Kenya Water Towers Agency v Boit (Civil Appeal 112A of 2022)
[2025] KEHC 8620 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8620 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 112A OF 2022

RN NYAKUNDI, J

JUNE 19, 2025

BETWEEN

KENYA WATER TOWERS AGENCY ..... APPELLANT

AND

MESHACK KIPRONO BOIT ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon.N. Wairimu, Senior Principal Magistrate delivered in Eldoret CMCC No. 1165 of 2018 on 8th July, 2022)

JUDGMENT

1. The appeal is both on quantum and liability. In the trial Court the Respondent had sued the Appellant claiming general damages, special damages plus costs and interest of the suit arising from road accident that occurred on 18.10.2018, wherein it is alleged that the defendant's driver, agent and or servant so negligently and carelessly drove, managed and or controlled motor vehicle registration number KCP 290K Toyota Prado along Eldoret – Nakuru road at poa place junction area that he caused it to ram onto motor cycle registration number KMDV 820Y occasioning serious bodily injuries to the Plaintiff a lawful rider of the said motor cycle.

2. In response to the Plaint, the appellant submitted a defence and counterclaim, categorically denying liability for the accident. The appellant instead contended that the respondent's own negligent acts and omissions were either wholly responsible for or substantially contributed to the causation of the accident in question.

3. After trial Judgment was delivered on 12/07/2022 and the court apportioned a liability of 70:30 and damages assessed as hereunder: -

    a. General Damages..... Kshs. 500, 000/=

    b. Special Damages..... Kshs. 98,318/=

c. Plus, costs and interests

4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (12) grounds: -

a. The Learned trial magistrate erred by arriving at finding on liability at 100% against the Appellant which was not supported by evidence adduced at the hearing.

b. The learned trial magistrate erred both in law and fact in failing to note from the evidence tendered that the Respondent were fully liable for occurrence of the accident.

c. The learned trial magistrate erred both in law and fact in failing to apportion a greater percentage of liability on the Plaintiff despite the said Plaintiff having been shown to have been overtaking at the time of the accident.

d. The learned magistrate erred in law in completely misinterpreting the doctrine of subrogation under Insurance Law.

e. The learned Magistrate erred in fact and in law in disregarding the evidence of all witnesses presented by the Appellant.

f. The learned magistrate erred in law and in fact in failing to appreciate or take into account the Appellant's submissions or at all.

g. The learned magistrate erred in law and fact in awarding Kshs. 500,000/= as general damages despite the fact that the Respondent only suffered one fracture.

h. The learned magistrate erred in law by awarding Kshs. 98,318/= as special damages where the same was not proved by production of receipts.

i. The Respondent's case was not proved on balance of probability as is required by law.

j. The learned Magistrate erred in law and in fact in dismissing the Appellant's Counterclaim.

k. The learned trial magistrate erred both in law and fact in basing her findings on the irrelevant matters.

l. The learned trial magistrate erred on all points of fact and law in as far as both liability and quantum are concerned in the Respondent's suit and the Appellant's counterclaim.

5. The appeal was canvassed through written submissions. The Appellants filed written submissions dated 14th February, 2024 whereas the Respondent filed submissions dated 7th March, 2024.

The Appellant's Submissions

6. On liability, Learned Counsel Mr. Kibichiy submitted that the trial magistrate's decision was erroneous on both liability and quantum, arguing that the magistrate misdirected herself on issues of law, thereby arriving at an erroneous decision. In support of his argument, he relied on the case of *Securicor Security Services vs. Joyce Kwamboka Ongonga & Another Kisii HCCC No. 230 of 2005*.

7. Learned Counsel Mr. Kibichiy submitted that the Respondent failed to adduce any evidence proving a causal link between the plaintiff's injuries and the defendant's negligence. He noted that the Respondent did not call any eye witness to narrate how the events transpired, nor did he produce any evidence from which any inference about how the accident occurred could be made.

8. Regarding the police officer who testified, Learned Counsel Mr. Kibichiy submitted that on cross-examination, the officer confirmed he was not the investigating officer, did not visit the accident scene, did not witness the accident, and was only in court to produce the police abstract. That the officer was vague about the particulars of the accident and did not have the police file or sketch maps to ascertain the occurrence of the accident or determine fault.

9. In support of his argument, Learned Counsel Mr. Kibichiy relied on the case of Evans Mogire Omwansa Vs. Benard Otieno Omolo & Another [2016] Eklr, where the court held that statements in police abstracts, unless corroborated by evidence from the investigating officer, are not sufficient and conclusive.

10. Furthermore, Learned Counsel Mr. Kibichiy submitted that the plaintiff did not produce his valid driving license, which could only be construed as evidence of him not having one. On cross-examination, the plaintiff also admitted to not wearing a helmet or reflective jacket. He argued that since it is incumbent on the plaintiff to prove his case, he ought to have called an eye witness to explain exactly how the accident occurred, a duty which the plaintiff failed to discharge.

11. On the quantum, Learned Counsel Mr. Kibichiy submitted that the learned trial magistrate erred in awarding damages to the Respondent given the circumstances of the case. He argued that the magistrate should have dismissed the Respondent's claim with costs for lack of sufficient evidence to hold the Appellants responsible for the injuries.

12. Alternatively, Learned Counsel Mr. Kibichiy submitted that the trial magistrate's award of damages was inordinately high and manifestly excessive for the injuries allegedly suffered by the Respondent. He referenced comparable cases with similar injuries, including Stanley Maore vs. Geoffrey Mwenda, NYR CA Civil Appeal No.147 of 2002 [2004] eKLR, which established that comparable injuries should be compensated by comparable awards.

13. Learned Counsel cited the cases of Kenya Power Lighting Company Ltd & Another v. Zakayo Saitoti Naingola & Another (2008) eKLR and the case of Bhanchu Industries Limited v. Peter Kariuki Mutura NRB HCCA No. 503 of 2009 (2015) eKLR where the court awarded Kshs. 300,000 on comparable injuries.

14. For special damages, Learned Counsel Mr. Kibichiy submitted that the plaintiff prayed for Kshs. 98,318/= but did not produce receipts proving he incurred this amount. He relied on Kenya Power & Lighting Co. Ltd v Clement Likobele Shikondi [2018] eKLR, where the judge stated that special damages must not only be specifically pleaded but also specifically proved.

15. Regarding the counter-claim, Learned Counsel Mr. Kibichiy submitted that the Appellants called four witnesses to support their defence and counter-claim dated 3rd March 2020. He argued that the court failed to consider the counter-claim despite evidence being tendered to that effect. He noted that while the trial court apportioned 30% liability against the Plaintiff in the primary suit, it erred by failing to apportion the same liability in the counter-claim.

16. Learned Counsel Mr. Kibichiy elaborated on the testimony of the witnesses called by the Appellant:

17. DW-1, an investigator from Web Insurance Assessors, produced an investigation report (Dexh 1) and confirmed payment of Kshs. 40,320/= as per the invoice. His sketch map showed the accident occurred at the Poa-place junction where the insured was joining the highway. The witness testified that the Respondent's motorcycle wrongfully overtook stopped vehicles without caution, leading to the collision.

18. DW-2, Philip Kibish Amasa, the driver of the appellant's vehicle (KCP 290K), confirmed the circumstances identified by DW-1 and blamed the motorcycle rider for causing the accident. He stated that the rider lacked a license, proper protective gear, and insurance.

19. DW-3, an assessor from Vision Assessors, confirmed that 32 parts of the Toyota Land Cruiser were damaged, with total repair costs amounting to Kshs. 1,524,580/=.

20. DW-4, Michael Njunguna from UAP Insurance Co. Ltd, testified that they insured the appellant's vehicle and compensated the repairs plus consumables totalling Kshs. 1,579,780, seeking recovery under rules of subrogation and indemnity.

21. Learned Counsel Mr. Kibichiy submitted that the Appellant had proven negligence on the Respondent's part, and the trial court should have found the Respondent 100% liable. He detailed that the Appellant's counter-claim included:

    i. Repair costs: Kshs. 1,524,580/=

    ii. Towing charges: Kshs. 6,380/=

    iii. Investigation fees: Kshs. 40,320/=

    iv. Inspection fees: Kshs. 6,380/=

22. In supporting the validity of the assessment report as evidence of material damage, Learned Counsel Mr. Kibichiy relied on cases including Mohammed Ali and Another vs. Sagoo Radiators Limited (2013) and Nkuene Dairy Farmers Coop Society Limited & James Kimathi vs. Ngacha Ndeiya (2010) eKLR.

23. In his conclusion, Learned Counsel Mr. Kibichiy urged that the Respondent's suit be dismissed and the Appellant's counter-claim be awarded the amount proved by genuine receipts along with interest and costs.

Respondent's submissions

24. Learned Counsel Mr. Keter submitted on behalf of the Respondent that the claim was based on the law of negligence wherein the learned magistrate found for the respondent as follows: liability apportioned at 70:30, general damages of Kshs. 500,000/=, special damages of Kshs. 98,318/=, and costs with interest. The Appellant's counterclaim was dismissed with costs.

25. Learned Counsel submitted that the appeal gave rise to 12 grounds which could be summarized into three broad categories: (a) appeal against findings on liability, (b) appeal against findings on quantum of damages, and (c) appeal on dismissal of counterclaim.

26. On the issue of liability, Learned Counsel Mr. Keter submitted that the Appellant's driver was wholly to blame in negligence for causing the accident. He provided the brief facts forming the cause of action, stating that the Respondent was a motor cyclist along the main Eldoret-Nakuru road when the Appellant's motor vehicle registration number KCP 290K, while attempting to join the highway from a feeder road, knocked him down.

27. Learned Counsel urged the Honourable court to re-evaluate the evidence of PW2, PW3, and DW3, which he deemed material to the issue of culpability. He submitted that from the analysis of evidence of all witnesses and upon reading the judgment, the following facts were not in dispute:

    a. That an accident occurred on the material day wherein the appellant sustained injuries.

b. That DW3 was the driver of the suit motor vehicle which was owned by the Appellant.

c. That the appellant's motor vehicle was attempting to join the highway from a feeder road when it knocked down the respondent who was on the main road.

d. That between the two, the Respondent had the right of way.

28. Counsel submitted that the Appellant attempted to shift blame to the Respondent by claiming there was another motor vehicle ahead of the cyclist and that the rider was attempting to overtake it. He noted that this particular fact was denied by the Respondent in totality, and PW1, the traffic police officer, did not mention the presence of any other traffic apart from the parties involved.

29. Learned Counsel further submitted that the Respondent did not provide particulars of the alleged third-party motor vehicle, and only DW3 raised this issue. He argued that this was not proven and was merely a desperate attempt at defending itself.

30. Mr. Keter reminded the court that as a first appeal, it has the authority to re-evaluate the evidence afresh and come up with its own finding in the interest of justice. He cited Order 42 Rule 32 of the *Civil Procedure Act*, which gives the court powers to make any order or further order as the case may require on an issue which has been appealed or any other issue, even where no cross-appeal exists.

31. On the matter of quantum, Counsel submitted that the learned trial magistrate awarded general damages of Kshs. 500,000/= and special damages of Kshs. 98,318/=. He noted that the Respondent had sustained a fractured femur bone. He pointed out that the only available evidence on the injuries sustained were those provided by the Appellant, with two doctors testifying and Dr. Sokobe's report showing that the plaintiff had implants in situ which would need further and future operations to remove the plates.

32. Learned Counsel Mr. Keter emphasized that the defendant in the trial court did not call any doctor nor request a second medical examination, effectively leaving the injuries uncontested. He argued that the decision to award damages is discretionary and each case depends on its special circumstances. He cited the decision by this court in Malindi Civil Appeal No. 72 of 2019, Daniel Gatana Ndungu & Another vs Harrison Angore Katana, noting that an appellate court is always slow to interfere with the exercise of discretion unless it is shown to have been manifestly erroneous.

33. Mr. Keter urged the court to consider the current economic situation and effects of inflation, and to award the plaintiff compensation that is fair under the circumstances of his injuries.

34. Regarding the counterclaim, Learned Counsel Mr. Keter submitted that the findings of the trial court dismissing the counterclaim with costs was merited. He argued that the counterclaim was a candidate for dismissal from the very onset, especially on two tenets:

a. As analysed under liability, the Appellant was wholly to blame. He argued that there can be no liability without fault, and a tortfeasor cannot be heard to claim for damages in the name of a counterclaim, as the appellant cannot profit from its own negligence.

b. The appellant's claim was in the form of special damages. He noted that in the counterclaim before court (pages 10, 11, and 12 of the record), the Appellant stated in paragraphs *18*(a), *18*(b), and *20*(a) that the claim was for repair costs and costs of labor and consumables. He emphasized that no figures had been pleaded as to the amount claimed, and it is trite law that special damages must be pleaded specifically and proved, which the appellant failed to do.

35. Learned Counsel concluded that there was no way to "breathe life" into the counterclaim, and the decision by the trial court to dismiss it was the only option available.

36. In his conclusion, counsel submitted that the Respondent had shown that the appellant had not presented an arguable appeal. He maintained that the appeal had fallen short in all aspects, as the Respondent had shown that the appellant's driver was wholly to blame in negligence and the respondent deserves compensation for damages. He prayed that the appeal be dismissed with costs.

Analysis & Determination

37. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123.

38. As stated above the two limbs to this appeal are quantum and liability. I shall deal with the issue of liability first. The appellant has argued that the trial court erred in apportioning liability against the Appellant at 70:30% contrary to the evidence on record and/or adduced during trial.

Liability

39. In determining liability, the court is to have regard to the following matters:

    i. Did any of the drivers involved in the accident fail to keep a proper look out and whether this contributed to the accident

    ii. Was speed a factor in the accident

    iii. On which side of the road did the accident take place

    iv. Whether the driver(s) exercised due care in taking evasive action to avoid the accident.

40. To start with, in the case of Stapley v Gypsum Mines Limited (2) (1953) A.C 663 the court stated that determination of liability in a road traffic case is not a scientific affair. Lord Reid reasoned 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. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

41. Additionally, the Court of Appeal in Michaeal Hubert Kloss & Another vs. David Seroney & 5 others (2009) eKLR addressed the issue of liability and the guidelines to be followed when exercising judicial discretion to apportion negligence in Road traffic accident claims thus:

> " 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 properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that a matter of history several people have been at fault and that of any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally..."

42. In the present case, upon a re-evaluation of all the evidence adduced, it is clear that an accident occurred between the appellant's vehicle registration number KCP 290K Toyota Prado and the respondent's motorcycle registration number KMDV 820Y. The undisputed factual account established that the appellant's vehicle was attempting to join the Eldoret-Nakuru highway when it collided with the respondent's motorcycle that was traveling on the main road. The appellant's contention that the respondent was overtaking other vehicles at the time of the accident was not substantiated by credible evidence.

43. The accident of this nature as described by the evidence has to be evaluated within the principles in the case of Grant v David Pareedon EWCA 1988 in which the court observed: "

> " Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of crucial importance in assisting a tribunal of fact in determining which side is speaking the truth."
>
> The root of liability is negligence, and what is negligence depends on the facts with which you are to deal. If the possibility for the danger emerging to reasonably apparent then to take no precaution is negligent but if the possibility of the danger emerging is only a mere possibility that would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions." (See 'Fosket v Mistry 1984 RTR 1).

44. The Respondent himself testified as PW3, reiterating that he was lawfully riding his motorcycle when the accident occurred. However, on cross-examination, he admitted that he did not have a valid driver's license at the time of the accident, and the officer noted that no helmet or reflector jacket was recovered from him. The accident occurred at 10:30pm when lights would be expected to be on, but there was

no evidence that the rider had his lights on. These admissions point to certain regulatory violations on the part of the Respondent.

45. The Appellant's evidence included testimony from the investigator (DW1) who, while admitting that the defendant's driver was supposed to give way, suggested that the plaintiff was to blame to some extent as he was trying to overtake. Notably, DW1 could not provide the registration number of the vehicle the plaintiff was allegedly overtaking. The Appellant's driver (DW2) also testified and admitted that he was joining the highway from a feeder road and that the person on the highway had the right of way.

46. The trial magistrate correctly identified that the accident occurred while the defendant's driver was joining the highway where the plaintiff had right of way, but also noted that the plaintiff was overtaking at the junction where another vehicle had given the defendant way. Based on these circumstances, the trial court apportioned liability at 70:30 against the defendant and in favor of the plaintiff, recognizing that while the defendant's driver failed to exercise proper caution, the plaintiff's actions also contributed to the accident.

47. Further, although the Respondent had the right of way, he was operating his motorcycle without a valid license, safety helmet, or reflector jacket, all of which are statutory requirements. The accident occurred at night (10:30pm), and there was no evidence that the Respondent's motorcycle had functioning lights. These factors suggest contributory negligence on the part of the Respondent and justify some apportionment of liability against him.

48. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

49. Having carefully analysed the evidence presented at trial, I find no reason to disturb the trial court's apportionment of liability at 70:30 against the Appellant. This apportionment appropriately reflects the primary responsibility of the Appellant's driver to yield when joining the highway, while also accounting for the Respondent's contributory negligence in operating his motorcycle without proper licensing and safety equipment. The trial magistrate carefully considered all relevant factors and arrived at a fair distribution of responsibility that aligns with established legal principles.

50. As to whether the award of general damages of Kshs. 500, 000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards".

51. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.

52. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] Kneller. J.A, stated:

> " 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 either 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 so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango v. manyoka [1961] e.a. 705, 709, 713; Lukenya Ranching And Farming Co-operatives Society Ltd V. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles."

53. The question is whether this court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.

54. To start with, the injuries suffered by the Respondent were listed in the P3 form and the Medical report by Dr. Joseph Sokobe as:

a. Fracture right femur

55. At this juncture it worth pointing out that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.

56. Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

57. From the evidence adduced by Dr. Joseph Sokobe medical report it is clear that the Respondent herein sustained a fracture. While appreciating that money cannot renew a physical frame that has been shattered or battered, the Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.

58. In Said Abdulahhi & Anor v Alice Wanjira Nairobi HCCA No.147 of 2013 the plaintiff suffered fracture of the right humerus and with soft tissue injuries and permanent incapacity of 10% had an award of KShs 600,000 reduced to Kshs. 300,000/-;

59. In Abdullahi & another vs Alice Wanjira (2016) eKLR where the High Court set aside the lower court's award of Ksh.600,000/= and substituted it with an award of Ksh.300,000/= for fracture of the right humerus bone with 10% permanent incapacity.

60. In Daniel Otieno Owino & another vs Elizabeth Atieno Owuor [2020] eKLR where Aburili J. reduced an award of Ksh.600,000/- to Ksh.400,000/- for compound fracture of the tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg.

61. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I substitute the award of Kshs. 500,000/= with an award of Kshs. 350,000/=.

62. Turning to special damages, Kshs. 98,318/= was pleaded and strictly proved as was held in the case of Hahn vs. *Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows;

"Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and

may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

63. In the end the court the award on damages and liability remains undisturbed and is entered in the following terms;

i. General Damages..... Kshs. 350,000/=

ii. Special Damages..... Kshs. 98,318/=

iii. Total .....Kshs. 448,318/=

iv. Less 30% ..... Kshs. 134,495/=

v. Sub-total ..... Kshs. 313,823/=

vi. Plus, costs and interest

It is ordered so.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 19TH DAY OF JUNE 2025

.....

R. NYAKUNDI

JUDGE