



**Mboga & 2 others v Mwaniki (Civil Appeal E057 of 2023)  
[2024] KEHC 4987 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4987 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E057 OF 2023  
LM NJUGUNA, J  
MAY 15, 2024**

**BETWEEN**

**BRIAN IRERI MBOGA ..... 1<sup>ST</sup> APPELLANT**

**CAROLINE WAMBUI ..... 2<sup>ND</sup> APPELLANT**

**FARM SHOP LIMITED ..... 3<sup>RD</sup> APPELLANT**

**AND**

**LEMSON MWANIKI ..... RESPONDENT**

*(Appeal arising from the decision of Hon. D. Endoo, RM in Embu  
CMCC No.88 of 2022 delivered on 26<sup>th</sup> September 2023)*

**JUDGMENT**

(Appeal arising from the decision of Hon. D. Endoo, RM in Embu CMCC No.88 of 2022 delivered on 26<sup>th</sup> September 2023)

1. The appellants/respondents have filed a memorandum of appeal dated 13<sup>th</sup> October 2023 challenging the decision of the trial court and seeking the following orders:
  - a. That the appeal be allowed;
  - b. That the award of general damages in the sum of Kshs.1,000,000/= be set aside and/or varied;
  - c. That the trial magistrate's decision finding the appellants/respondents 70% liable be reviewed, varied, reversed and/or struck out and replaced with a finding that the respondent/appellant failed to prove his case on a balance of probabilities;
  - d. That this honourable court be pleased to assess reasonable compensation to the respondent/appellant; and



- e. Costs of the appeal be awarded to the appellants/respondents.
2. Their appeal is premised on the grounds that:
    - a. The learned trial magistrate proceeded on wrong principles in entering judgment for the respondent/appellant for the sum of Kshs.1,000,000/= in general damages;
    - b. The learned trial magistrate erred in failing to scrutinize/evaluate the evidence tendered in support of the injuries suffered by the respondent/appellant and to correctly relate them to caselaw cited and thereby failed to arrive at a fair and reasonable compensation to the respondent/appellant for his injuries;
    - c. The learned trial magistrate erred in failing to give reason for finding that the sum of Kshs.1,000,000/= in general damages to the respondent/appellant was reasonable and/or adequate compensation;
    - d. The learned trial magistrate erred in failing to scrutinize/evaluate the evidence tendered and to correctly relate it to caselaw cited and thereby misapprehend the facts by finding the appellants/respondents 70% liable for causing the accident;
    - e. The learned trial magistrate erred in law and fact by validating the respondent/appellant's evidence in determining liability; which evidence was not supported factually and was marred with inconsistencies in its entirety;
    - f. The learned trial magistrate erred in law, facts and principle in failing to note that the respondent/appellant failed to strictly prove the particulars of negligence pleaded in the plaint contrary to the trite rule of evidence that negligence must be strictly proved; and
    - g. The learned trial magistrate erred in law and fact in failing to apportion liability considering the totality of evidence laid by the appellants/respondents and respondent/appellant.
  3. The respondent/appellant filed a memorandum of cross-appeal dated 18<sup>th</sup> October 2023 seeking the following orders:
    - a. That the trial magistrate's finding that the respondent/appellant was 30% liable for causing the accident be set aside and/or reviewed and/or reversed and be substituted with a finding that the appellants/respondents are 100% liable for causing the accident;
    - b. That the appellants/respondents' appeal be dismissed; and
    - c. That the respondent/appellant be awarded costs of the appeal and cross-appeal.
  4. The cross-appeal is premised on the ground that the trial magistrate erred in law and fact by failing to appreciate/ evaluate the evidence on record and/or tendered during the trial thus misapprehended the facts by finding the respondent/appellant 30% liable for causing the accident.
  5. Through the plaint dated 27<sup>th</sup> June 2022 and amended on 15<sup>th</sup> August 2022, the respondent/appellant sought judgment against the appellants/respondents for general damages for pain and suffering, special damages of Kshs.13,240/= future medical expenses and costs of the suit together with interests on the awards. The particulars of negligence were that on or about 01<sup>st</sup> October 2021, the respondent/appellant was riding a motor cycle along Embu-Meru Road when the motor vehicle registration number KCP 416T owned by the appellants/respondents, was being driven along the same road so carelessly and/or dangerously, and/or controlled by the 1<sup>st</sup> appellant/respondent without due care and attention to other road users, especially the motor cycle being ridden by the respondent/appellant, that



- it lost control and veered off its lawful lane and violently knocked down the said motor cycle causing the respondent/appellant bodily injuries. The respondent/appellant suffered comminuted fracture on the right distal third femur which healed with malunion, a cut wound over the nasal ridge and a brain concussion leading to unconsciousness for 30 minutes.
6. The appellants/respondents, through their statement of defense, denied liability for the accident and they stated that in any event, the respondent/appellant contributed to the accident but no particulars of negligence were pleaded. The matter went to hearing where PW1 was the respondent/appellant. He testified that he was riding his unmarked motor cycle along the Embu-Meru road. That when he reached Kiangima area, he saw 2 oncoming motor vehicles and the second one was registration number KCP 416T belonging to the appellants/respondents and it tried to overtake the vehicle in front of it thus coming onto his lane and knocked him down. That he immediately lost consciousness and his relatives informed him that he was assisted by well-wishers to Kerugoya General Hospital where he was admitted for one month until he regained consciousness.
  7. He stated that he was transferred to Embu Level 5 Hospital where he was also admitted and later discharged. He detailed the injuries he suffered and stated that in the course of his treatment, he spent a substantial amount of money. That he reported the incident at the police station and began the process of suing the appellants/respondents. He produced receipts for his medical and other expenses as evidence. On cross-examination, he stated that he did not see the oncoming motor vehicles' registration numbers but he was given the details by the police who attended the scene. That there was not much that he could have done to avert the accident in the circumstances.
  8. PW2 was Eric Mbogo who stated that on the day of the accident, he was walking along the Embu-Meru road towards Embu and he noticed that the appellants/respondents' motor vehicle was being driven behind a lorry but the driver tried to overtake the lorry. That in his attempt to overtake, the driver of the motor vehicle knocked down the respondent/appellant who was riding a motor cycle. That as a result of the impact, the respondent/appellant was thrown off the road and he fell unconscious.
  9. That he rushed to the scene and he recognized the respondent/appellant as someone he knew and so he called his relatives who arranged for transportation to hospital. That the respondent/appellant had sustained injuries and was bleeding from the right leg and head. On cross-examination, he stated that the appellants/respondents' motor vehicle stopped after the impact but the vehicle in front of him continued moving and so he could not capture its registration number.
  10. PW3 was PC Noor Aden of Embu Police Station, who stated that he was not the Investigating Officer of the case but he is versed with the facts. That the accident was reported and he produced police abstract which was issued to the respondent/appellant. He produced the police abstract as evidence.
  11. The appellants/respondents did not testify at the trial. In her judgment, the trial magistrate found the respondent/appellant 30% liable for the accident for riding an unregistered motorcycle. She held the 1<sup>st</sup> appellant/respondent directly liable and the 2<sup>nd</sup> and 3<sup>rd</sup> appellants/respondents vicariously liable. She relied on the case of *Van Den Berg (K) Ltd v. Charles Osewe Osodo* (2018) eKLR and awarded general damages of Kshs.1,000,000/=.
  12. In this appeal, the court directed parties to file their written submissions but only the appellants/respondents complied.
  13. In their submissions, the appellants/respondents contended that the award of general damages was inordinately high and they urged the court to interfere with it. They relied on the cases of *Acceler Global Logistics v. Gladys Nasambu Waswa* (2020) eKLR, *David Kaburuka Gitau & Another v. Nancy Ann Wathithi Gitau & Another* (2016) eKLR, *Kemfro Africa Limited t/a "Meru Express Services (1976)"*



*Ɖ another v Lubia Ɖ another (No 2)* (1985) eKLR and *Mariga v. Musila* (1984) KLR 251. They urged the court to re-examine all the evidence adduced at the trial and make its findings as guided by Section 78 of the *Civil Procedure Act* and the case of *Oluoch Eric Gogo v. Universal Corporation Limited* (2015) eKLR.

14. It was their argument that PW1, PW2 and PW3 contradicted themselves when they stated the identity of the motor vehicle. That the court failed to compare awards by similar cases to guide in its determination. They urged the court to reduce the award to Kshs.500,000/= based on the following cases: *Daniel Otieno Owino Ɖ Another v. Elizabeth Ationo Owuor* (2020) eKLR, *Gladys Lyaka Mwombe v. Francis Namatsi Ɖ 2 others* (2019) eKLR and *Civicon Limited v. Richard Njomo Omwancha Ɖ 2 Others* (2019) eKLR in which the courts awarded lesser damages for more severe injuries than the ones suffered herein.
15. I have considered the trial court’s record, the pleadings and submissions by the parties at trial and the pleadings and submissions in this appeal and the cross-appeal. In my view, the issues for determination are as follows:
  - a. Whether the trial court made correct findings on liability;
  - b. Whether general damages awarded by the trial court are commensurate to the injuries suffered by the respondent.
16. It is worth reiterating that the appellate court makes its decision purely based on the record and findings of the trial court as was held in the case of *Okeno vs. Republic* (1972) EA 32 wherein the court held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
17. On the issue of liability, the trial court based its findings on the fact that the respondent/appellant was riding an unregistered motor cycle, contrary to the law. Liability was apportioned at the ratio of 70%:30% against the appellants/respondents. From the evidence adduced at the trial, PW1 stated that he was riding the unregistered motor cycle when he collided head-on with the motor vehicle registration number KCP 416T and suffered injuries. PW2 stated that he witnessed the accident and he stated that he saw the motor vehicle registration number KCP 416T attempting to overtake another vehicle but ended up colliding head-on with the unregistered motor cycle being ridden by the respondent/appellant.
18. The appellants/respondents did not testify at the trial. From the evidence, and on a balance of probabilities, the identity of the injured person and the facts are not in doubt. This being a civil suit, it is immaterial that the motor cycle was unregistered. This line of argument is more relevant in a traffic case regarding the same accident. Moreover, the appellants/respondents did not challenge the fact that the respondent/appellant’s motor cycle was not registered. In the case of *James Gikonyo Mwangi v D M (Minor Suing through his Mother and next Friend, I M O)* (2016) eKLR, the court, while determining the tortious claim, was not swayed by the fact that the respondent was driving an unregistered motor vehicle but determined the appeal on its merits.



19. In my view, there is sufficient evidence to enable the court make a finding on liability regardless of whether the motor cycle was unregistered. According to PW1 and PW2, the motor cycle and the motor vehicle collided head-on while the 1<sup>st</sup> appellant/respondent was attempting to overtake another motor vehicle and his vehicle collided with the respondent/appellant's motor cycle and caused him injuries. Therefore, the appellants/respondents should be held 100% liable for the accident.
20. On the issue of general damages, it is important that the same be modest and not inordinately high or low. In the case of *John Kipkemboi & Another v. Morris Kedolo* (2019) eKLR the court stated:
- “The assessment of damages in personal injury case by court is guided by the following principles: -
- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained;
  - 2) The award should be commensurable with the injuries sustained;
  - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts;
  - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account; and
  - 5) The awards should not be inordinately low or high (See *Boniface Waiti & another Vs Michael Kariuki Kamau* (2007) eKLR.”
21. The trial court was guided by the case of *Van Den Berg (K) Ltd v. Charles Osewe Osodo* (2018) eKLR and awarded general damages of Kshs.1,000,000/=. According to the medical report by Dr. Njiru, the respondent/appellant was received at Kerugoya Level 5 Hospital while unconscious following a road traffic accident. That he was admitted for treatment and then transferred to Embu Level 5 Hospital where he was also admitted for further treatment. According to Dr. Wambugu's medical report, the respondent/appellant suffered a fracture on the right femur, had injury and multiple lacerations. The Doctor assessed that the respondent/appellant would live with 8% permanent incapacity if he does not undergo future treatment he estimated at Kshs.110,000/=. The trial court awarded future medical expenses at Kshs.110,000/= and the amount has not been contested.
22. Comparatively, in the case of *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna* [2022] eKLR the plaintiff suffered a head injury with loss of consciousness, a fracture of the right zygoma (facial bone), Multiple facial lacerations, blunt injury to the shoulders, blunt injury and bruises to both lower limbs. The court awarded Kshs.350,000/= as general damages for pain and suffering. The court in the case of *Mwangi v Siloma & another* (Civil Appeal E102 of 2022) [2023] KEHC 26140 (KLR) (27 November 2023) awarded Kshs.800,000/= where the injuries were; a fractured distal end of the right tibia and fibula, fractured left lateral malleolus of the left ankle joint, fractured left medial malleolus of the left ankle joint, blunt injury to the lower back leading to soft tissue injuries, blunt injury to the left hand leading to post traumatic radial nerve palsy, fracture proximal end of the left humerus, soft tissue injury of the right leg, soft tissue injuries of the left ankle joint.
23. In the case of *Daniel Otieno Owino & Another v. Elizabeth Ationo Owuor* (2020) eKLR, the court awarded Kshs.400,000/= for similar injuries in 2020. In the case of *Gladys Lyaka Mwombe v. Francis Namatsi & 2 others* (2019) eKLR, the court upheld an award of Kshs.300,000/= in 2019 for a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face. In the case of *Civicon Limited v. Richard*



Njomo Omwancha & 2 Others (2019) eKLR, the court reduced an award of Kshs.1,000,000/= to Kshs.450,000/= for a single fracture of the tibia and fibula and dislocation of the hip joint. The fracture was treated by POP.

24. From the comparative case analysis, the award of general damages by the trial court is inordinately high and should be reviewed. I am guided by the case of Butt v. Khan [1981] KLR 349 where it was held:

“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.”

25. In conclusion, I have considered all the evidence and submissions of the trial court, the submissions of the parties to this appeal and the cross-appeal, relevant case law and the provisions of the law and do find as follows:

- a. The appeal partially succeeds as regards the award of general damages. The trial court’s award of general damages of Kshs.1,000,000/= is hereby set aside and substituted with an award of Kshs.600,000/=;
- b. The cross-appeal has merit and it is hereby allowed. The trial court’s finding on liability is hereby set aside and substituted with a finding of 100% liability against the appellants/respondents;
- c. Each party to bear their own costs of the appeal/cross-appeal.
- d. Interest at court rates on special damages from the date of filing of the plaint and general damages, from the date of judgment of the trial Court.

26. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 15<sup>TH</sup> DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

