**Hydrolo Pipeline Limited v Charo (Civil Appeal E019 of 2023)**
**[2025] KEHC 10263 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10263 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL E019 OF 2023**

**M THANDE, J**

**JULY 11, 2025**

**BETWEEN**

**HYDROLO PIPELINE LIMITED ..... APPELLANT**

**AND**

**NGUMBO CHARO ..... RESPONDENT**

## JUDGMENT

1. The Respondent filed Mariakani CMCC No. E113 of 2021 against the Appellant seeking both general and special damages arising from a road traffic accident that occurred on 5.1.2021 at Kibanda Hasara area along the Mombasa-Nairobi Highway between the Appellant's motor vehicle registration number KCD 927S and the Respondent's motor cycle registration number KMEL 061M. The respondent claimed that as a result of the accident, he sustained serious injuries.

2. The Appellant denied liability and asserted that the accident was caused by the negligence of the Respondent.

3. The matter proceeded to hearing and at the conclusion, the trial Magistrate entered judgment for the Respondent against the Appellant in the following terms:

    Liability 100%

    Pain and suffering Kshs. 600,000/=

    Loss of future earning capacity Kshs. 400,000/=

    Future medical expenses Kshs. 182,000/=

    Special damages Kshs. 2,000/=

    Total Kshs. 1,184,000/=

Costs of the suit, interest on special damages from date of filing suit and on general damages from date of judgment till payment in full.

4. Being aggrieved, the Appellant filed the Appeal herein raising the following grounds:

    1. That the Learned Magistrate erred in law and in fact in finding the Defendant 100% liable.

    2. That the Learned Magistrate erred in law and in fact by failing to appreciate the evidence of the police officer that the Respondent was to blame for the accident.

    3. That the Learned Magistrate erred in law and in fact in failing to appreciate the evidence of the Defendant.

    4. That the Learned Magistrate erred in Law and in fact by failing to apportion liability on the Respondent.

    5. That the Learned Magistrate erred in law and in fact in awarding loss of future earning capacity.

    6. That the Learned Magistrate erred in law and fact awarding future medical expenses.

    7. That the Learned Magistrate erred in Law and in fact by failing to judiciously analyze the appellant's evidence and submissions on record.

    8. That the Learned Magistrate erred in law and in fact by awarding special damages which were never proved.

    9. That the Learned Magistrate erred in law and in fact by awarding the Respondent the sum in damages which is manifestly excessive and/or inordinately high as to be unjust.

5. The Appellant prayed that the appeal be allowed with costs to the Appellant. Further that the Respondent's case against the Appellant be dismissed with costs and the judgment of the trial court be set aside.

6. Being a first appeal, this Court is called upon to re-evaluate and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See Selle v Associated Motor Boat Co. [1968] EA 123). The Court is also guided by the Court of Appeal decision in Samuel Mwanasokoni v kenya Bus Services Ltd [1985] eKLR, where it stated:

> Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sotiros Shipping v Sauviet Sohold, The Times, March 16, 1983:
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> > "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

7. Parties filed their written submissions which the Court has duly considered.

8. The Appellant faults the trial Magistrate for finding it liable for the accident. Further that having noted the doubt the Appellant cast upon the Respondent's evidence, the trial Magistrate ought not to have proceeded on the basis of assumptions to find the Appellant 100% liable for the accident. The

Respondent submitted that he led evidence to demonstrate that the Appellant was to blame for the accident.

9. I have looked at the record. The testimony of the Respondent in the trial court is that he was riding his motorcycle on the left side of the road heading towards Mombasa, when the Appellant's vehicle hit the back tyre of the motorcycle. He was thrown off the road and lost consciousness. He was taken to the health centre where he regained consciousness. PW2 Boaz Katana Nasib who was a pillion rider on the motorcycle stated that they were on the left side headed towards Mombasa and were moving slowly waiting or vehicles to pass so that they could cross over to the right side of the road. Suddenly, they were hit from the back by a vehicle.

10. PW3 PC Festus Muoki Muema produced the police abstract. He stated that he was not the investigating officer and did not visit the scene of the accident. He testified that he issued the abstract to the Respondent on 25.5.21 using OB No. 40/5/01/2021. He stated that after interviewing PW2 who was a pillion rider and his father in July, he cancelled the abstract and issued a second abstract. In the second abstract, the Respondent was to blame for the accident. in July. He further stated that the interview with PW2 as well as the evidence on the follow up report led him to blame the Respondent.

11. DW1 Hassan Mohamed Ali, the driver of the vehicle stated that he was driving the from Nairobi to Mombasa and that just past Mariakani Dukani, the motorcycle coming on the wrong side from Mombasa hit his motor vehicle. He stated that the motorcycle hit the vehicle on the driver's side on the front left side. He added that the vehicle was extensively damaged on the bonnet, engine and entire front. He blamed the Respondent for the accident. He reported the matter and obtained an abstract and the police blamed the Respondent. On cross examination, he stated that the vehicle was inspected but he did not file the inspection report in court.

12. From the evidence on record, the Respondent and PW2 both stated that the motorcycle was on the left side of the road and was hit from the rear by the Appellant's vehicle. DW1 gave conflicting testimony, namely that the motorcycle hit the vehicle on the driver's side on the left side. He further stated that his vehicle was extensively damaged on the bonnet, engine and entire front. Was his vehicle hit on the driver's side, on the left side or on the front? He did not produce the inspection report to support his version of how the accident occurred. If indeed his vehicle was extensively damaged on the bonnet, engine and entire front as he claimed, then it would seem on a balance of probabilities that he is the one who hit the motorcycle from the rear, noting that none of the witnesses talked of a head on collision. Little wonder then that the police abstract produced by the Respondent indicated that DW1 was to blame for the accident.

13. PW3's testimony did not shed much light on the matter. He was not the investigating officer nor did he visit the scene of the accident. He stated that after interviewing PW2 and his father, he cancelled the earlier abstract and issued a second one in which he placed blame on the motor cycle. He did not however produce the latter abstract, nor tell the trial court what the 2 witnesses said, to make him change his position on liability. He did not also produce the sketch plan to show the point of impact. His evidence was thus of no assistance to the court.

14. It is trite law that he who alleges must prove. Section 107(1) of the *Evidence Act* provides:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

15. Section 109 stipulates that:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

16. In Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR, the Court of Appeal addressed the purport of the above provisions and stated:

> We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.

17. Based on the evidence on record, I find that the Appellant did not discharge the burden placed upon it. The evidence on record established a preponderance of probability in favour of the Respondent (see Siraj Din –Vs- Ali Mohamed Khan (1957) EA 25). I accordingly find no fault in the finding of the trial court on liability.

18. On the quantum of damages, the Appellant urged the Court to award the sum of Kshs. 200,000/=. Reliance was placed on the case of Ibrahim Kalema Lewa v Esteel Co. Ltd [2016] eKLR where an award of Kshs. 300,000/= was upheld.

19. On future medical costs, the Appellant submitted that the same was a recommendation by an examining doctor and not the doctor who treated the Respondent, which does not mean that the same would be incurred. The Appellant contended that there was no proof and that it is trite law that special damages must be proved. He urged the Court to dismiss the claim. As regards damages for loss and diminished capacity, it was submitted that the Respondent did not prove his sources of income or activities that have been affected by the accident and that the claim should be dismissed.

20. For the Respondent, it was submitted that the Appellant did not produce any evidence to contradict the medical report produced by PW4 as to the nature and extent of the injuries sustained by the Respondent. He urged the Court to uphold the evidence which remained uncontroverted.

21. The record shows that the Appellant sustained a fracture of left proximal femur bone with displacement; bruises and abrasions on the left side of the forehead, left shoulder and forearm, chest abdomen and lower limb.

22. In his opinion contained in his medical report dated 31.5.21, Dr. Kiema indicated that as a result of the injuries, the Respondent is predisposed to post traumatic arthritis and stiffness of the left hip and knee joints; shortening of the left lower limb; a lifetime of recurring post traumatic pains at fracture site especially during cold weather and when walking or working. The fracture site is a point of weakness that can easily fracture in future.

23. In the impugned judgment, the trial court awarded the sum of Kshs. 600,000/= for pain and suffering. This was after considering the medical report, the nature of the injuries sustained by the Respondent

and extent of the incapacity. The trial court found the sum of Kshs. 1,500,000/= proposed by the Respondent too high, while the sum of Kshs. 200,000/= proposed by the Appellant to be inordinately low. In arriving at the amount awarded, the trial court considered that awards by courts ranged from Kshs. 500,000/= to Kshs. 1,500,000/= for comparable injuries.

24. In the court below, the parties cited a number of authorities which I have duly considered. In the case of Peter Karoka v Mbaluka Malonza & 2 others [2018] eKLR, Sergon, J. awarded the sum of Ksh.800,000/= for a fracture of the left femur. In Maqsooda Begum Sroya v Sunmatt Limited [2017] eKLR the Appellant suffered 2 fractures of the femur. The Court of Appeal upheld an award of Kshs. 1,000,000/=. In the Ibrahim Kalema Lewa case (supra) Sergon, J. upheld an award of Kshs. 300,000/= for a fractured femur. After considering these awards and the age of the cited cases, I am of the view that the award of Kshs. 600,000/= was reasonable in the circumstances and that the trial court did not misdirect itself in its decision.

25. The Appellant has faulted the trial court for the award made for future earning capacity as his earnings were not proved. Dr. Kiema had in his medical report, indicated that as a result of the injuries, the Respondent had diminished capacity to work and undertake activities of daily living. He assessed the Respondent's partial permanent disability at 20%.

26. In its judgment, the trial court considered the extent of the incapacity. The trial court found, and correctly so, that the Respondent did not prove that he earned between Kshs. 1,000/= and 1,500/= per day and awarded a global sum of Kshs. 400,000/=.

27. The guiding principles for the award of damages for loss of earning capacity were set out by the Court of Appeal in the case of Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR, as follows:

> The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.

28. It is not disputed that the Respondent earned his living as a motorcycle rider. What is in dispute is the amount earned from the activity. The purpose of the award is to compensate the Respondent for the risk that the 20% partial permanent disability as assessed, has exposed him to, namely of being unable to earn a living as he did prior to the accident. In light of this, the awarded global sum of Kshs. 400,000/= is in my view reasonable, and I find no reason to interfere with the same.

29. The Appellant further faulted the trial court for the award of future medical expenses contending that the report by Dr. Kiema was merely a recommendation. In his report, Dr. Kiema had indicated that the Respondent would incur future medical expenses relating to purchase of painkillers and joint/bone care medication estimated at Kshs. 3,000/= for at least 2 years; physiotherapy sessions estimated

at Kshs. 50,000/= per year for 2 years and purchase of crutches at Kshs. 7,500/= replaceable every 3 years for life.

30. In his testimony, Dr. Kiema stated that he is a qualified and licensed medical doctor and is therefore an expert. The Court is aware that the evidence of an expert is not necessarily binding. In Shah and Another vs. Shah and Others [2003] 1 EA 290, it was held:

> The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.

31. In Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR, the Court of Appeal stated as follows regarding expert opinions;

> We have stated before, and it bears repeating, that such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.

32. In the instant case, the Court has considered the evidence of Dr. Kiema. The Appellant did not provide a contrary medical report or expert opinion to controvert that of Dr. Kiema. In light of this, I find no proper and cogent basis for rejecting this opinion and the Appellant has not laid any before this Court or the trial court.

33. The upshot is that the Appeal fails and is dismissed with costs to the Respondent.

**DATED SIGNED AND DELIVERED IN MALINDI THIS 11TH DAY OF JULY 2025**

**.....**

**M. THANDE**

**JUDGE**