



**Litei v Wafula (Civil Appeal E213 of 2024) [2025] KEHC 8152 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8152 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E213 OF 2024**

**A MABEYA, J**

**JUNE 5, 2025**

**BETWEEN**

**FRANCIS LITEI ..... APPELLANT**

**AND**

**HAZEL WAFULA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. M.N. Olonyi RM delivered on the 26/9/2024 in the Tamu SPMC Case No. E002 of 2024, Hazel Namalwa Wafula v Francis Litei)*

**JUDGMENT**

1. The respondent filed the primary suit before the trial court vide a plaint dated 26/1/2024 for general and special damages of Kshs. 282, 252.43 for injuries sustained following a road traffic accident.
2. The appellant entered appearance and filed an amended statement of defence dated 28/3/2024 in which he denied the respondent's claim stating that the vehicle which allegedly caused the accident was not being used for the purposes for which it was meant for.
3. The matter proceeded to trial and by a judgment delivered on 26/9/2024, the trial court found in favour of the respondent as follows: -
  - a. Judgment on liability 100% in favour of the respondent.
  - b. Special damages of Kshs. 43,050/-.
  - c. General damages Kshs. 850,000/-.
  - d. Interest on (ii) and (iii) above from the date of filing suit and from the date of judgment, respectively plus costs.
4. Being dissatisfied with the said judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 18/1/2024 and raised six (6) grounds of appeal as follows: -



- a. The learned trial magistrate erred in law and in fact in holding the appellant vicariously liable despite the overwhelming evidence adduced in court showing that the deceased driver was not acting as the Appellant's servant when the accident occurred.
  - b. That in arriving at his decision on liability, the Learned Trial Magistrate erred in law in appreciating the meaning of the principle of vicarious liability and proceeded to hold the appellant liable for the negligent acts of the deceased driver.
  - c. The Learned Trial Magistrate erred in law and in fact in awarding general damages which were inordinately high in view of the nature and extent of injuries suffered thereby resulting in a miscarriage of justice.
  - d. That the Learned Trial Magistrate erred in law in assessing General Damages for pain and suffering at a sum that was inordinately high as to constitute an entirely erroneous estimate as having regard the nature of the injuries sustained by the Plaintiff/Respondent.
  - e. That the Learned Trial Magistrate erred in fact and law by holding the Appellant wholly liable for the accident without providing reasons and there not existing sufficient evidence establishing the Appellant's negligence.
  - f. In arriving at his decision, the Trial Magistrate did so in a speculative and cursory manner not guided by law or any set of legal principles and failed to exercise his discretion within the applicable principles of law and the failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.
5. The appeal was disposed of by written submissions. The appellant submitted that the trial court erred by misinterpreting the principle of vicarious liability. That it shifted the burden of proof to the appellant by holding that the appellant needed to show that the MV registration number KAV 222W Toyota Corolla was strictly used to take his mother to hospital or use at home and not for the deceased driver's errands.
  6. That the Court erred by attributing negligence to the appellant simply because the suit motor vehicle was a Toyota Corolla with passenger's seats and there being no warning signs "No authorised passengers" the appellant was thus liable.
  7. That he had discharged the burden of proof by demonstrating that the Naivasha trip was not done for purposes of furthering his interest and therefore was acting wholly outside his scope of employment as was similarly held in the case of *BM Security Limited v Kibira & Another* (Civil Appeal No. 12 of 2019) (2025 KECA 166 (KLR) 7<sup>th</sup> February, 2025).
  8. On quantum the appellant proposed an award of Kshs. 300,000/- as was awarded in the comparable cases of *Maina Onesmus v Charles Wanjohi* (2019) eKLR & *Abdulahi & Another v Alice Wanjira* (2016) eKLR.
  9. On his part, the respondent urged the court not to interfere with the trial court's findings stating that to disapprove that he was not 100% vicariously liable for the accident, the appellant would have had to produce an insurance policy that expressly limited the use of the motor vehicle as was held in the case of *APA Insurance Limited v Gatugi* (Civil Case 32 of 2020) [2024] KEMC 18 (KLR) (27 September 2024) (Judgment).
  10. That the appellant's assertions that the suit motor vehicle was for use by family errands/ferrying his mother to hospital amounted to mere allegations lacking any probative value as it was not backed by



any evidence as was held in the case of Omondi v Anzofu (Civil Appeal 04 of 2020 [2024] KECH 2675 [KLR] (13 March 2024) (Judgement).

11. That the appellant was vicariously liable for the accident as from his own testimony, he was the owner of the vehicle and that he gave the late brother express and/or implied authority to drive the same on his behalf. Reliance was placed on the case of Beatrice William Muthoka & Edward Mutisya v Agility Logistics Limited.
12. On quantum, the respondent submitted that the award by the trial court was commensurate to comparable awards for similar injuries in the cases of Alphonza Wothaya Warutu & Another v Joseph Muema (2017) eKLR & Hussein Dairy Ltd v Samwel Mokaya [2016] eKLR. The respondent urged the court to dismiss the appeal with costs.
13. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.
14. Before the trial court, the respondent told the court that on the 14/10/2023 he was given a lift by one Wilfred Litei aboard motor vehicle registration no. KAV 222W, Toyota Corrolla when along the Firiburn-Koru Road at Kamdeuhe Bridge the vehicle lost control, hit the barriers and rolled over leading her to sustain injuries. She testified that the deceased driver offered her the lift.
15. PW2, CPL Josphat Kago produced the police abstract in relation to the accident and further testified that as per the insurance, the appellant was the owner of the vehicle.
16. In his testimony the appellant admitted that the vehicle was his, that his brother, the late Wilfred Litei was driving the vehicle on the date of the accident. That however, the vehicle was only for use at his rural home. He testified that he learnt that on the date of the accident his brother was carrying people who were not family members and thus not authorized to be in the motor vehicle.
17. That the meeting at Naivasha was not family related and thus his brother was not acting as his agent/ servant and or driver at the time of the accident and thus he cannot be linked to the accident.
18. I have considered the evidence tendered before the trial court and the submissions made before me. Having considered the record, the grounds of appeal may be summarized as follows: -
  - a. That the trial court erred in holding the appellant 100% liable for the accident,
  - b. That the trial court erred in granting the respondent general damages which were manifestly excessive and inordinately high as to constitute an erroneous estimate considering the injuries sustained by the respondent.
19. On the first ground, the principles guiding an appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & 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 circumstances, 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.”
20. In Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, it was held that apportionment



of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

21. The law is clear that he who alleges must prove. The question therefore is whether the respondent discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein she was allegedly injured.
22. The respondent had pleaded negligence on the part of the driver of the subject vehicle and thus sought that the appellant be held vicariously liable for the accident. She set out the particulars of negligence in paragraph 5 of the plaint.
23. The respondent was the only witness before court as to how the accident occurred. In her testimony, she adopted her witness statement dated 26/1/2024 as her evidence in chief wherein at paragraph 2 she stated that the vehicle lost control and hit the safety barriers along the climbing lanes and rolled over.
24. As the deceased Wilfred Litei was driving and based in the evidence on record, it is discernible that he was liable for the accident. The question then is whether the appellant should be held vicariously liable for the accident.
25. The appellant argued that the trial court erred by finding him vicariously liable for the activities of the driver notwithstanding that the vehicle was being used for purposes of which he had no interest or concern or for which the vehicle was not designated for.
26. On her part, the respondent argued that no evidence was adduced to prove that the subject vehicle was designated for a specific purpose as alleged by the appellant.
27. Vicarious liability is defined in Black's Law Dictionary 10<sup>th</sup> Edition by Bryan A. Garner as: -

“liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties – also termed as imputed liability”.
28. Further, vicarious liability depends not on ownership but on the delegation of tasks or duty.
29. In *Jane Wairumu Turanta v Githae John Vickery & 2 others* [2013] eKLR, the Court cited with approval the case of *Morgan –vs- Launchbury* (1972)2 All ER 606 wherein it was held: -

“To establish agency relationship, it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner.”
30. In the present case, what came out from the evidence was that the driver of the vehicle was the appellant's brother. He gave a lift to the respondent. The appellant's testimony was that his brother had no authority to carry passengers as the car was meant for use at home to take their parents to the hospital.
31. However, both the court below as well as this Court finds that there was no evidence that was produced by the appellant to affirm this assertion.
32. What emerged from the evidence on record is that, the vehicle was for use by the family and amongst the uses of which was to take the appellant's parents to hospital. The deceased driver was one of the family members authorized by the appellant to use the vehicle. There was nothing to show that he was not permitted to make use of it.



33. In the circumstances and on a balance of probabilities, it is this Court's finding that the respondent established agency on the part of the deceased driver and the appellant. And, that the driver was using the vehicle with the permission of and within the scope permitted by the appellant.
34. Accordingly, I am inclined to uphold the trial court's finding on liability and dismiss the first ground of appeal as summarized by the Court.
35. On the second ground, it is a challenge on the quantum awarded by the trial court. In *Kenya Bus Services Limited v Jane Karambu Gituma Civil Appeal Case No. 241 of 2000*, the Court of Appeal stated that: -
- “... in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”
36. And in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR*, the Court of Appeal held as follows: -
- “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.”
37. From the record, it is undisputed that the respondent sustained soft tissue injuries as well as a fracture of the right radial shaft. In other words, in addition to the soft tissue injuries, the respondent sustained a fracture in the radius bone of the right forearm.
38. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. In *Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR*, the Court of Appeal stated that “comparable injuries should attract comparable awards”
39. In assessing damages, there are certain considerations that a court has to take into account. These include; that an award of damages is not meant to enrich the victim but to compensate him/her for the injuries suffered, that the award should be commensurable with the injuries suffered, previous awards in similar injuries sustained are a mere guide but each case should be treated on its own facts, previous awards to be taken into account in order to maintain stability of awards but factors such as inflation should be taken into account. Finally, that awards should not be inordinately low or high.
40. The duty of this Court therefore is to analyze similar injury cases to arrive at the decision whether the trial court did or did not factor in the principles applicable to the award of general damages.



41. The Court understands that no single case is typically identical to the other. In *Penina Waithira Kaburu v LP* [2019] eKLR, the Court stated: -

“While no injuries occurring in different circumstances can be similar in every respect, and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.”

42. The question that arises is if the award of damages of Kshs. 850,000/- was adequate or excessive. In *Philip Musyoka Mutua v Leonard Kyalo Mutisya* [2018] eKLR, the plaintiff was awarded Kshs. 300,000/- for a fracture of the distal left radius, bruises on the chest and left hand, cut wound on the face near the right eye, and blunt injury to the chest and both shoulders.

43. In *Paul Karimi Kithinji v Joseph Mutai Kaberia* [2018] eKLR, a sum of Kshs. 150,000/- was awarded for segmental fracture of the right proximal ulna and minor lacerations of the face.

44. In *Mwangi & another v Gachui (Civil Appeal 60 of 2023)* [2024] KEHC 10978 (KLR) (9 September 2024) (Judgment), the appellate court reduced the trial court’s award of Kshs. 500,000/- to Kshs. 300,000/- where the respondent sustained injuries in the nature of a fracture to the right ulna (one of the two bones in the forearm) and blunt soft tissue injuries to the right knee.

45. In view of the foregoing, I think that the award of Kshs. 850,000/- was excessive in the circumstances. I therefore set aside the award of Kshs. 850,000/- and substitute the same with an award of Kshs. 500,000/-.

46. Since the appeal is partially successful, I order that each party do bear own costs of the appeal.

It is so decreed.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF JUNE, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

