



REPUBLIC OF KENYA



KENYA LAW
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Mumo v Ng'ang'a (Civil Appeal 304 of 2024)
[2025] KEHC 12685 (KLR) (9 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12685 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 304 OF 2024
FN MUCHEMI, J
SEPTEMBER 9, 2025

BETWEEN

CHRISTINE MUTHONI MUMO APPELLANT

AND

ANDREW NJUNGE NG'ANG'A RESPONDENT

*(Being an Appeal from the judgment and decree of Hon. Joseph Were
(CM) delivered on 17th October 2024 in Ruiru CMCC No. E334 of 2022)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Chief Magistrate in CMCC No. E334 of 2022 from a claim based on a road traffic accident whereby the trial court apportioned liability at the ratio of 50:50 in favour of the respondent and awarded the respondent general damages of Kshs. 800,000/- and special damages of Kshs. 746,462/- plus costs and interest.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 11 grounds summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in finding the appellant contributed to the occurrence of the accident whereas the respondent's witness, PW2 was categorical that the respondent was to blame for the accident.
 - b. The learned trial magistrate erred in law and in fact by failing to appreciate the evidence adduced to show that the respondent was not qualified to drive or ride since he tendered no evidence to prove he was qualified as such.
 - c. The learned trial magistrate erred in law in awarding manifestly excessive general damages in the circumstances.



- d. The learned trial magistrate erred in law and in fact in awarding special damages which were not specifically proven as required by law.
 - e. The learned trial magistrate erred in law and in fact in awarding the respondent the entire costs of the suit when he had apportioned liability at 50% either side.
3. Directions were issued that parties put in written submissions and the record shows that the appellant complied by filing submissions on 27th May 2025. The respondent on the other hand had not filed his submissions by the time of writing this judgment.

The Appellant's Submissions

4. The appellant refers to the cases of *Timsales Ltd vs Stephen Gachie* (2005) (no citation given) and *Agnes Mutinda Ndolo & Another vs Mboya Wambua & 2 Others* (2017) eKLR and submits that the respondent did not prove any causal link between the accident and her negligence leading to his pain and injuries. Furthermore, PW1 Police Constable Maurice Okoth testified that the respondent who was riding motor cycle registration number KMBS 239D was to blame for the accident evidenced by the police abstract and motor vehicle inspection report. Thus, the evidence of the police and her three witnesses leaves no doubt that the respondent was wholly to blame for his own misfortune hence she ought not to be held liable. To support her contentions, the appellant relies on the case of *Jacob Momanyi Orioki vs Kevian Kenya Limited* [2018] eKLR.
5. The appellant submits that the trial court ought to have considered that the respondent was not qualified to ride or drive as he did not produce any documentary evidence to prove otherwise. Furthermore, the respondent admitted that he was riding in the middle lane of the super highway while carrying heavy luggage containing a welding machine, two grinders and a toolbox all weighing 65 kgs. This made his vehicle to be slow moving and should have been in the extreme left lane or the service lane. Thus, he ought to have been wholly blamed for the accident.
6. The appellant further submits that the evidence by DW2, James Munene was that the respondent tried to overtake her motor vehicle which was at the material time driving on the extreme left lane of the super highway but due to the heavy luggage which was resting horizontally on the pillion of the respondent's motor cycle came into contact with her right rear review mirror, lost control and fell. Relying on the case of *Munyi vs Karira & 3 Others* (Civil Appeal E610 of 2022) [2024] KEHC 9672 (KLR), the appellant argues that she did not in any way contribute to the respondent's misfortune and thus urges the court to set aside the award by the trial court on liability and quantum.
7. The appellant prays that the court set aside the award on general damages of Kshs. 800,000/- and substitute it with Kshs. 400,000/- which is commensurate to the injuries suffered by the respondent and considering his injuries have healed with no permanent deformity. The appellant relies on the cases of *Elizaphen Mokaya Bogonko vs Fredrick Omondi Ouna* [2022] eKLR where the respondent suffered head injury with loss of consciousness, fracture of the right zygoma (facial bone), multiple facial lacerations, blunt injury to the shoulders and blunt injury and bruises to both limbs. The appellate court set aside the award of Kshs. 850,000/- and substituted the same with an award of Kshs. 500,000/-. Further in *GA (Minor suing through her father and next friend BZO) vs Paul Muthuku* [2020] eKLR where the appellant sustained multiple fractures of the frontal left orbital roof (communitated) right temporal bones (petrous), bleeding in the skull airspaces (haem sinus), cut on the head (frontal), a cut on the chin. The court substituted an award of Kshs. 300,000/- with an award of Kshs. 500,000/-.
8. The appellant argues that the respondent was awarded Kshs. 746,462/- in special damages which he did not specifically prove.



The appellant submits that the amount of Kshs. 950,000/- which the respondent stated was raised during a fund raiser to pay his medical bills cannot be awarded to him as it did not belong to him which will lead to unfair enrichment. Further, the respondent produced three invoices from Kenyatta National Hospital for Kshs. 743,483/- but he failed to produce receipts to show that the said amounts were paid. To support her contentions, the appellant refers to the cases of Total (Kenya) Limited formally Caltex Oil (Kenya) Limited vs Janevams Limited [2015] eKLR and Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR. Thus, the appellant argues that the respondent ought to be awarded a sum of Kshs. 18,550/- which he specifically proved.

9. Relying on the case of Mburu vs Komba (Civil Appeal 220 of 2023) [2024] KEHC 10447 (KLR) (23 August 2024), the appellant argues that the trial court erred in awarding the respondent the entire costs of the suit despite apportioning liability at 50% which places her at a disadvantage.

Issues for determination

10. The main issues for determination are:-
 - a. Whether the liability apportioned by the trial court was against the weight of the evidence adduced.
 - b. Whether the award on general damages was manifestly excessive.
 - c. Whether special damages were specifically pleaded and proven.

The Law

11. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

12. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of 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.

13. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and



- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the liability apportioned by the trial court was against the weight of the evidence adduced.

14. The appellant seeks to have the court substitute the trial court's findings of 50% liability against her with 100% liability upon the respondent. The appellant asserts that the accident was substantially caused by the respondent and she did not contribute in any form to its occurrence.
15. The principles guiding the 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.

16. The record shows that the appellant's three witnesses and the respondent are the only parties who witnessed the accident. According to the appellant's driver DW1, on the material day, he was driving motor vehicle registration number KBU 890V along Thika superhighway on the outermost left lane when upon reaching Kenyatta University, near Uni City Mall, the respondent who was riding motor cycle registration number KMDS 239D in the middle lane and on DW1's right side hit his motor vehicle from the right back right wing and scratched it all the way to the front right. The witness further testified that the motor cycle was trying to overtake him and cross over the extreme left lane but he could not do so as his motorcycle was not sufficiently powerful and the luggage on his pillion made him lose control of the motor cycle causing it to collide with his car from the right side. DW1 attributed negligence on the part of the respondent as he was riding on the wrong lane, the middle of the superhighway and yet he was not actually riding fast enough; he veered off suddenly from the middle lane to the left lane of the road and suddenly came into contact with his car which was in the extreme left lane; he did not check whether there was a motor vehicle in the left lane before deciding to veer off and he did not fasten his helmet. The witness further testified that the police visited the scene and blamed the respondent for the accident.
17. On cross examination, the witness testified that the respondent was carrying luggage, a welding machine which was placed horizontally and protruding on both sides. The witness further testified that he was driving at a moderate speed as he was not on the fast lane. DW1 testified further that the impact was on the right side of his motor vehicle.
18. DW2, testified that on the material day, he was in the company of his son, DW1 in motor vehicle registration number KBU 890V which was being driven at the left outer lane of the superhighway when the respondent who was riding motor cycle registration number KMDS 239D carrying heavy luggage on the pillion of his motor cycle and riding in the middle lane suddenly swerved towards their lane in a bid to overtake them and cross to the extreme left lane. However the respondent's motor cycle was not powerful enough and he lost control thus colliding with their motor vehicle. On cross examination DW2 testified that the respondent was in the middle lane and the damage to the appellant's motor vehicle was to the right side, the mirror.
19. DW3, testified that on the material day he was driving behind the DW1 in his motor vehicle registration number KBM 651B and as they approached Unicity Mall after Kenyatta University, the respondent who was riding his motor cycle in the middle lane suddenly swerved to the left lane and hit motor



vehicle registration number KBU 890V at the side mirror. As a result of the impact, the respondent lost control and fell on the tarmac and skidded for a distance. On cross examination, DW3 testified that he was about 5 meters behind the appellant's motor vehicle. The witness testified that the respondent could have lost control due to the luggage which was placed horizontally. The witness testified that the accident was largely caused by the respondent.

20. The respondent testified as PW1 and stated that on the material day, he was riding his motor cycle registration number KMDS 239D on his lane along Thika superhighway when motor vehicle registration number KBU 940V rammed into the rear side of his motor cycle. On cross examination, the witness testified that he was riding on the left lane which is slow. He further testified that the suit motor vehicle hit him from behind instead of overtaking him. He further testified that he was carrying a welding machine weighing 45 kgs, two grinders of 16 kgs and toolbox of 8-9 kgs all totaling to Kshs. 65kgs.
21. The respondent called Police Constable Maurice Okoth as PW1 who confirmed that an accident occurred on 3rd May 2019 between motor cycle registration number KMBS 239D and motor vehicle registration number KBU 890V. The police officer testified that the respondent was to blame for the accident. On cross examination, the witness testified that he was not the investigating officer and that he did not visit the scene of the accident.
22. From the evidence, it is evident that the respondent was riding his motor cycle in the middle lane of the superhighway and not the left lane as he alleged. This is evident from the damage on the appellant's vehicle on the left side. It is not disputed that the respondent was carrying heavy luggage in his pillion which was placed horizontally and protruding on both sides. It is also clear from the evidence that the rider hit the motor vehicle registration number KBU 890V on the right side. If the respondent had been hit from behind as he alleged the side mirror of the motor vehicle could not have been ripped off. The evidence of DW1, DW2, DW3 and the PW1 all show that the respondent was to blame substantially for the accident. The police abstract evidently shows that the respondent was to blame for the accident. The police visited the scene and DW1 testified that he was not blamed for anything and he was issued with a police abstract blaming the respondent. It is evident that the respondent was economical with the truth when he testified that he was riding on the extreme left lane while three witnesses said they saw him in the middle lane. The respondent alleges that DW1 was overtaking and thus hit him from the back, but the testimonies of DW1, DW2 and DW3 who all saw the accident testified that the respondent hit DW1. Furthermore, the appellant produced a certificate of examination and test of vehicle which showed that his motor vehicle was damaged at the door causing a dent and that the rear view offside mirror was ripped off. Thus, the evidence clearly supports the accident occurred as per the testimonies of DW1, DW2 and DW3. Furthermore, the luggage by the respondent which was heavy and placed horizontally played a role upon the respondent hitting the suit motor vehicle which caused him to loose control and fall off the tarmac. It is thus evident that the respondent was the author of his own misfortune. The accident occurred in the middle of the road which supports the appellant's evidence that it was the respondent who was overtaking the appellant's vehicle and not vice versa as the respondent tried to put it.
23. Had the magistrate carefully considered the entire evidence and especially that of the three (3) witnesses of the appellant, he would have arrived at a different conclusion on liability. This leads me to the conclusion that the finding of the magistrate on liability was not based on the evidence on record. As such, the apportionment of liability at the ratio of 50:50 was erroneous.
24. I hereby set aside the judgment on liability of the court below and substitute it with a finding that the respondent failed to prove his case on the balance of probabilities and it is hereby dismissed with costs to the appellant.



25. Despite this finding on liability this court requires to deal with the issue of quantum for purposes of a possible 2nd appeal.
26. It is noted that Dr. Wokabi's medical report that the respondent suffered fracture of the right frontal bone, and fracture of the right orbital bone, had frequent headaches and lost consciousness after the accident. The court awarded general damages of Ksh.800,000/= which are reasonable comparatively with relevant cases. The damages in my view, are not excessive and are hereby retained as assessed.
27. As for special damages, the respondent pleaded Ksh.953,000/= in his amended plaint dated 18/08/2022. However, the receipts produced as prove of payment were for Ksh.3000/= for medical report dated 7/12/2021. As for the rest of the special damages claimed, no receipts were attached for medical expenses, save for invoices. The respondent said his family raised Ksh.950,000 /= for payment of medical expenses but produced no receipt. It is trite law that special damages must not only be pleaded but also proved which the respondent failed to do.
28. I would have awarded special damages of Ksh.3000/= only for the medical report as proved had this appeal been unsuccessful.
29. Consequently, this appeal has merit and is hereby allowed.
30. Due to the circumstances of this case and the outcome of this appeal, I hereby order that each party meets their own costs.
31. It is hereby ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE

