Njambi v Njoroge & another (Civil Appeal E031 of 2024)
[2025] KEHC 12773 (KLR) (10 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12773 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E031 OF 2024

GL NZIOKA, J

SEPTEMBER 10, 2025

BETWEEN

ERASTUS KAHUGU NJAMBI ..... APPELLANT

AND

PETER MBURU NJOROGE ..... 1ST RESPONDENT

SAMWEL GATHANA ..... 2ND RESPONDENT

(Being an appeal against the decision of Hon J. Ndengeri (PM) delivered on 4th April 2024, in Naivasha Chief Magistrate Civil Case No, 297 of 2022)

JUDGMENT

1. By a plaint dated 7th May 2022, the plaintiff (herein "the appellant" sued the defendants (herein "the respondents") seeking for judgment against the respondents jointly and severally for:
    a. Kshs 213,844.00
    b. General damages
    c. Kshs 200,000.00- future medical expenses
    d. Cost of the suit
    e. Interest on above at court rates from the date of filing suit
2. The appellant's case is that on or about 2nd December, 2021 at about 19.30 hrs he was lawfully walking at Karate center having successful crossed the Naivasha-Kinangop road when the respondent's, agent, driver, servant and or employee negligently drove, controlled and/or managed a motor vehicle Registration No. KCD XXXV parked off the road and knocked the him.

3. The appellants tabulates the particulars of negligence attributed to the respondents at paragraph 4 of the plaint as follows: -

    a. Driving motor vehicle registration No. KCD XXXV on a public road whist the same was brake-less and/or defective.

    b. Driving at an excessive speed in a build up area

    c. Failing to keep a proper look out

    d. Driving without due care and attention

    e. Allowing and/or permitting an accident to occur

    f. Causing the said accident

    g. Losing control of the motor vehicle

    h. For failing to ensure whether it was safe to drive off and driving off while it was unsafe to do so

    i. Knocking the plaintiff

    j. Failing to give due regard to other road users and in particular the plaintiff

    k. Failing to brake, stop, slow-down and/or prevent the accident

    l. Res Ipsa Loquitor

4. The appellant' further aver that as a result of the accident he sustained the following injuries:

    a. Fracture left tibia and fibula

    b. Fracture left humerus

    c. Soft tissue injuries of the face

    d. Blunt injury to the anterior chest wall leading to soft tissue injuries

    e. Severe soft tissue injuries of the left hand

    f. Severe soft tissue injuries of the left leg

5. Further that as a result of the subject accident, he suffered loss and special damages as follows:

    a. Medical report ---------- Kshs 8,000.00

    b. Records from registrar of motor vehicles- Kshs 550,00

    c. Medical expenses ---------- Kshs 205, 294.00

    Total ---------- Kshs 213,844.00

6. However, the appellant's claim was opposed by the respondents vide a statement of defence dated 10th November 2022 filed by the 2nd respondent. He denied all the averments in the plaint, in particular that, that the accident occurred as alleged and/or was caused by the negligence of the respondent;s agent. Similarly, the particulars of negligence attributed to the respondents was denied.

7. However, the 2nd respondent pleaded that in the alternative and without prejudice basis that, if the accident occurred at all, then the same was solely caused or substantially contributed to by the negligence of the appellant

8. The 2nd respondent tabulated the particulars of negligence attributed to the appellant at paragraph 5 of the statement of defence as follows:

   a. Failing to take any or any adequate precaution for his safety

   b. Failing to have regard to other road users and particularly motor vehicle registration number KCD XXXV

   c. Failing to keep to the pedestrian walk

   d. Sanding carelessly and dangerously on the road

   e. Failing to move and avoid the accident

9. At the close of the pleadings, the case, proceeded to full hearing. The appellant's case was supported by the evidence of (PW1) Dr. Obed Omuyoma who produced a medical report dated 23rd April 2022 (P. exh1) in which he noted that the appellant suffered 30% permanent disability and that he required Kshs. 200,000 to remove implant. He classified the injuries suffered as grievous harm.

10. The appellant's case was further supported by the evidence of (PW2) No. 96XXX PC Josephat Makau who confirmed the occurrence of the accident and produced the police abstract as an exhibit.

11. The appellant on his part, adopted his witness statement as evidence in chief where he reiterated the averments in the plaint. He blamed the the owner of the subject vehicle for allowing unqualified personnel to control the vehicle and the driver for negligently and causing the accident. He further stated that he was admitted at Naivasha County Referral Hospital from 2nd December 2021 to 17th January 2021, during which period he underwent an operation for open reduction and internal fixation (ORIF).

12. Notably the respondents did not call any witness in support of their case.

13. The parties subsequently filed their respective submissions. By a judgment dated 4th April 2024, the trial court entered judgment in favour of the appellant in the following terms:

    Liability ---------- 90% against the defendants jointly

    General damages---------- Kshs. 600,000

    Special damages----------Kshs. 129,920

    Future medical expenses----------Kshs. 100,000

    Kshs. 829,920 less 10%

    Total ----------Kshs. 746,928

14. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds:

    a. That the learned Magistrate erred in law and fact in apportioning liability at 10% to 90% as between the appellant and respondent's contrary to the evidence on record.

    b. That the learned Magistrate erred in law and fact in failing to consider adequately or at all the submissions by the appellant and the authorities submitted.

    c. That the learned Magistrate erred in law and in awarding general damages which were so in ordinately low as to represent an entirely erroneous estimate of the compensation due to the appellant owing to the nature of the injuries sustained and the residual disabilities there to.

d. That the learned trial Magistrate erred in law and fact in failing to award al the special damages pleaded and proved.

e. That the learned trial Magistrate erred in law and fact in failing to award future medical expense as pleaded and proved.

f. That the learned Magistrate erred in law and fact in writing a judgment which failed to meet the criteria set out in the Civil Procedure Rules

15. The appeal was disposed of vide of filing of submissions. The appellant in submissions dated 18th October 2024, argued that the trial court erred in apportioning liability at 10% against him and 90% against the respondent in absence of any evidence of contributory negligence on his part.

16. That the trial court disregarded his uncontroverted evidence that the accident occurred off the tarmac and erroneously held that he was on the road when the accident occurred. Further, the misapprehension of the evidence was an error of principle and led to a wrongful finding of contributory negligence.

17. The appellant further argued that despite the respondent pleading negligence on the part of the appellant in paragraph 5 of defence, the respondent did not adduce any evidence in support, rendering the allegation a mere averment without proof. He relied on the case of CMC Aviation Ltd v Cruisair Ltd (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, where Madan J (as he then was) stated that pleadings are not evidence until proved or admitted by evidence, and no decision can be founded upon them.

18. The appellant submitted that he proved on a balance of probabilities that the accident was caused by the respondent's negligence and therefore liability should have been wholly decided against the respondents.

19. On the issue of quantum, the appellant submitted that the award of Kshs 600,000 as general damages is inordinately low. That the the trial court failed to consider the nature and extent of injuries sustained namely: fracture of the right tibia and fibula, fracture of the left humerus, soft tissue injuries to the face, and blunt chest trauma, resulting in soft tissue injuries with permanent incapacity assessed by Dr. Omuyoma at 30%.

20. That he sought an award of Kshs 1,200,000, in the trial court and relied on the case of; Ouru Super Stores v Geoffrey Gichana Onchwari (Kisii HCCA No. 63 of 2017), where the respondent sustained similar injuries to wit: facial bruises, tenderness of the anterior chest wall, fracture of the left humerus bone mid 1/3, and fracture of the left tibia and fibula and the High Court upheld trial court's award of Kshs. 800,000 as general damages.

21. That in this matter the trial court erred in holding that the injuries in the precedent were more severe than the injuries he sustained yet they were identical in every respect. Further that the trial court erred by failing to have due regard to the binding precedent and awarded general damages of Kshs. 600,000 without reference to any comparable authority. In addition,

22. Furthermore, the trial court erred by relying on precedents decided in the year 2018, in a judgment delivered in the year the 2024 judgment. That an award that was deemed reasonable in the year 2018 cannot remain appropriate six (6) years later without adjustment for economic realities.

23. On future medical expenses, the appellant submitted that the trial court erred in awarding Kshs. 100,000 contrary to the evidence on record. That the expense was properly pleaded in prayer (c) of the plaint and was supported by uncontroverted evidence in medical report and testimony by Dr.

Omuyoma's, who justified the amount as Kshs 200,000 representing the average cost for mission or public hospital treatment.

24. However, the trial Magistrate's reduced the award to Kshs. 100,00 based on an unsubstantiated evidence as that she did not reveal the source of the figure. The appellant referred the court to the case of Kenya Power & Lighting Company Limited v AMK (Civil Appeal 58 of 2020) KECA 52, where the Court of Appeal referenced it earlier decision in Tracom Limited & Another v Hassan Mohamed Adan, where it held that while future medical expenses are in the realm of special damages, it may be impractical to ascertain the exact costs, and an estimate cost ssuffices if supported by evidence.

25. The appellant urged the court to allow the appeal, set aside the judgment on liability and apportion it wholly against the respondent, enhance general damages to Kshs. 1,200,000, future medical expenses to Kshs. 200,000 and award him costs of the appeal.

26. The respondents did not file any submissions on the appeal.

27. At the conclusion of the arguments by the parties I note that the role of the 1st appellate court as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion.

28. The court stated as follows: -

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

29. Pursuant to the aforesaid, I find that on the issue of liability, the appellant at paragraph 4 of the plaint, blamed the respondents for the accident as per the particulars of negligence tabulated. In support of his allegations, the appellant filed a witness statement dated 9th May 2022, in which he detailed how the accident occurred and states that, the point of impact of the accident was off the road. He subsequently adopted that statement as his evidence in chief at the time of hearing of the case.

30. Furthermore, through the evidence of (PW2) No. 96XXX Pc Josephat Makau, the appellant produced the police abstract which confirmed that he and respondent's vehicle were involved in the accident. However, the abstract does not indicate who was to blame for the accident, as the results of investigation or prosecution therein is indicated as; "case referred to insurance".

31. In apportioning liability against the appellant the trial court stated that:

> " the plaintiff through responses in cross-examination demonstrated that, he did not know how the accident occurred. He was however certain that the vehicle was coming from the opposite direction. This court entertained the possibility that the plaintiff was on the road as his pleadings pointed in the direction of being in the process of crossing the road. This therefore means that he ought t have also been on the lookout for his own safety.

> It was the finding of this court that even in the absence of any cogent evidence called by the defence, the court still found that the plaintiff failed to exercise diligence as a road user as well. He shall shoulder 10% liability. The two defendants are held liable at 90% jointly and severally."

32. However, the appellant argues in the submissions filed that, there was no proof of negligence on his part and that his evidence on occurrence of the accident was not challenged and/or controverted. As already stated the respondent did not file any submissions on the appeal, consequently, the appeal is generally unopposed.

33. Be that, as it were the law is settled that he who alleges proves. The respondents alleged that the appellant was negligent and therefore they were legally bound to prove the same but did not do so as they led no evidence to substantiate their allegation.

34. The finding of the trial court that they did so through cross-examination is not tenable. The purpose of cross-examination is to test the veracity of the evidence of a witness and establish a defence. Therefore, the respondents had to adduce direct evidence to support their defence. Indeed, the trial court was live to the same as stated at paragraph 8 of the judgment, that, there was no cogent evidence called by the defence.

35. Consequently, the appellant's evidence as to how the accident occurred remain unchallenged and by holding that, he was 10% liable for the accident, the trial court erred. As a result, I set aside the finding on liability and substitute it with a finding that, the respondents are jointly and severally liable for the accident at 100%.

36. As regards quantum, the law is settled as to the circumstances under which the appellate court will interfere with an award of quantum. That while assessing damages at the appeal stage, the appellate court will not interfere with the trial court's decision on quantum unless in exercising that discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another Vs Shah (1968) EA and Mkube -vs - Nyamuro 1983 KLR 403.

37. Further the Court of Appeal in the case of: Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003 (unreported) stated as follows: -

> " We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257)."

38. In the instant matter, the appellant has pleaded the injuries sustained at paragraph 5 of the plaint. In support thereof, he produced a P3 form dated 2nd December 2021 which shows he sustained the following injuries; blunt injury on the left side of the chest with mild tenderness on deep palpatic; fracture of the left mid humerus with medial longitudinal scar measuring 2,5cm where ORIF was done; a fracture of the left mid tibia and fibula with an ugly scar on the lateral aspect measuring 40cm where ORIF was done. The injuries were classified as grevious harm.

39. In addition, the appellant availed a medical report dated 22nd April 2022 prepared by Dr. Obed Omuyoma which indicates that the appellant was admitted for one and half (1½) months. That, he

was taken to theatre for Open Reduction Internal Fixation (ORIF) and the fractures fixed after surgical debridement.

40. The report further indicates that the appellant sustained the injuries pleaded and has suffered a permanent disability of thirty percent (30%). Further, the implant will in future be removed at a cost of Kshs 200,000. The degree of injuries was classified as grievous harm.

41. At the hearing of the case (PW 1) Dr. Obed Omuyoma produced the medical report in evidence.

42. Notably, the respondents did not adduce any medical evidence regarding the injuries the appellant suffered.

43. The appellant in submissions before the trial court sought for a sum of Kshs. 1,200,000 as general damages, special damages stated and Kshs. 200,000 for future medical expenses.

44. Notably again the respondent's submissions in the trial court is not included in the record of appeal. In that regard, it suffices to note that, the appellant's counsel confirmed that the record of appeal was complete. Again, regrettably the trial court's judgment does not indicate whether the respondents filed any submissions in the trial court.

45. Be that as it were, the appellant faults the trial court for failure to consider precedents and inflationary trends. Further that the trial court did not consider authority cited by the appellant, which was binding on the trial court and neither was it distinguished.

46. That the case cited by the appellant was in all fours with the matter herein and that had the trial court considered it properly it would not have awarded the Kshs. 600,000 as general damages. Further decision that the decision of; Ouru Super Stores v Geoffrey Gichana Onchwari (Kisii HCCA No. 63 of 2017) relied on was decided six (6) years earlier than the matter herein and therefore Kshs. 800,000 which was reasonable in the year 2018 cannot have depreciated to Kshs. 600,000 in the year 2024.

47. That as regards future medical expenses, the appellant argues that the Kshs. 200,000 sought for was supported by Dr. Omuyoma. That as the medical report was not challenged and that the sum of Kshs. 100,000 is not tenable since the trial court did not mention the source relied on to award Kshs. 100,000.

48. It suffices to note that the appellant abandoned the ground of appeal on special damages.

49. Pursuant to the a foresaid, as regard general damages, I note from the judgment of the trial court that the court did not indicate whether it considered the medical evidence adduced by the appellant or not and/or the submissions filed by the appellant and the authority cited therein.

50. Further I note that the legal authorities relied on by the court were decided in the years; 2013 and 2014 respectively. Yet the court did not indicate in the judgment how the inflationary issue was considered.

51. Furthermore, the injuries in the case of Young & Company E.A. Limited vs Edward Yumatsi (2013) eKLR were less in severity than those herein and those in the case of Samuel Mwangi Kamau vs Joseph M. Kimemia and Another (2004) eKLR are relatively similar to those herein. However, having relied on the said authority the award herein should have been as near the sum therein as possible especially taking into account the appellant herein suffered 30% permanent disability.

52. In addition, although the trial court indicates it considered the appellant's injuries, nothing much is said of the same in the judgment.

53. In re assessing general damages, I note from the medical documents that, the appellant suffered inter alia, three fractures and was hospitalized for 1 ½ months. He was still on treatment at the time of trial.

The authority cited by the appellant was generally comparable to the matter herein. Further the award of Kshs. 800,000 given in the year 2018 cannot have depreciated.

54. Taking into account the aforesaid and in particular the appellant suffered the permanent disability of 30% and the period the matter has been in court and inflationary factors, I find that the figure of Kshs. 600,000 awarded as general damages is not reasonable. I set it aside and substitute it with a figure of Kshs 1, 000,000.

55. As regards the future medical expenses Dr. Omuyoma confirmed the same. The respondents did not oppose it. The sentiments of the trial court on the same in awarding the lesser sum than pleaded are not substantiated. Consequently, I set aside the figure of Kshs. 100,000 and substitute with figure of Kshs 200, 000.

56. The sum awarded shall attract interest from date of judgment in the trial court. The costs of suit in trial court is awarded to the appellant.

57. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 10TH DAY OF SEPTEMBER 2025

GRACE L. NZIOKA

JUDGE

In the presence of:-

Mr. Wainaina for the appellant

N/A for the respondent

Ms. Hannah: court assistant