



**Ismail v Elavuna (Civil Appeal E257 of 2023)
[2025] KEHC 12296 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E257 OF 2023**

**F WANGARI, J
JULY 17, 2025**

BETWEEN

WAHEEDA ISMAIL APPELLANT

AND

WILSON AJEGA ELAVUNA RESPONDENT

*(Being an appeal against the entire Judgment of Hon. D.O. Mbeja (PM)
delivered on 4th September 2023 in Mombasa Chief Magistrate's Court
Civil Suit No. 2013 of 2019, Wilson Ajenga Elavuna v Wabeeda Ismail)*

JUDGMENT

1. The Plaintiff/ Respondent through a Plaint dated 04/11/2019 sued the Defendant/ Appellant for General and Special Damages suffered as a result of a road accident involving his motor cycle and the Defendant's motor vehicle registration number KBZ 070L. He averred that on or about the 28/07/2019, he was lawfully riding his motorcycle when the Defendant and/or the authorized driver, agent, employee and/or servant in the course of the employment, negligently and/or carelessly drove, managed and/or controlled motor vehicle causing it to violently knock down the Plaintiff thereby occasioning him severe injuries, pain and damages. The Plaintiff held the Defendant liable and/or vicariously liable for the accident and subsequent serious injuries, loss, pain, and suffering he suffered.
2. The Plaintiff further averred that he suffered displaced fracture of the distal left femur and as a result of the accident, his motorcycle was completely damaged, he was rendered incapacitated by the severe injury and was unable to resume or continue with his work as a rider. That he therefore suffered earnings at the rate of Kshs. 1,500/- per day which he claimed from the Defendant.
3. The Plaintiff/Respondent prayed that Judgment be entered against the Defendant/Appellant for General Damages, Special Damages for Kshs. 74,326/-, costs of and/or incidental to the suit, interest on general damages, special damages and costs at court rates.



4. The Defendant/Appellant entered appearance and filed a Statement of Defence dated 07/01/2020 denied each and every allegation made by the Plaintiff in the Plaint and put him to strict proof thereof. The Defendant denied being the beneficial owner of Motor vehicle registration number KBZ 070L and denied occurrence of the accident.
5. That in the alternative and without prejudice to the foregoing, the Defendant averred that if indeed the accident occurred, the same was due to the sole and/or contributory negligence of the Plaintiff. The Defendant therefore prayed that the suit is dismissed with costs.
6. Both the Plaintiff and the Defendant testified adopting their witness statements as their evidence in chief. The Plaintiff called the doctor and the traffic police officer as his witnesses.
7. After hearing the parties, Judgment was entered in favour of the Plaintiff against the Defendant for Kshs. 1,600,000, General Damages for pain and suffering, and Kshs. 74,326 being Special Damages as pleaded and proved. Costs and interest at court rates from the date of filing suit was also awarded.
8. Being dissatisfied with the Judgement, the Appellant filed the Memorandum of Appeal dated 19/09/2023 on grounds that the learned trial magistrate erred in law and fact by finding the Appellant 100% liable for the accident despite the existence of overwhelming contrary evidence and without considering the Appellant's witness testimony, submissions and authority.
9. The court was also faulted for failing to find the Respondent contributorily negligent despite the existence of overwhelming evidence that the Respondent negligently rode his motorcycle thereby veering into the path of the Appellant's motor vehicle.
10. The court is said to have failed to consider the submissions of the Appellant on quantum, thus awarding General Damages that were inordinately excessive in the circumstances.
11. The Appellant prayed that the appeal be allowed, that the appellate court do set aside the learned trial magistrate judgment on quantum and liability and replace it with its own assessment and/or finding, and that the costs of the appeal be borne by the Respondent.

Analysis

12. The appeal was canvassed by way of written submissions. Having perused through the pleadings and the submissions filed, the issues for determination are;
 - a. Whether the appeal has merits
 - b. Who bears the costs
13. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co. (1968) E.A 123* as follows: -

“ ... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
14. The appeal was on liability and quantum



Liability

15. The Plaintiff/ Respondent stated that the Defendant/ Appellant was driving his vehicle from the opposite direction, when he overtook the vehicles on his lane then collided with the Plaintiff's motorcycle. He blamed the Defendant for the negligence.
16. The Defendant/ Appellant on the other hand testified that he was driving on the main road when the Respondent emerged from the side road and collided with his vehicle. He blamed the rider for the accident.
17. The Traffic Police Officer testified that from the police file and the Occurrence Book, the traffic police officer who visited the scene blamed the Defendant/ Appellant for colliding with the motor cycle. He said the collision was head-on.
18. From the evidence on record, this court is to determine if the trial court erred in finding the Appellant liable for the accident. The burden of proof was upon the Plaintiff to proof that the Defendant was liable for the accident.
19. 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.”
20. Both parties gave their contradicting versions of how the accident occurred. The evidence of the Traffic Officer sheds some light. He states as per the police records, it was the Defendant/ Respondent who turned without due care and attention thus causing the head-on collision. I find that the Plaintiff/ Respondent had discharged the burden of proof, and therefore no reason to disturb the finding on liability.

Quantum

21. The Appellant submitted that the award for General Damages was inordinately high. He relied on his lower court submissions where he proposed an award of Kshs. 500,000/=. The Respondent submitted that the award by the trail court was not exorbitant considering the severity of the injuries sustained.
22. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.”
23. Further, the Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”



24. The Respondent suffered a displaced fracture of the distal left femur. The Doctor testified that the Respondent had 15% permanent disability. The doctor recommended that future medical costs regarding removal of the metal surgical implants which is usually done after 2 years will be Kshs. 80,000 at Coast General Hospital.
25. 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.
26. 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. All these authorities pose similar and comparable injuries and suggest that the award by the Trial Court of Kshs. 1,600,000/= was inordinately high in the circumstances. Considering the lapse of time and inflation, an Award of Kshs. 800,000/- for the Plaintiff herein is adequate compensation for General Damages. I therefore interfere with the award by the Trial Court to this extent.
28. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. Considering that the appeal is partially successful, each party is to bear its own costs.

Determination

29. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. That the appeal is partially successful. Judgment of General Damages is hereby set aside and substituted with an award of Kshs. 800,000/= as General Damages for pain and suffering.
 - b. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF JULY, 2025

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HON. F. WANGARI

JUDGE

In the presence of;

Mr. Busieka Advocate for the Appellant

N/A by the Respondent

Norah, Court Assistant

