



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Baya v Kipkemboi (Civil Appeal E106 of 2024)
[2025] KEHC 12071 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 12071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E106 OF 2024**

F WANGARI, J

JUNE 9, 2025

BETWEEN

MUSA FUNDI BAYA APPELLANT

AND

RONO JOSEPH KIPKEMBOI RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. Nyariki J.
SRM delivered on 01/12/2022 in Mombasa CMCC No. 1414 of 2016)*

JUDGMENT

1. The Plaintiff/ Appellant filed a suit in the lower court through the Plaint dated 12/07/2021 claiming General and Special Damages as a result of an accident that occurred on 04/03/2020 involving Motor Vehicle registration number KBV 125H owned and driven by the driver of the Defendant/ Respondent, while the Plaintiff/ Appellant was a pillion passenger in an undisclosed motor cycle.
2. It was pleaded that the Defendant's driver carelessly drove his motor vehicle by encroaching the Plaintiff's lane causing it to hit the motor cycle resulting to serious injuries sustained by the Plaintiff.
3. The Plaintiff set forth particulars of negligence for the accident. The Plaintiff pleaded Kshs. 4,450/= as Special Damages and injuries as follows:
 - a. Comminuted fractures of the right patella knee cap bone
 - b. Fracture of the right tibia leg bone
 - c. Cut on the knee
4. The Respondent entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint. He pleaded that the accident was caused by the negligence on the part of the owner/ rider of the motor cycle. He prayed that the suit be dismissed with costs.



5. The Trial Court heard the parties and proceeded to render judgement on 26/03/2024. In the Judgement, the Court found that the Plaintiff had failed to proof negligence on the part of the Defendant as ‘there was no link between the accident, the Defendant and the Plaintiff’. The suit was dismissed with costs to the Defendant.
6. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this appeal on grounds that the trial magistrate erred in law and fact by holding that the Plaintiff had failed to proof his case on a balance of probabilities. He prayed that the appeal be allowed and the Defendant be held liable for the accident and assessment of damages be carried out.
7. The court directed that the appeal be disposed off by way of written submissions. Both parties complied by filing the rival submissions which I have perused and considered.

Analysis

8. Having perused through Record of Appeal and the submissions filed, the issues for determination are;
 - a. Whether the appeal has merits
 - b. Who bears the costs
9. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (See *Peters vs Sunday Post Limited* [1958] EA 424) and *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
10. On liability, The Appellant urge this court to find that the trial court erred in failing to find the Respondent 100% liable for he was to wholly blame for the accident. On the other hand, the Respondent’s case is that the judgement of the lower court was correct and should not be disturbed.
11. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
12. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case.
13. It is settled that the standard of proof on civil cases is on a preponderance of probabilities. In re-evaluating the evidence, I note that both parties admit that there was an occurrence of the accident. The Plaintiff testified that it was the Defendant’s driver who negligently drove his motor vehicle and hit the Plaintiff’s motor cycle resulting to injuries sustained by the Plaintiff. He said the Defendant’s driver left his lane and collided with the motor cycle.
14. The Defendant’s driver testified and stated that he was negotiating a corner when the motor cycle emerged from the opposite direction leaving its lane thus colliding with the motor vehicle. The rider of the motor cycle ran away. Other motor cycle riders came and they were becoming rowdy. That is when the driver left the scene and went to the police station and reported the accident.



15. I note that on cross examination, the Defendant's driver stated that by the time he was reaching the scene of accident, the motor cycle had already fallen. Under the same breath, he stated that it was the motor cycle that hit his vehicle.
16. In order to get the proper position, I have perused through the Defendant's driver witness statement dated 06/07/2022. He stated that he was negotiating a sharp bend when the motor cycle emerged from the opposite direction and the 2 vehicles collided as the motor cycle encroached into the lane of the Defendant's vehicle. I find the true position is that there was collision between the Plaintiff's motor cycle and the Defendant's vehicle.
17. I have also perused through judgment and the reasoning of the trial magistrate was that there was no link between the accident, the Defendant and the Plaintiff's injuries. He based the reasoning on the evidence that the Defendant's driver was working with Mombasa Maize Millers and the accident had already occurred by the time he reached the scene as the motor cycle had already 'fallen'. I do agree with the appellant that the trial magistrate did not consider the evidence adduced as discussed herein above.
18. On who was to blame for the accident, the Defendant in the Statement of Defence stated that it was the rider of the motorcycle that was on the wrong. The Plaintiff said it was the driver of the Defendant's vehicle that was on the wrong.
19. The traffic police officer who testified on behalf of the investigating officer, one P.C Eric Jefwa testified that the Defendant's lorry was the one that was driven to the motor cycle's lane hitting it with the front side, causing the motor cycle to veer off the road and fall on its side. The Plaintiff who was the pillion passenger suffered injuries. The motor cycle details were unknown as it had been taken away from the scene of accident. On cross examination, he said the investigations were still pending and nobody had been blamed for the accident.
20. The Plaintiff being a pillion passenger was in no way blamed for the accident. From the evidence, and in the absence of third party proceedings being instituted by the Defendant, maybe due to the fact that the motorcycle was removed from the accident and details were unknown, the fact that there was a collision has been proved by the Plaintiff.
21. I find that both the Defendant's vehicle and the motorcycle were to blame for the accident and apportion liability on 50:50 basis between the two vehicles. The sketch plan and photos relied on by the Defendant are inadmissible as the author has not been disclosed, and there is no document in support of the same.
22. The trial court did not assess damages that ought to have been awarded had he found the Defendant liable. The Appellant suffered fracture of the right kneecap bone and the right tibia. He also suffered cut wound on the right knee. He was found to have developed 11% permanent incapacity as per the medical report.
23. The Appellant in the submissions dated 27/02/2025, he relied inter alia on the case of Shadrack Mathias & ano. v Agnes Muluki Wambua [2021] eKLR and Godfrey Wamalwa Wamba & ano v Kyalo Wambua [2018] eKLR proposing an award of Kshs. 1,000,000 as General Damages.
24. The Respondent in the submissions dated 07/03/2025 did not submit on quantum of damages. I have however perused through the Defendant's submissions in the lower court dated 14/11/2023. Relying on the case of Patrisis Adhiambo v Emily Mandala [2020] eKLR, a proposal of Kshs. 250,000 was made for the injuries sustained. It was submitted that the examination done two years after the accident showed that the Plaintiff had healed with zero disability.



25. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 - 2) The award should be commensurable with the injuries sustained.
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high.
26. In Ali Malik Brothers Motor (K) Limited and Another v Emmanuel Oduor Onyango NRB HCCA No. 252 of 2016 [2018] eKLR, the plaintiff sustained a fracture of the pelvic sprain hymen and cuts of the right knee and was awarded Kshs. 700,000/- which was affirmed by the High Court. In Joseph Njeru Luke & 3 others v Stellah Muki Kioko [2020] eKLR, the Plaintiff sustained pelvic fractures and soft tissue injuries, the High Court reduced the Lower Court's award of Kshs. 1,700,000 to Kshs. 750,000.
27. From the above, the Plaintiffs suffered injuries almost similar to those suffered by the Respondent. Considering the loss of value for money over the years, I find that the award of Kshs. 700,000 granted as general damages would be commensurate to the injuries suffered. The Respondents takes 50% liability of the same.
28. On special damages, the receipts from the hospital produced amount to Kshs. 3,150/=. The other receipts relied on do not have the evidential value as they do not bear the name of the Plaintiff.
29. On costs, the appeal being successful, costs are awarded to the Appellant both in the lower court and on appeal.

Determination

30. In the upshot, I make the following orders: -
- a. The Appeal has merits and the lower court judgment dated 26/03/2024 is set aside and substituted with judgment of this court on the following terms;
 - i. The Respondent is found to be 50% liable for the accident
 - ii. General damages are awarded at Kshs. 700,000/= less 50% liability
 - iii. Special Damages awarded at Kshs. 3,150/= less 50% liability
 - b. Costs awarded to the Appellant both in the lower court and on appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 9TH DAY OF JUNE, 2025.

.....

F. WANGARI



JUDGE

In the presence of;

N/A by the Appellant

N/A by the Respondent

Ms. Getrude, Court Assistant

NB: Judgment released to the registry. Parties be notified.

