Mutinda v Bosire & 2 others (Civil Appeal E028 of 2023)
[2025] KEHC 9944 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9944 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CIVIL APPEAL E028 OF 2023

CM KARIUKI, J

JULY 10, 2025

BETWEEN

PATRICIA NDUNGE MUTINDA ..... APPELLANT

AND

JUSTIN ATANDI BOSIRE ..... 1ST RESPONDENT

TABITHA MORAA MOKAYA ..... 2ND RESPONDENT

DIAMOND TRUST BANK LIMITED ..... 3RD RESPONDENT

(Being an Appeal from the judgment/decree of the Honourable. G. Sagero (Mr.) (SRM) delivered on 16.10.2023 in Narok CMCC No. E149 of 2019)

JUDGMENT

1. This appeal arises from the judgment of the Chief Magistrate's Court at Narok in *Civil Suit No. E149 of 2019*, delivered on 16th October 2023. In the impugned judgment, the trial court entered judgment in favour of the 1st Respondent and against the Appellant, with the following awards:

   a. Liability apportioned at 70:30 in favour of the 1st Respondent.

   b. General damages: Kshs. 250,000.

      30% contribution: Kshs. 75,000/=

   c] Special damages: Kshs. 3,550/=.

      Total net award: Kshs. 178,550/=

      Plus, costs and interest

2. The Appellant, being dissatisfied with the whole judgment and decree of the Hon. Senior Resident Magistrate delivered on 16th October 2023 in *Narok CMCC No. E149 of 2019*, filed an amended Memorandum of Appeal dated 15th January 2025, raising the following six [6] grounds of appeal:

    1. The Learned Trial Magistrate erred in Fact and in law by holding the appellant 70% liable for the accident in view of the lack of the evidence tendered.

    2. The Learned Trial Magistrate erred in Fact and in law by awarding the Plaintiff an excessive and unjustified amount as quantum for damages in view of the lack of evidence tendered.

    3. The Learned Trial Magistrate erred in Fact and in law by awarding Kshs. 250,000/= which was excessive and an erroneous estimate of awardable damages in view of the lack of evidence tendered.

    4. The Learned Trial Magistrate erred in fact and in law in failing to consider Appellant's submissions on liability and general damages awardable, if any.

    5. The Learned Trial magistrate erred in fact and in law in awarding special damages of Kshs. 3,550/= which was not supported by any evidence.

    6. The Learned Magistrate erred in fact and in law in failing to accord the Appellant's submissions due consideration.

Background

3. The suit giving rise to this appeal stems from a road traffic accident that occurred on 4th February 2018, involving motor vehicle registration number KBU 800Z, owned by Appellant. At the material time, the 1st Respondent was a fare-paying passenger aboard the said vehicle. It was alleged that the motor vehicle was negligently and carelessly driven, causing it to veer off the road and overturn, thereby occasioning the 1st Respondent severe bodily injuries, resulting in loss and damage.

4. The 1st Respondent sustained the following injuries as a result of the accident:

    i. Blunt neck injury;

    ii. Blunt back injury;

    iii. Crotal laceration on the right thigh.

    iv Blunt abdominal injury.

    v Backaches and abdominal pains.

    vi. Abdomen tender on palpation.

    vii. Lacerated scars on the right sacral region.

    viii. Lumbo-sacral region tenders on flexion.

5. The 1st Respondent pleaded special damages as follows:

    a. Medical report: Kshs. 3,000.

    b. Motor vehicle search: Kshs. 550.

    c. Medical and related expenses [continuing, with details to be supplied at the hearing].

6. The total special damages pleaded amounted to Kshs. 3,550.

7. The Appellant filed Third-Party Notices dated 8th September 2020 against the 2nd and 3rd Respondents, who were impleaded as third parties. However, there is no record indicating that the said notices were ever served upon the third parties. Further, no interlocutory judgment was entered against them.

Evidence.

8. PW1 – Justin Atandi Bosire

9. A male adult, duly sworn, testified in Swahili. He stated that he resides in Kajiado and is a Jua Kali artisan by profession. He recorded a witness statement with his advocate on 15th July 2019, which he adopted as his evidence-in-chief. He also sought to produce documents listed in his list of documents dated the same day. Among the documents produced were:

    i. Police Abstract – marked as PMFI-1;

    ii. Discharge Summary – marked as PMFI-6.

10. PW1 stated that he was involved in a road traffic accident and sustained injuries to his back, thighs, and neck. He testified that his back had not fully healed, and he could no longer work as he used to due to persistent backaches. He prayed for compensation, costs, and special damages for the injuries and loss suffered.

11. In cross-examination, PW1 confirmed that his ID number is 31598823. He testified that he was travelling from Kisii to Nairobi aboard a motor vehicle registration number KBU 800Z. He alleged that the vehicle was being driven at a speed of 120 kph and the driver was reckless. At the Ntulele area, the motor vehicle hit a tyre that had apparently come off motor vehicle KBM 991B, which was about 10 meters away and was in motion on the same road.

12. PW1 stated that the tyre was in the middle of the road, on the right side, and when their motor vehicle hit it, the driver lost control, veered off the road, and overturned. He clarified that they were travelling on the left side of the road, heading towards Nairobi, and he was seated directly behind the driver. He said that he had warned the driver prior to the accident due to the speeding and reckless driving.

13. When questioned about police findings, PW1 acknowledged that the police abstract did not attribute blame to the driver of the vehicle he was in, and also stated that he had never testified in any other matter concerning the said accident.

14. Evidence of PW2 – Police Officer

15. PW2 – No. 74595 PC David Koros, a male adult, duly sworn, testified in English. He stated that he is a police officer attached to Ntulele Traffic Base. He appeared before the court to produce a Police Abstract relating to a road traffic accident that occurred on 4th February 2018 at around 1:00 a.m. at Pingny area along the Narok–Mai Mahiu Road. The accident involved: Motor vehicle KBU 800Z – a Toyota matatu ferrying passengers; and Motor vehicle KBM 991B – a Scania bus.

16. He testified that the two vehicles collided at the said location and that Justin Bosire, a passenger in KBU 800Z, sustained injuries. He produced the Police Abstract dated 18th April 2019 as part of his evidence. PW2 also noted that he was paid Kshs. 5,000 for his court attendance.

17. During cross-examination, PW2 confirmed the following: The circumstances of the accident were obtained from the Occurrence Book [OB] entry No. 4/4/2/2018, which he did not bring to court. He was not the Investigating Officer [IO]; the IO was PC Gitonga, who has since been transferred to Laikipia. He had no access to the police file and was unable to tell which motor vehicle was to blame

for the accident. He did not know whether any driver was charged. He was summoned to court and received the summons on 23rd September 2022. He stated that motor vehicle KBM 991B was insured by Invesco Assurance.

18. The Medical Discharge Summary relating to the 1st Respondent's injuries was produced by the consent of the parties and marked as Plaintiff's Exhibit 6 [P. Exh. 6].

19. The Defence closed its case without calling any witnesses.

Directions of the Court

20. The appeal was canvassed by way of written submissions as directed by the court. Both parties duly filed their submissions, which the court has considered.

The Appellant's Submissions

21. The Appellant submitted that PW1's evidence confirmed that the accident occurred after a tyre from motor vehicle KBM 991B dislodged and was struck by the matatu [KBU 800Z] in which PW1 was a passenger. The Appellant emphasized that PW2, a police officer, could not testify to the circumstances of the accident, as he was not the Investigating Officer, had no police file or OB in court, and the police abstract did not assign blame to either party.

22. Relying on Sections 107 and 108 of the *Evidence Act* [Cap 80, Laws of Kenya], the Appellant argued that the burden of proof lay with the Plaintiff, who failed to discharge it. It was reported that no causal link was established between the Appellant's alleged negligence and the Respondent's injuries. The Appellant contended that since both PW1 and PW2 did not witness the accident's actual causation, their testimonies could not support a finding of negligence.

23. The Appellant cited the case of *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* [2016] eKLR, which emphasized the necessity for the plaintiff to prove duty, breach, and a causal link to the injury. Further, reliance was placed on *Evans Mogire Omwansa v Benard Otieno Omolo & Another* [2016] eKLR, where the court held that the absence of defence evidence does not relieve a plaintiff of the legal burden to prove his case on a balance of probabilities.

24. On quantum, the Appellant submitted that although the Plaintiff sustained several injuries—blunt neck and back injuries, scrotal laceration, abdominal tenderness, and lacerated scars—the medical evidence showed the Plaintiff had healed well. It was therefore submitted that the award of Kshs. 250,000 in general damages was excessive and unwarranted.

25. The Appellant reiterated that assessment of damages is discretionary, but this discretion must be exercised judicially and within principles laid down in precedent. The court was invited to interfere with the award on the grounds that the trial court: Took into account irrelevant factors, left out relevant considerations, or arrived at an award that was so inordinately high as to amount to an erroneous estimate.

26. Citing *Kigaraari v Aya* [1982–88] 1 KAR 768, as followed in *Godfrey Wamalwa Wamba & Another v Kyalo Wambua* [2018] eKLR, the Appellant submitted that awards must remain within reasonable limits, considering the state of the economy and comparable precedents. Reference was also made to *Martha Waithera Kinyanjui v Anestar Secondary School* [2020] eKLR, where the High Court upheld an award of Kshs. 30,000 for soft tissue injuries that had healed.

27. In conclusion, the Appellant urged the court to set aside the trial court's findings on both liability and quantum, as they were not supported by sufficient evidence, and the award was excessive, unfair, and unjustified.

28. The Appellant prayed for the costs of this appeal under Section 27[1] of the *Civil Procedure Act*, arguing that costs follow the event, and no sufficient reason had been demonstrated to deviate from this general principle. The Appellant also asked the court to award interest on costs as provided under the law.

The 1st Respondent's Submissions

29. The 1st Respondent submitted that the evidence on record—both oral and documentary—clearly established that a road traffic accident occurred on 4th February 2018, involving motor vehicles KBU 800Z and KBM 991B, while the Respondent was lawfully aboard KBU 800Z as a fare-paying passenger. This fact was corroborated by the testimony of PW2 [PC David Koros], who produced a police abstract confirming the accident.

30. It was submitted that the Respondent sustained serious bodily injuries, which were supported by a medical report by Dr. Cyprianus Okoth Okere dated 5th June 2019. The Respondent emphasized that drivers, being trained professionals, owe a high duty of care while operating vehicles on public roads. The fact that the motor vehicle KBU 800Z veered off the road and overturned, it was argued, amounts to negligence per se, as it demonstrated a lack of control or recklessness by the driver.

31. The Respondent asserted that, based on the evidence, the trial court correctly found that the driver of KBU 800Z was liable and apportioned liability at 70%. It was submitted that the trial magistrate properly evaluated the evidence and applied the applicable legal principles. The Respondent relied on Section 107[1] of the *Evidence Act*, and the cases of *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526, and *Miller v Minister of Pensions* [1947] 2 All ER 372, to reinforce the principle that proof on balance of probabilities was satisfied.

32. On quantum, the Respondent submitted that the injuries were well-documented and supported by treatment notes and the medical report, which outlined: Blunt neck and back injuries; Scrotal laceration on the right thigh; Blunt abdominal injury and associated pain; Lacerated scars on the right sacral region; and Tenderness of the lumbo-sacral spine on flexion.

33. In support of the general damages award of Kshs. 250,000, the Respondent cited comparable authorities, including:

    i. *Poa Link Services Co. Ltd & Another v Sindani Boaz Bonzemo* [2021] eKLR – Kshs. 350,000 for soft tissue injuries.

    ii. *Joseph Kimani Gathaga & Another v Dickson Ndungu Njoroge* [2019] eKLR – Kshs. 240,000.

    iii. *Kitale Hauliers Ltd v Emmanuel Soita Simiyu* [2013] eKLR – Kshs. 200,000.

34. The Respondent argued that the Appellant's proposed figure of Kshs. 30,000 was unreasonably low and based on incomparable injuries. It was emphasized that damages must reflect the seriousness of the injuries sustained and fall within the reasonable range of comparable case law.

35. Citing *Peter Namu Njeru v Philemone Mwagoti* [2016] eKLR, the Respondent submitted that an appellate court should only interfere with a trial court's discretion on damages where it is shown that the trial court: Applied the wrong principles; Took into account irrelevant factors; Failed to consider relevant factors; or make an award that was inordinately high or low.

36. In conclusion, the Respondent urged the court to dismiss the appeal with costs, maintaining that the trial court properly exercised its discretion on both liability and quantum, and that no basis had been shown for appellate interference.

Analysis and Determination.

Duty of the Court

37. In accordance with Section 78[2] of the *Civil Procedure Act*, this Court, sitting as a first appellate court, has the mandate to re-evaluate and re-analyze the evidence on record and to arrive at its own independent conclusions, while bearing in mind that it did not have the benefit of seeing or hearing the witnesses firsthand. The provision reads:

> " The appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

38. The guiding principle for a first appellate court is well articulated in the decision of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court held:

> " An appeal to this court from a trial by the High Court is by way of a retrial, and the principles upon which this court acts in such an appeal are well settled. 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."

Issues

39. Upon careful consideration of the pleadings, grounds of appeal, and submissions by the parties, the following issues arise for determination:

    1. Whether the learned trial magistrate erred in law and in fact in apportioning liability at 70% against the Appellant.
    2. Whether the Respondent proved his case on a balance of probabilities.
    3. Whether the award of general and special damages was excessive, unjustified, or based on an erroneous estimate.
    4. Whether the trial court failed to consider the Appellant's submissions.
    5. Whether the trial magistrate erred in awarding special damages of Kshs. 3,550/= without proof.

Issue 1: Apportionment of Liability

40. The Appellant faulted the trial court for apportioning 70% liability against him, arguing that the Respondent failed to prove negligence. The Respondent, however, maintained that the driver of motor vehicle KBU 800Z lost control, causing it to veer off the road and overturn — an event which, it was submitted, spoke for itself and pointed to negligence.

41. While PW1 [the 1st Respondent] did not witness the mechanical workings of the accident, he testified credibly that the matatu was speeding at approximately 120 kph and that he had warned the driver

before the accident occurred. He stated that the vehicle struck a tyre lying on the road, lost control, and overturned. PW2, the police officer, confirmed that an accident involving KBU 800Z and KBM 991B occurred, though he was not the investigating officer and could not confirm which party was to blame.

42. Although the police abstract did not assign fault, the uncontested evidence that the vehicle veered off the road and overturned supports a presumption of negligence under the doctrine of *res ipsa loquitur*. In *Masembe v Sugar Corporation & Another* [2002] 2 EA 434, the court held that where a vehicle leaves the road and causes injury to a passenger, the burden shifts to the driver to explain the incident.

43. The Appellant chose not to call any evidence or rebut the Plaintiff's assertions. In civil proceedings, a party who fails to adduce evidence risks having a judgment entered against them. The trial court cannot be faulted for apportioning a greater share of liability to the Appellant, the driver of the vehicle in which the Respondent was a passenger. The apportionment at 70:30 was a reasonable and fair finding based on the evidence on record.

44. This ground fails. The trial court did not err in apportioning liability.

Issue 2: Whether the Respondent Proved His Case

45. Under Sections 107–109 of the *Evidence Act*, the burden of proof lies with the person who alleges. The Respondent was required to prove that:

    i. He was a passenger in the vehicle.

    ii. The accident occurred due to negligence.

    iii. He sustained injuries as a result.

46. From the evidence, it is not in dispute that the Respondent was a fare-paying passenger, was injured in the course of the journey, and sustained multiple injuries which were corroborated by a medical report and discharge summary. The Appellant neither rebutted the evidence nor tendered contrary testimony. On a balance of probabilities, the Respondent discharged his burden of proof.

47. The Respondent proved his case to the required standard.

Issue 3: Whether the General and Special Damages Award Was Excessive

48. The trial magistrate awarded Kshs. 250,000 as general damages for soft tissue injuries, which were medically confirmed. The Appellant claimed this amount was excessive and proposed Kshs. 30,000, citing healed injuries.

49. However, the trial court considered medical evidence, the nature of injuries, and applicable authorities. The injuries were not minor and included blunt trauma, lacerations, and persistent back pain. The court was within its discretionary powers to award damages based on comparable injuries, and the cases cited by the Respondent [e.g., *Poa Link Services Co. Ltd v Sindani Boaz Bonzemo*] supported similar or higher awards.

50. An appellate court will not interfere with quantum unless the award is so inordinately high or low or is based on wrong principles [*Butt v Khan* [1981] KLR 349]. No such misdirection has been demonstrated.

51. The award was fair and proportionate. No basis for interference.

Issue 4: Whether the Trial Court Ignored Appellant's Submissions

52. While the Appellant alleges that his submissions were not considered, the judgment reflects that the trial court considered both parties' pleadings and evidence. A trial magistrate is not required to adopt arguments made in submissions; they are persuasive, not binding. The absence of express reference does not, of itself, constitute an error.

53. There is no evidence that the court failed to consider submissions.

Issue 5: Special Damages of Kshs. 3,550

54. It is trite law that special damages must be specifically pleaded and strictly proved. The Respondent pleaded with Kshs. 3,550/= as special damages, which included: Medical report – Kshs. 3,000; and Motor vehicle search – Kshs. 550. These were itemized and supported by receipts and were not challenged in the cross-examination.

55. Special damages were proved and properly awarded.

Disposition

56. In view of the foregoing analysis, the Court finds that the appeal is without merit. The trial court neither misdirected itself in the law nor erred in fact in apportioning liability or in its assessment of damages.

57. Accordingly, the Court makes the following orders:

    i. The appeal is hereby dismissed in its entirety.

    ii. The judgment of the trial court in *Narok CMCC No. E149 of 2019*, delivered on 16th October 2023, is hereby upheld in full.

    iii. The costs of this appeal shall be borne by the Appellant.

58. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 10TH DAY OF JULY, 2025

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CHARLES KARIUKI

JUDGE