compound fracture proximal middle 1/3 of the right tibia, fracture of middle 1/3 of the right femur, soft tissue injuries of the left hands and cut wounds on the head and scalp. He had been treated with antibiotics and his leg amputated and one of the fractures fixed. He had a wound which had taken long to heal and he would need Kshs 450,000.00 for treatment. He produced his report dated 11th May 2018.

19. The defence called two witnesses the first one being the appellant. She told the court that on the fateful day, she was driving from Kisumu to Homabay. She claimed to have been driving at 60 kilometers per hour when a motor cycle from the opposite direction turned right towards her car. It came towards her side and despite her hooting, flashing lights and swerving to avoid the accident, the motor cycle hit her on the right side. The motor cycle did not indicate that it was turning to the right. According to her, the motor cycle was being ridden very fast and it was to blame for the accident. She denied that she was overtaking and that she was drunk. She also insisted that the accident happened on her lane.

20. The second defence witness was Corporal Rodjun Simiyu who was based at Ahero police station performing traffic duties. He testified that the accident occurred at Kobura area. According to him, the rider failed to give way. Instead, the rider made a right turn. The appellant tried to swerve to avoid the

accident but the rider hit the motor vehicle on the right side. He added that the investigations officer blamed the rider. According to him, the rider was incompetent because he did not have a licence and the motor cycle was not insured. He added that the rider ought to have stopped for the vehicle to pass before he turned right. The rider was also blamed because he did not indicate that he was turning right. He produced another police abstract as the appellant's exhibit.

21. When he was cross-examined, he stated that he was not the investigations officer and his exhibit was not legible and it did not have the name of PC Susan who was said to be the investigations officer. The police abstract he produced was said to have been issued on 8-06-2016. The witness admitted that he did not visit the scene. He also stated that the police normally look at the impact to establish who was to blame in an accident.

22. The appellant's last witness was a private investigator known as David Kamau who had carried out investigations under instructions from the appellant's insurer. He produced his report dated 15-06-2020. The summary of it is that the rider was to blame for the accident. His narration on how the accident occurred was similar to that of the appellant. He stated that he did not speak to the respondent

23. I have read the submissions of the parties in this matter. The appellant's submissions are dated 23rd April 2024 while those of the respondent are dated 4th March 2024. I have also considered the authorities cited by the parties despite them being unnecessarily voluminous especially those of the respondent. In my opinion, the accident is not disputed neither is the nature and the extent of the injuries suffered by the respondent. What is in contention in this appeal is the quantum of damages and liability.

24. I will start with the issue of liability. From the testimonies of the appellant and the respondent, it is a case of one's word against the other's. The appellant insists that the respondent made a right turn and hit her car from the right side while the respondent maintains that the appellant swerved and caused the accident in the middle of the road. The interesting part is that both called police officers from the same station to support their cases. The two officers produced an abstract with different results of investigations. The first abstract to be obtained blamed the rider while the latter indicated that the case was still pending under investigations.

25. The police officer who testified on behalf of the appellant blamed the respondent and the one who testified on behalf of the respondent maintained that the case was pending under investigations. Both admitted that they did not visit the scene and were not the investigations officer. None of them gave account of which part of the motor vehicle or the motor cycle were damaged to enable the court appreciate the point of impact which would have assisted in reconciling the damages with the versions of the story given by the parties. To say the least, this is an embarrassment to the police service. One must be left wondering whether the police station can be trusted as a source of the truth and whether the two officers were authorised by the same station head to testify on the same accident.

26. The testimony of the private investigator is not in my opinion credible enough to be relied on by the court. The report was made four years after the accident. The investigator did not interview the respondent or conduct any independent witness. Worse, his sketch plan shows that the point of impact was off the road on the left side of the appellant's way while the appellant is on record telling the court that the accident occurred on her lane and not off the road. The report also alleges that the respondent should be blamed because he was incompetent for lack of licence and the motor cycle was not insured. In my view, lack of licence or insurance cover does not necessarily mean that the rider was the cause of the accident. He may as well have lacked these statutory documents but that is an issue for another cause of action and not negligence.

27. With the above set of facts and evidence, this court finds it difficult to apportion liability on any of the two antagonists and I am minded to follow the established principle that where a collision between two or more vehicles occurs and the court is unable to make a decision on who is to blame based on the evidence placed before it, it should apportion liability equally among the vehicles. I am guided by authority of Hussein Omar Farar v Lento Agencies C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it held that-

> " In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

28. I now turn to the issue of quantum. The parties are not at variance as to the injuries the respondent sustained. The injuries have been reproduced in the evidence of the respondent and the doctors above. What I think I need to emphasize is that, the respondent spent a week at JOOTRH and about a month at MTRH and again another week in MTRH. The discharge summaries from MTRH show that he was there twice. That is from 11-06-2016 to 17-07-2016 and again on 31-07-2016 to 4-08-2016. He is said to have visited MTRH until 13-09-2016. The amputation was caused by development of gangrene on the leg where he suffered fracture of the tibia. The fracture of the femur was fixed and it would appear that it healed except for the pains he is said to have complained of at the time of examination by PW5.

29. The appellant has asked the court to award a sum of Kshs 250,000.00 for pain and suffering. The respondent has complained that the amount of Kshs 1,500,000.00 is too low compared to the injuries sustained and asks the court to award Kshs 3,500,000.00. In my assessment both parties are pulling too much to their side. The authorities they have cited do not match the injuries suffered by the respondent.

30. In my view, I think the case of Mose & another v Ochieng [2024] KEHC 4875 (KLR) where the respondent had sustained fracture of mid femur bone, multiple lacerations on the left knee, crash fracture left foot (distal tibia-fibula area), amputation below the left distal (tibia-fibula area) of the left foot and multiple soft tissue injuries and was awarded Kshs 1,800,000.00 for general damages for pain and suffering by the subordinate court which was upheld on appeal is more comparable to the case before me. Same goes for Sindano v Keino [2022] KEHC 10375 (KLR) where the Honourable Judge upheld an award of Kshs 2,000,000.00 for fracture of the right ulna distal, crushed right leg leading to amputation below the knee and fracture of the right femur. The first judgement was delivered on 14-05-2024 while the second one was delivered on 19-05-2022

31. While appreciating that it is not possible to have different cases involving exactly the same injuries, the courts ought to seek the closest of the cases and keep the trend of the award in comparable levels. Taking all relevant factors into consideration, I hold that a sum of Kshs 2,000,000.00 would be reasonable to ameliorate the suffering of the respondent noting that he will never be able to use his amputated limb again. I find the award of Kshs 1,500,000.00 given by the Honourable Magistrate on the lower side.

32. On future medical expences, the appellant submits that the same is a special damage and should have been specifically pleaded and strictly proved. I have noted from the plaint at paragraph 8 that the plaintiff had pleaded that he would incur great loss and expences to enable him fully recover. Prayer 'c' of the plaint also asked for future medical expences although it does not indicate of how much. It is also notable that the respondent had filed his documents together with the suit. Among the documents so filed was medical report Doctor Olima dated 11-05-2018 which indicated that the respondent would

need a sum of Kshs 450,000.00 for knee prosthesis. This to me was enough and sufficient notice of what the respondent's claim for further medical expences would be. The purpose of pleadings is to give notice to, the adverse party of the nature and kind of claim they are expected to defend and in my view the future medial expences were properly pleaded and proved. I therefore find no merits in the ground of appeal and I dismiss it.

33. The last bit of this judgment is on the respondent's cross appeal. I have already made a decision on the general damages for pain and suffering and loss of amenities and I don't have to repeat it here. What remain of the cross appeal is the claim that the court erred in failing to award damages for loss of earning capacity.

34. The plaint did not indicate or have a plea for damages for loss of earning capacity. These damages are awarded to compensate a claimant for diminished prospects of getting a job similar to that he used to have before the accident or alternative job that can attract the remuneration or income to keep the claimant in the same status of lifestyle he had or enjoyed before the accident. The plaintiff must prove to the satisfaction of the court that the injuries he sustained will keep him in a lower level of earning than he used to be before the accident concurred. A basis must be laid for such compensation to be awarded.

35. In his testimony, the respondent did not lead evidence to establish or prove what he used to do and earn before the accident. The only semblance of this is a short statement where he stated that he used to be a security guard. He did not tell the court how much he used to earn from that job and what efforts he has since made to get a similar job and failed. He did not even mention for whom or which entity he used to work as security guard or officer. In view of this, I do not see any basis for such damages and the cross appeal must fail on that part.

36. In conclusion, I find that both parties have been partly successful. The appeal and cross appeal are allowed to the extent that the judgement and decree of the lower court is hereby set aside and substituted for orders as follows;

    1. Liability shall be 50:50 with each party taking half of the blame.

    2. Subject to (1), above there shall be judgement for the respondent against the appellant as follows

        a. General damages for pain and suffering Ks hs 2,000,000.00.

        b. Future medical expences Kshs 450,000.00.

        c. Cost of the suit in the lower court.

        d. Interest on 'a' and 'b' above from the date of judgement of the lower court until payment in full.

    3. Each party shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Mr. Kamau for the appellant and Mr. Owuor for the respondent.