Makau & 2 others v Nandwa (Civil Appeal E882 of 2024)
[2025] KEHC 9870 (KLR) (Civ) (9 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9870 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E882 OF 2024

LP KASSAN, J

JULY 9, 2025

BETWEEN

HELLEN MWENDE MAKAU ..... 1ST APPELLANT

JANE WANJIRU MBURU ..... 2ND APPELLANT

GRACE NJOKI MBURU ..... 3RD APPELLANT

AND

BONIFACE MITIRA NANDWA ..... RESPONDENT

(Being an appeal from the judgment of the Honourable Lui Okwengu (SRM) delivered on 19.07.2024 from Nairobi CMCC No. 1263 of 2022)

JUDGMENT

1. The trial magistrate, following an amended plaint dated 01.07.2022 filed by the Respondent and the subsequent defence and a full hearing, entered the following judgment in favour of the Respondent:
    a. Liability is entered 90:10% against the Defendants.
    b. General damages at Kshs 1,300,000/=.
    c. General damages for loss of earnings Kshs 300,000/=
    d. Special damages at Kshs 141,986/=.
    e. Cost of this suit and interest at court rates.
2. A brief background of this matter is that on 26.10.2021 the Respondent was a cyclist along southern bypass when the 2nd Defendant by herself or her agent driving motor vehicle registration number KDB

984F lost control and hit the Respondent. The Respondent sustained a fracture of the left tibia plateau, tear left anterior cruciate ligament, tear left patellar tendon, bleeding into left knee and loss of upper 2 incisor teeth. The Respondent relied on the doctrine of Res Ipsa Loquitur.

3. The Appellants have now appealed against the decision of the subordinate court on liability and quantum on the following grounds summarized as:

    1. The learned magistrate erred in law and fact by entering judgment in favour of the Respondent against the Appellants on liability at the ration 90:10

    2. The learned magistrate erred in law and fact by awarding inordinately high general damages of Kshs 1,300,000/= for pain and suffering having failed to apply the principle of stare decisis in considering conventional awards for general damages in cases of similar injuries.

    3. The learned magistrate erred in law and fact by awarding the Respondent future medical expenses of Kshs 150,000/= disregarding the Appellant's metal implants was unnecessary.

    4. The learned magistrate erred in law and fact by applying the wrong principles of law whilst awarding damages in the sum of Kshs 300,000/= for loss of earning capacity

    5. The learned magistrate erred in law and fact by admitting the Respondent's documents and/or receipts for special damages of Kshs 141,986 into evidence despite their non-compliance with section 19 of the *Stamp Duty Act*

    6. The learned magistrate erred in law and fact in failing to consider the Appellants' submissions and considering the relevant legal principles to critically analyse the Appellant's case while arriving at the judgment, thus resulting in a miscarriage of justice to the Appellants.

4. The appellant seeks that:

    i. The judgment/decree of the Honourable Lui Okwengu dated 19th July 2024 be reviewed and/or set aside.

    ii. The Respondent bears the costs of the Appeal.

5. The Respondent filed a cross-appeal dated 02.10.2024 the ground set out is

    i. The learned judge erred in fact and law by holding that the Respondent was partially liable for the accident against the weight of the evidence adduced, whereas the Appellants were entirely liable for the accident.

6. The Respondent seeks orders that:

    a. The cross-appeal be allowed

    b. The Appellant's appeal be dismissed

    c. The aforesaid judgment and the decree emanating therefrom with respect to the learned magistrate's decision on liability be set aside with a determination that the Appellants were wholly liable for the accident

    d. The costs of the Cross-Appeal and the Appellant's appeal be borne by the Appellants

7. The following issues arise for determination:

    a. Whether the trial court properly analyzed the evidence on liability.

    b. Whether the award on quantum of damages was excessive.

c. Whether there is merit in the Respondent's cross-appeal

Analysis and Determination

8. This appeal is against the decision on liability and damages, I am guided by the decision of the Court of Appeal in Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 where the court held that;

> " An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low"

9. As a first appellate court, I am bound by the principle in Selle v Associated Motor Boat Co. Ltd (1968) EA 123 to re-evaluate and re-analyze the evidence afresh while bearing in mind that I did not have the opportunity to see or hear the witnesses testify.

10. On liability, the trial magistrate apportioned liability at 90:10 in favour of the Respondent. Upon re-evaluating the evidence, the 2nd appellant admitted the Respondent was ahead and was struck from behind with the front left side of her vehicle. I find that the 2nd Appellant admitted she struck the Respondent from behind while he was cycling ahead of her on the designated cycling lane. The evidence shows she entered the bypass and failed to observe the cyclist, hitting him with the front left side of her vehicle. The police officer also confirmed the cyclist was visible and had the right of way. The Respondent was under no duty to anticipate being struck from behind. The 2nd Appellant failed to exercise reasonable care to avoid colliding with a vulnerable road user. Whether the Respondent was on the hard shoulder or on the road, he was visible to the 2nd Appellant, who had a clear duty to keep a proper lookout and avoid hitting vulnerable road users from behind. There was no logical basis to apportion liability to the Respondent for a rear-end collision.

11. The burden of proof rests on the plaintiff. Sections 107 and 108 of the *Evidence Act*, Cap. 80 Laws of Kenya, provides that he who alleges must prove.

12. As held in Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991], there is no liability without fault. Mere occurrence of an accident does not impute negligence unless supported by cogent evidence.

13. Consequently, the trial court's apportionment of liability is set aside and I allow the cross-appeal, and I hold the Appellants 100% liable.

14. On quantum, the trial court awarded general damages at Kshs 1,300,000/=. A trial court should consider comparable cases when awarding damages to ensure consistency and fairness.

15. In the case of Francis Ndungu Wambui & 2 Others-vs-VK (a minor suing through next friend and mother MCWK) (2019) eKLR, the Respondent sustained soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more 30 minutes after the accident. Due to the severity of the fracture the Respondent was at risk of secondary stress fracture on the same site. The trial court award of Kshs 1,000,000/= was upheld by the High Court.

16. Similarly, in Anthony Nyamweya-vs-Dorcas Gesare Mounde (2022) eKLR, the Respondent sustained a swollen knee joint tender on palpation, loss of 3 upper teeth, loss of 3 lower teeth, and bruises on the left neck. The trial court award of Kshs 750,000/= was set aside and substituted with Kshs 600,000/=.

17. The Appellants relied on the authorities of Akamba Public Road Services-vs-Abdikadir Adan Galgalo (2016) eKLR, the Respondent suffered fracture right tibia leg bone mallelolus, right fibular bone was awarded Kshs 500,000/= by the appellate court after setting aside an award of Kshs 800,000/=.

18. In the case of John Njenga Maina-vs-Humphrey Kinyua Rukeria (2016) eKLR, the Appellant sustained compound fractures of the right tibia and fibula, fracture of the distal 1/3 of the left tibia and fibula, laceration of the scalp, friction burns on the left hand and elbow, bruises on the left knee and blood loss, physical and psychological pains. The doctor opined a permanent incapacity of 200%. The trial court dismissed the Appellant's case, however, the High Court set aside the dismissal and awarded Kshs 750,000/=.

19. In the case of Vincent Mbogholi-vs-Harrison Tunje Chilyalya (2017) eKLR, the respondent suffered a fracture of the left tibia leg bone, blunt object injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe. As such, the Plaintiff was awarded a global sum of Kshs 500,000/= by the trial court and the same upheld by the Appellate Court.

20. In the case of Sammy Mugo Kinyanjui & Ano.-vs-Kairo Thuo (2017) eKLR, the Respondent sustained a slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs, fracture of the right tibia, fracture of the left tibia and fibula. The trial court award of Kshs 1,000,000/= was set aside and substituted with Kshs 600,000/=.

21. In the case of Tirus Mburu Chege & Ano.-vs-JKN (minor suing through the next friend and mother DWN & Ano.) (2018) eKLR, the 1st Respondent sustained fractures of the tibia/fibula (both legs), a blunt head injury (forehead), broken upper right 2nd incisor tooth, nose bleed and transient (brief) loss of consciousness. The trial court awarded Kshs 800,000/= was set aside and substituted with Kshs 500,000/=.

22. In the case of Daniel Otieno Owino & Ano.-vs-Elizabeth Atieno Owuor (2020) eKLR, the Respondent sustained a fracture on the right leg, chest injuries, injuries on the eye bridge, injury on the left leg, and injury on the left eye. The trial court award of Kshs 600,000/= was set aside and substituted with Kshs 400,000/=.

23. In the case of Ndwiga & Ano.-vs-Mukimba (Civil Appeal E006 of 2022) (2022) KEHC 11793 (KLR) (13 July 2022) (Judgment), the Respondent sustained tenderness and swelling of the left leg and a fracture of tibia and fibula of the left leg. The trial court award of Kshs 1,200,000/= was set aside and substituted with Kshs 500,000/=.

24. In the case of Wabomba-vs-Wanyama (Civil Appeal E007 of 2021) (2024) KEHC 2191 (KLR) (27 February 2024) (Judgment), the Respondent sustained soft tissue injuries, psychological trauma and fractures of the right tibia and fibula. The trial court award of Kshs 800,000/= was set aside and substituted with Kshs 500,000/=.

25. The evidence adduced by the Respondent is that he sustained a fracture left tibia plateau, a tear left anterior cruciate ligament, a tear left patellar tendon, bleeding into the left knee and loss of 2 upper incisor teeth. He was examined by Dr. G.K. Mwaura, who prepared a report dated 09.12.2021. He opined that the Respondent was still undergoing treatment and was on crutches. He sustained grievous harm injuries (fracture and tendon injuries). Healing was expected, but the onset of post-traumatic osteoarthritis was expected (pain and some loss of function). Permanent degree of incapacity was assessed at 10% on the right lower limb. Future medical expenses for removal of implants Kshs 200,000/=.

26. He underwent a 2nd medical, he was examined by Dr. P. M. Wambugu (consultant surgeon), who prepared the medical report dated 03.03.2023. He noted the injuries sustained by the Respondent as a loss of upper central incisors and a fracture left tibial plateau. He opined that the Respondent's injuries were consistent with those due to blunt trauma as may have occurred during the said accident. He sustained skeletal, dental and soft tissue injuries from which he has since made adequate recovery. The lost teeth may be bridged using a dental prosthesis at an estimated cost of Kshs 20,000/= in a medium-cost private hospital. The fracture tibial plateau had healed, and the metal implants don't have to be removed. There is residual mild stiffness of the knee joint, and I do not hesitate to award him 5% as the degree of permanent incapacitation.

27. Although the Appellants contended that the Respondent didn't prove he sustained a fractures, this is contradicted by both medical reports herein above, including their 2nd medical report wherein Dr. Wambugu confirmed the fracture and opined that it was not necessary to remove the metal implants.

28. On loss of earning, the Respondent pleaded for the same at paragraph 11 of the Amended plaint. In the case of Ouru Super Stores Limited-vs-Jackson Keragori Obure (2018) eKLR; Majanja J. observed:

> " 15. Loss of earning capacity is compensation for the diminution of earning capacity and is usually awarded as part of the general damages under the heading of general damages for pain, suffering and loss of amenities. Cohesion Ag.JA in the case of Butler-v-Butler (1984) KLR 225 stated that:
>
> > "Loss of earning capacity or earning power may and should be included as an item within general damages....but where it is not so included, it is not improper to award it under its own heading as the learned Judge did in this case."
>
> 16. This claim is to be distinguished from loss of earnings which is a special claim. As the Court of Appeal stated in Cecilia W. Mwangi & Ano.-vs-Ruth W. Mwangi (1997) eKLR:
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> > "Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability."
>
> 17. It follows from the principles I have outlined that it is not necessary to plead the claim for loss of earning capacity, however, it must be established and proved on the balance of probabilities. In the case of SJ-vs-Frances Di Nello & Ano. (2015) eKLR the Court of Appeal expressed the difficulty faced by courts in making awards under this head when it said:
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> > "The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to assign any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market.
>
> 18. Dr Mugenya noted in his report that the respondent had resumed cycling to enable him to go back to his hawking business. In his testimony, the respondent confirmed that he could no longer ride a bicycle and comfortably

> carry goods. In cross-examination, he admitted that he was still operating his shop though he had to engage someone to assist him. In my view, this was a proper case for the court to consider the award for loss of earning capacity as an integral part of the award for general damages for pain, suffering and loss of amenities. As the basis of calculating a separate award was not pleaded nor proved. I would set aside the separate award for loss of earning capacity."

29. I have considered the injuries sustained by the Respondent and the after effects thereto. The course of treatment was long with an extended admission period at the hospital. Also considered is the Respondent was left with a permanent disability assessed at 5-10%. I find the award of Kshs 1,000,000/= in general damages was reasonable.

30. On future medical expenses, Dr Mwaura opined that the removal of implants would cost Kshs 200,000/=. Dr Wambugu, on the other hand, opined that it was not necessary to remove the implants. The Respondent expressed his interest in removing the implants. He didn't give a figure of the cost of having the implants removed. He gave the costs to bridge the teeth at Kshs 20,000/=. Special damages, including future medical expenses, have to be strictly pleaded and proved to be allowed. The Respondent didn't plead the future medical expenses for the teeth. As such, I find that the Respondent proved he would require Kshs 200,000/= for the removal of the implant and I award the same.

31. On the Special damages award, a party must produce receipts in order to meet the requirement of specifically proving special damages. The Respondent pleaded for Kshs 141,986/=. In the case of Oigoro v Matunda (Fruits) Bus Services Ltd & another (Civil Appeal E069 of 2022) [2025] KEHC 188 (KLR) (20 January 2025) (Judgment), I concur with the finding therein that it was not the Appellant's duty to affix them but the receiver of the payment and therefore, it does not affect the sum above on special damages The receipts produced before the trial court amounted to Kshs 45,926.68/= which I award. There is an invoice of Kshs130,000.07/= indicating the payer as NHIF. In the case of Joram Njoga Ngeruro-vs-Peter Nyakiri Mokaya [2017] eKLR, the court held:

> "9. It should be pointed out, from the outset, that a demand note, a fee note and an invoice are not documents that evidence payment, for they are merely notes making demands for payment. Payment is evidenced or established by a receipt, or some other document evidencing acknowledgement of payment. Indeed, in Great Lakes Transport Co. (U) Ltd vs. Kenya Revenue Authority [2009] eKLR (Waki, Onyango Otieno & Visram, JJA), the court asserted that invoices were not receipts, unless they carried an endorsement that the goods, or services for that matter, for which the invoice was raised, had been paid for."

32. There is no endorsement on the said invoice that the amount was paid. The same indicated NHIF was the payer. As such, if it was paid by NHIF then a rebate has to be taken into account. However, since there is no proof that the Respondent paid the said invoice, the trial court should not have considered it in making its award.

33. The upshot of the above is that:

    i. The appeal partly succeeds on the special damages.

    ii. The cross-appeal succeeds, the trial court award on liability is set aside and substituted with 100% against the Appellants in favour of the Respondent.

    iii. The trial court general damages award of Kshs 1,000,000/= is upheld.

iv. Future medical expenses Kshs 200,000/=

v. Special damages at Kshs 45,926.68/=.

vi. Costs of the appeal and cross-appeal are awarded to the Respondent.

34. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF JULY 2025

LINUS P. KASSAN

JUDGE

In the presence of:-

Kiwingu for Respondent

Mutesi for Appellant

Court Assistant – Carol