



**Eastcon Multipliers Limited & another v Mutisya (Civil Appeal  
E033 of 2022) [2024] KEHC 4995 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4995 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E033 OF 2022**

**MW MUIGAI, J**

**MAY 16, 2024**

**BETWEEN**

**EASTCON MULTIPLIERS LIMITED ..... 1<sup>ST</sup> APPLICANT**

**DAIMA CONNECTIONS ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SHADRACK NZIOKA MUTISYA ..... RESPONDENT**

*(Being an Appeal from the judgment delivered on 10th March, 2022 at the Chief Magistrate's Court number 408 of 2020 at Mavoko by Hon. Benard Kasavuli Principal Magistrate)*

**JUDGMENT**

**Background**

**Proceedings in Magistrates' Court**

**Plaint**

1. Vide Plaintiff dated 10<sup>th</sup> June, 2020 and filed on 11<sup>th</sup> June, 2020, brought against the Defendants/Appellants in which the Plaintiff/Respondent claimed that at all material times to the suit, the 1<sup>st</sup> Defendant/Appellant was the registered owner while the 2<sup>nd</sup> Defendant/Appellant was the beneficial owner of motor Vehicle Registration Number KCE 988Q ScaniaBus/coach respectively.
2. The cause of action on 24<sup>th</sup> day of May, 2019 at around 5:45 a.m when the Plaintiff/ Respondent was lawfully, carefully and prudently riding his Motor Cycle Registration Number KMDS 428T Skygo along Mombasa Road at Bridge 39 and as he was approaching stage 39, Motor Vehicle Registration Number KCE 988Q ScaniaBus/coach which was being driven recklessly and by over speeding knocked him down Respondent from the rear side while the Plaintiff/Respondent was still on his right and



lawful lane and as a result of the said accident the Plaintiff/Respondent suffered the following serious injuries;

- a. Blunt injuries to the head;
  - b. Degloving injuries to the left foot;
  - c. Friction burns to the left knee and left ankle joint;
  - d. Friction burn wounds to the left flank (abdomen)
3. The Plaintiff/Respondent held the Defendant/Appellant vicariously liable for the loss and damage suffered and prayed for;
- a. General damages
  - b. Special damages of Kshs. 3,750.00/-
  - c. Costs of the suit;
  - d. Interest on (a), (b) and (c) above.
  - e. Any other/further relief this court may deem fit and just to grant.

#### **Statement of Defence**

4. The Defendants/Appellants in their defense dated 25<sup>th</sup> June, 2020 and filed in court on 8<sup>th</sup> July,2020, denied all the contents of the Plaint and averred that any such occurrence as the Plaintiff/Respondent could prove was caused solely and/or substantially contributed to by the Plaintiff's/Respondent's own negligence. They prayed that the suit against them be dismissed with costs.

#### **Reply to Defence**

5. The Plaintiff/Respondent, in his reply to defense dated 14<sup>th</sup> July,2020 and filed in court on 15<sup>th</sup> July,2020 denied the contents in the defense

#### **Hearing in the Trial Court**

##### **The Plaintiff's Case**

6. PW1 No. 68609 CPL Zakhanua Mideny testified that he had the police abstract for Plaintiff who was involved in road traffic accident. The Police abstract was dated 14/5/2020 and accident occurred on 24/5/2019 at about 5:45a.m. According to PW1 the accident occurred at State 39 area along Nairobi-Mombasa Road. It was his testimony that Plaintiff was riding KMDA 428T make Skygo motor cycle heading towards Nairobi direction when it was knocked by motor vehicle KCE 988Q Scania bus which was heading to Nairobi from Mombasa and as a result a pillion passenger succumbed to injuries which claimant was injured seriously. Police Abstract- EXH-2.
7. In cross-examination, it was the testimony of PW1 that Sargent Issa, P.C Wambui were investigating officers. PW1 stated that the motor cycle was joining the road from a petrol station. That the police abstract only shows registration number of motor cycle. The O.B. entry was done by the Investigating Officer. PW1 did not have inspection reports of motor vehicle and motor cycle. The scene was on a highway. PW1 was not aware if investigations had been concluded. According to PW1 he only had police abstract for the rider and that if the driver had Police abstract it must have been issued from their station.



8. In re-examination, it was testified that they relied on the most recent abstract which was issued to Shadrack.
9. PW2 was Shadrack Nzioki Mutisya. He stated that he was involved in an accident on 24/5/2019; he was from Athi River to Everest where he was taking his client. He stated that motor vehicle approached from behind and knocked them. PW2 was injured but passenger died. He was admitted at KNH and later discharged. He blamed the driver for careless driving. He told the Trial Court that he was wearing helmet and reflector. He prayed for damages and that he had not healed well.
10. In cross-examination, he told the Trial Court that he has identity card Number 25174039. PW2 said he was 33 years old and was 32 years when the accident occurred. PW2 had a driving license but it was not in the list of documents. He testified that he was in the dark. On whether he was a licensed motor cycle list or not, according to PW2, he was taking his customer at Everest, and he was riding on a highway. PW2 was from Athi River direction heading to Nairobi direction. PW2 was coming from petrol station. Testifying that the road is a highway and he had no evidence of the motor vehicle was over speeding.
11. He said that the motor Cycle was hit from behind. He did not have inspection report of motor cycle. That he had used the road for 5 years and that there are petrol stations on that road but the accident did not occur at petrol station; further that the road is busy but it was not busy at that time.
12. According to his witness statement, he said there was a rider at the scene though he was not his witness. He also said he could not recall for how long he was unconscious. PW2 did not have a sketch plan to show how accident occurred. PW2 did not know who reported accident neither did he know if police went at the scene. PW2, had lost consciousness and woke up in the hospital.
13. It was the testimony of PW2 that he showed the doctor the injury on head. He said he only saw a boda boda rider at the scene before pain worsened. PW2 did not record his statement. It was recorded by his brother who is not a witness herein. That the police abstract blames the rider. PW2 was the rider. He told Trial Court that he did not know why police blamed him. PW2 did not agree with driver and conductor that he was to blame. PW2 did not agree with the evidence of PW1. He wanted court to disregard police evidence herein. That he was wearing helmet.
14. He said that he was injured on the head because the helmet was plastic and it broke. He fell on opposite side of road as one comes from Nairobi direction. PW2 was riding towards Nairobi direction. He fell on his left side as you face Nairobi direction. That the passenger died because impact was from behind. PW2 did not know if other witnesses recorded witness statements He told the Trial Court that he did not know if driver was charged for causing accident. He wanted compensation for loss of motor cycle because he was using it. He recorded a witness statement after leaving hospital at the police station but he could not remember the date. He told Trial Court that he no longer went for treatment as he was discharged.
15. In re-examination, he told Trial Court that Defendant's police abstract was issued on 25/7/2020, that this was two months later. He said that he had license at the time of accident. it was his testimony that the driver was 1<sup>st</sup> to report and that he was admitted for about 2 months. He told the Trial Court further that the motor vehicle was at high speed and that is why the helmet broke, falling on his right facing Nairobi.

### **The Defendant's Case**

16. DW1 was No. 90892PC Pius Kariuki who told Trial Court that he had been summoned to produce Police Abstract on road traffic accident of 24/5/2019 which occurred around 5:45a.m. at bridge 39



- area near Total Petrol Station along Nairobi-Mombasa Road. Testifying it involved motor vehicle KCE 988Q Scania Bus which was being driven by Mwai and Motor cycle KMDS 428T driven by Shadrack Nzioka.
17. Further that the rider was carrying pillion passenger Thuo Kamau. Opining that it occurred that bus was from Mombasa road and on reaching location of accident, the bus knocked motor cycle while joining the road from petrol station. That the driver was seriously injured and passenger died. DW1 told the Trial Court that scene was visited by sergeant Iso and both motor vehicles and bus were towed to police station to await inspection. He said that according to O.B, the driver was joining main road from petrol station. He said that the police abstract blamed the rider. DW1 produced in Trial Court Police Abstract as DEXH-1 and O.B.-DEXH.2.
  18. In cross-examination, it was DW1's testimony that the O.B details did not blame the rider and that he is not aware the Plaintiff was issued with Police Abstract on 14/5/2020. DW1 did not have the Police Abstract dated 25/7/2020. Testifying that he was not the Investigating Officer and that he did not visit the scene. Further, he stated that Sergeant Iso and P.C Wamboi recorded the O.B and that he did not have the police file. DW1 told the Trial Court that he was not aware Defendant had recorded Witness Statement saying he had knocked Plaintiff from the rear and that he could have been hit at any side if he was joining the road.
  19. In re-examination, it was DW1's testimony that 25/5/2020 is the date of Police Abstract.
  20. DW2 was David Maina Mwangi who told the Trial Court that he is a driver since 2000 and that he recorded a Witness Statement which he wished to rely on. He further testified that on fateful day, he was from Mombasa and on reaching Athi River near Bridge at 5:50a.m, he saw a boda boda rider joining the road in a hurry. He claimed that he was about 10 meters away from him. He said that he tried avoiding him but he knocked his motor vehicle front near head lamp.
  21. DW2 said he was joining road from DW2's left side as you face Nairobi direction. DW2 testified that he could see road clearly and that he was driving at about 50km/h. He told Trial Court that the driver was injured but the passenger died. DW2 applied the emergency brakes. It was his testimony that he did not hit the rider from behind and that the security guard came and said the rider and his passenger were leaving in emotions and in hurry. DW2 could not tell the number of passengers he was carrying but the bus was about full.
  22. It was his testimony that police went at scene of accident fifteen (15) minutes after the accident. DW2 blamed the rider for failing to check if it was safe to cross. He told Trial Court that the motor vehicle was hit on front left side. That the rider was joining the road to head towards Mombasa direction as DW2 was heading to Nairobi direction. According to DW2 there were skid marks on the road; police took measurements. DW2 said he was not charged and that the rider was blamed.
  23. In cross-examination, DW2 testified that he was not with the rider when he recorded Witness Statement at police station because he had been taken to hospital by ambulance. He told Trial Court that he never hit the motor cycle from the rear; motor cycle knocked him. DW2 denied knocking the rider from behind. DW2 claimed that his Witness Statement should be relied on. DW2 testified that he had never been in any other judicial criminal case/traffic case. That he was driving KCE which was new. He told Trial Court that his motor vehicle was in good condition and he could see a head well. Claiming that visibility was clear.
  24. In re-examination, he testified that the rider knocked him and not other way round. Police visited the scene and he recorded Witness Statement.



## **Trial Court Judgment**

25. Vide a judgment dated and delivered on 10<sup>th</sup> March,2022, the Trial Court concluded that liability be apportioned at 70:30 in favor of the Plaintiff/Respondent and entered judgement as follows:
- a. Liability 70:30
  - b. General damages Kshs. 300,000.00
  - c. Special damages Kshs. 3,750.00
- Total Kshs. 303,750.00  
Less 30% Kshs. 91,125.00  
Net award Kshs. 212,625.00

## **The Appeal**

26. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 18<sup>th</sup> March,2022 and filed in court on 21<sup>st</sup> March,2022 sought orders that:
- a. Spent
  - b. The Appellate court do set aside the Learned Trial Magistrate's judgment delivered on 10<sup>th</sup> March,2022 on liability and quantum and re-place with its own assessment.
  - c. Costs of this appeal be borne by the Respondent.
27. The appeal is brought on the grounds that:
- a. The Learned Magistrate erred in law and in fact in finding the Appellants' 70% liable which finding is against the height of evidence presented in court by the Appellants through their evidence on record.
  - b. The Learned Trial Magistrate erred in law and in fact in failing to pay regard to the evidence given in court by the Defendant and their witnesses that was guiding on liability in this case.
  - c. The Learned Trial Magistrate erred in law and in fact in failing to pay regard to the submissions and authorities filed alongside the Defendant's submissions that were guiding on liability as this case.
  - d. The Learned Magistrate erred in fact in law in awarding the Respondent on a 70:30 liability as against the Appellants; Kshs. 300.000/= for general damages, Kshs. 3,750/= for special damages which amount was exorbitantly high in the circumstances and injuries suffered by the Respondent.
  - e. The Learned Magistrate erred in fact and in law in holding that the Respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.
  - f. The Learned Magistrate erred in law and in fact in awarding the Respondent Kshs. 303,750/= as quantum which finding is against the height of evidence on record.
  - g. The Learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.



- h. The Learned Trial Magistrate erred in law in fact in failing to pay regard to submissions and decisions filed alongside the Defendants' submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
  - i. The Learned Magistrate erred in fact and law in finding that the Respondent was entitled to Kshs. 303,750/= quantum and 70% liable as against the Appellants.
28. The appeal was canvassed by way of written submissions

## **Submissions**

### **The Appellant's Submissions**

- 29. The Appellant in his submissions dated 17<sup>th</sup> March,2022 and filed in court on 20<sup>th</sup> March,2023, in which counsel for the Appellant I submitted that the Respondent did not prove liability; that the Appellants were negligent as per Section 107 of the *Evidence Act*. That the witness statement was written by the Respondent's brother who did not testify as to how the accident occurred. This meant that the Respondent's testimony was hearsay and is/was not admissible in court.
- 30. The Appellant submitted that the Respondent did not call any eye witness to the accident to testify about the alleged negligence on the part of the Appellant. It was contended that in any event, the abstract report indicates that the party to blame is the motor cycle rider who was negligent at thereby causing the accident.
- 31. To bolster this limb counsel placed reliance on the case of *Bwire Vs Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) (24 January 2022).
- 32. It was the case of the Appellant that the Respondent was negligent when joining the road and occasioned the accident. Contending that this court should hold the Respondent 100% liable and dismiss the awards under the heads of liability and quantum by the Trial Court.
- 33. On quantum, counsel submitted that the injuries sustained by the Respondent warrant an award of Kshs. 200,000.00. To buttress this limb counsel placed reliance on the following cases, Martin Mutuku & Another Vs SN (suing through his mother and next friend DC) [2021] eKLR and Francis Ndungu Wambui & 2 Others Vs Purity Wangui Gichobo [2019] eKLR.
- 34. It was contended that this court should bear in mind the principles on assessment of damages in determining whether to interfere with the same or not, quoted the case of Power Lighting Company Limited & Another Vs Zakayo Saitoti Naingola & Another (2008) eKLR.
- 35. The Appellant urged this Court to set aside the Judgment of the Trial Court herein and reassess the quantum based on their submissions herein and in the Trial Court. Prayed that the Appeal herein be allowed as prayed and the Respondent be awarded costs of this Appeal.

### **Respondent's Submissions**

- 36. In his submissions dated 10<sup>th</sup> May,2023 and filed in court on 21<sup>st</sup> June,2023, wherein counsel for the Respondent while raising an issue of whether the quantum awarded was inordinately high submitted that the Respondent pleaded to have sustained the following injuries:
  - a. Blunt injuries to the head;
  - b. Degloving injuries to the left foot;



- c. Friction burns to the left knee and left ankle joint;
  - d. Friction burn wounds to the left flank (abdomen)
37. It was submitted that Dr. Titus Nzina Ndeti through his medical report dated 23/10/2019 stated that the injuries sustained by the Respondent were severe soft tissue injuries which caused him pain, blood loss and suffering. Contending that the Doctor stated that complete healing was anticipated with residual scars which were permanent and of cosmetic concern.
38. It was the case of the Respondent that considering the rate of inflation and comparable authorities it is his prayer that the award of general damages of Kshs. 300,000 be upheld as it is sufficient for the injuries sustained. To cement the case, Counsel relied on the cases of Francis Ochieng & Another Vs Alice Kajimba [2015] eklr, John Kaindo Ngugi & Another Vs John Kimani Iraya [2020] eklr and Michael Okello Vs Priscilla [2021] eklr, and submitted that the Appeal be dismissed and costs of the Appeal be borne by the Appellants.

### **Determination/Analysis**

39. I have considered the trial court records, the memorandum of Appeal and the submissions of the parties and two issues arise;
- i. Whether the Appellant was 70% to blame for the accident
  - ii. Whether the award of general damages of Kshs 300,0000 should be disturbed.
  - iii. Whether the award of special damages of Kshs 3,750 should be disturbed
40. This is a 1<sup>st</sup> appeal and the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the principle was enunciated thus:
- “...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”
41. It is not in dispute that an accident occurred on 24<sup>th</sup> day of May,2019 along Mombasa Road at Bridge 39 at around 5:45 a.m between Motor Cycle Registration Number KMDS 428T SKYGO and Motor Vehicle Registration Number KCE 988Q ScaniaBus/coach wherein the rider was injured but the pillion passenger died.
42. The first issue that has been raised is that of liability. According to the Appellant, the Respondent did not prove that they were negligent.
43. Section 107 of the *Evidence Act* provides that he who alleges must prove. From the record, PW1 was not the investigating officer but he came to produce the abstract dated 14.5.2020. It was his testimony that the Plaintiff was not charged nor was he blamed.
44. DW2 the driver of theBus stated that he was not charged either. DW1 also produced a police abstract dated 25/2/2020 and it was his testimony that the abstract blamed the rider but the OB does not blame the rider. Noteworthy is that neither PW1 nor DW1 was the Investigating officer and none of them visited the scene of the accident after the accident had occurred nor interviewed any witnesses



45. The Appellant contests liability as the Police Abstract produced by DW1 the rider was blamed for the accident. The Court noted with concern that the original Court file was not availed despite the Deputy Registrar Machakos High Court called for it. The Court relied on the Record of Appeal by the Appellant.
46. From the record, PW1 and DW1 both testified and each produced a Police Abstract of the same accident. PW1's Police Abstract indicated that the matter was under investigation and DW1's Police Abstract the rider was blamed for the accident. Both PW1 & DW1 were not Scene visiting Officer and/or Investigation Officers of the case. As the Trial Court rightly pointed out in the judgment, the Police Abstract evidence was contradictory.
47. After taking account the evidence by the rider PW2 & Driver of the Bus DW2 and each blamed the other for causing the accident, the Trial Court relied on the evidence in the OB that was filled in by the Investigation Officer.
48. In the case of Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:
- “When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object ....Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently...”
49. The Trial Court considered the Respondent contributed to the accident by joining the main road suddenly without proper lookout. Secondly, the driver would not have been driving at 50KPH and fail to brake on the rider suddenly joining the road and avoid the accident. Although, neither of the parties, driver and rider was charged with traffic offence, in the absence of tangible and cogent evidence by independent witnesses and/or Scene Visiting Officer/Investigation Officer on how the accident occurred the Court ought to apportion liability 50% / 50%.
50. As was noted in *Lakhamshi v Attorney General*, (1971) E A 118, 120 for such cases which -
- “It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there



is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

## Quantum

51. The second issue is that of general damages. The principles of interfering with general damages were espoused by the Court of Appeal in *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...

The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgment and experience. In a sphere in which no one can predict with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...

52. Similarly, in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by considering some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

53. From the record, the Discharge Summary from Kenyatta Hospital & Dr Ndeti’s Medical Report, the Respondent sustained the following injuries;

- a. Blunt injuries to the head;
- b. Degolving injuries to the left foot;
- c. Friction burns to the left knee and left ankle joint;
- d. Friction burn wounds to the left flank (abdomen)

54. The Trial Court after the hearing was awarded Kshs. 300,000 as general damages which is what this court would have awarded in the circumstances from comparable cases with similar injuries but now at 50% / %50% ratio on liability. As regards special damages; it is trite law that he who alleges must prove.



The Plaintiff pleaded Kshs 3750 and produced the following documentation in support of this prayer as per the bundle of documents;

- a. Medical report receipt Kshs 3,000
- b. Police Abstract Kshs 200
- c. Motor vehicle search receipt Kshs 550
- d. Kenyatta national hospital receipt Kshs 650

55. This amounts to 4,400 but the amount pleaded of Kshs 3750 is what this court would have awarded.

56. In the end, the appeal succeeds and the judgment is set aside and varied as follows;

- a. The 50%/ 50% liability is entered for liability between the driver and rider in responsibility for the accident
- b. The award for damages, costs and interest shall now be in terms of 50%/ 50% basis.
- c. The costs of the appeal are awarded to the Appellant.

It is so ordered.

**JUDGMENT DELIVERED, DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 16/5/2024 (VIRTUAL/PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

No Appearance - For The Appellant

Mr. Mica H/b/ Mr. Obwoye - For The Respondent

Patrick - Court Assistant

