



**Simiyu v Munialo (Civil Appeal 104 of 2022)  
[2024] KEHC 7176 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 7176 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 104 OF 2022**

**REA OUGO, J**

**MAY 23, 2024**

**BETWEEN**

**BEN WEKESA SIMIYU ..... APPELLANT**

**AND**

**PATRICK WANYONYI MUNIALO ..... RESPONDENT**

*(Being an Appeal from the judgment of Hon. A.A Odawo Senior Resident  
Magistrate delivered on 17/10/2022 in Bungoma CMCC No. 52 of 2022)*

**JUDGMENT**

1. The appellant's suit before the subordinate court was that on 27/1/2021 at around 8:30 p.m., he was riding his motorcycle along Bungoma-Kanduyi road near Bungoma Airstrip area when the defendant who was driving Motor Cycle Reg. No KCB 384J Toyota Prado lost control veered off the road and knocked the appellant. As a result, he sustained soft tissue injuries.
2. The respondent filed his statement of defence denied causing the accident and without prejudice averred that if at all an accident occurred then the same was solely and or substantially caused by the appellant.
3. The appellant relied on the testimony of 4 witnesses and the respondent testified as Dw1. The trial magistrate after the hearing entered the following judgment in favour of the appellant:

Liability assessed at 50%

General damages Kshs 150,000/-

Special Damages Kshs 5,650/-

Less 50% Kshs 77,825/-

Total Kshs 77,825/-



4. The appellant is dissatisfied with the judgment of the trial magistrate and has filed this instant appeal on the following grounds:
  1. The trial magistrate erred in law and fact in determining liability of 50% against the overwhelming evidence hence arriving at a wrong decision.
  2. The trial magistrate erred in law and fact in awarding a meagre award of Kshs 150,000/- as general damages on the head of pain, suffering and loss of amenities when the appellant suffered grave injuries.
  3. The trial magistrate erred in law and fact in holding that since as per the police abstract the case at traffic base was pending under investigations then the court was justified to apportion liability of 50%:50% hence arriving at a wrong decision.
  4. The trial magistrate erred in law and fact in holding that the evidence of the appellant's eye witness had glaring issues hence arriving at wrong decision.
  5. The trial magistrate erred in law and fact in believing and agreeing with evidence of the defendant when the said evidence was not corroborated at all hence arriving at a wrong decision.
  6. The trial magistrate erred in law and fact in believing the evidence of the appellant when the said evidence was corroborated.
  7. The trial magistrate erred in law and fact in not granting the prayer of loss of earning capacity when the appellant had indeed proved that he was entitled to loss of earning capacity.
  8. The trial magistrate erred in law and fact in not granting the prayer of future medical expenses when the appellant was entitled to hence arriving at a wrong decision.
  9. The trial magistrate erred in law and fact in entering judgment against defendant "jointly with a third party" when there was no third party included in the case.
  10. The trial magistrate erred in law and fact in subjecting an award of special damages on a liability hence arriving at a wrong decision.
  11. The trial magistrate erred in law and fact in becoming a player in the legal field hence acted with a lot of biasness against the appellant hence arriving at a wrong decision.
5. The appellant seeks that the award on pain, suffering, and loss of amenities be enhanced, the loss of earning capacity and future medical expenses be awarded, and the award of special damages to liability to a ratio of 50%:50% be set aside.

### **Analysis And Determination**

6. First, I shall re-evaluate the evidence and arguments presented during the trial, as is expected of a first appellate court. (see the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
7. Ben Wekesa Simiyu (Pw1) adopted his witness statement dated 17/2/2022 as his evidence in chief. He testified that he was near the airstrip while keeping to his left when he was knocked down by the respondent's vehicle which was being driven in the opposite direction. The respondent knocked him after deviating from his lane by not keeping his left-hand side. He was hospitalized and following the accident he suffered soft tissue injuries including vision problems.



8. Also at the scene was Eric Simiyu Nyongesa (Pw4) who adopted his witness statement. He testified that the vehicle was being driven at high speed in a zig-zag manner. When it reached the junction, it deviated from its left-hand side to the right hand and hit the appellant. The appellant was riding his motorcycle from Kanduyi to Bungoma and had already joined Kiwanja Ndege- Bungoma town road. He testified that the respondent ought to have given the appellant the right of way.
9. On cross-examination, Pw4 testified that the vehicle turned on the right side before reaching the rightful point to turn. He recalled that the vehicle was going in the opposite direction with the rider and that the rider hit the vehicle from behind. He testified that he did not see the indicator that the respondent turning.
10. The appellant went to Bungoma County Referral Hospital and was attended to by Elias Adoka (Pw2) who presented the appellant's treatment notes. On cross-examination, he testified that the injuries sustained by the appellant were soft tissue injuries. No.81576 PC Jackline Ori (Pw3) testified that she was not the investigating officer and produced as evidence the police abstract.
11. The respondent in his defense testified as Dw1. He recalled that on the material day, he was driving his vehicle at a speed of 30 km/hr along the hospital road from the airstrip. At the junction headed to Marel, he slowed down and indicated to turn left so that he could go home to his Home in Marel. Immediately after he turned left, he heard a loud bang on the left side of his vehicle. He stopped and found that the appellant's motorcycle which was being ridden behind him had rammed onto the rear side of the vehicle causing damages to the vehicle. On cross-examination, he testified that the accident occurred off the main road and the point of the road traffic accident was along the mortuary road.
12. The trial magistrate found that from the evidence adduced was not clear who caused the accident. She relied on the case of *Farah v Lento Agencies* [2006] eKLR where the court held that in circumstances where the court is not sure as to who is to blame for the accident, then liability is apportioned at 50:50. In that case the Court of Appeal held as follows:

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of *Barclay – Steward Limited & Another Vs. Waiyaki* [1982-88] 1 KAR 1118, this Court said:-

“The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it.”

The Court of Appeal went on to state:

“The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.”

13. The appellant in his submissions argues that the evidence of Pw1 was corroborated with the evidence of Pw2 and the appellant's case was watertight and cogent. He faulted the finding of the trial court that the evidence of Pw2 was not consistent. He relied on the case of *Kahindi Kifaru Chengo (Legal Representative of the deceased of the estate of Baraka Kahindi Kifaru (deceased) v Auto Industries Ltd*



& Another [2020] eKLR and the case of Elizabeth Gathoni Thuku (Suing as the legal representative of the estate of Charles Gitonga Wathuta) v Peter Kamau Maina & Another [2021] eKLR.

14. The respondent submitted that the trial magistrate was right in the apportionment of liability as the appellant and the witness called did not prove the case to the required threshold.
15. I have carefully considered the evidence by both parties. In my view, the evidence of Pw2, who was an independent witness, was clear. Pw2 testified that he saw the vehicle being driven at high speed in a zig-zag manner. Initially, the vehicle was in the opposite direction as the appellant. However, the respondent without indicating turned and joined the appellant's line. He testified that this turn by the respondent was not at the rightful/lawful turning point. This explains why the respondent's vehicle was hit from behind, however, it is evident that the appellant must also have been driving at high speed. This is because he would have applied his brakes when he saw the respondent turn. After carefully looking at the testimony of Pw1, Pw2 and Pw3 it is clear how the accident occurred and the apportionment of liability at 50:50 was not proper. I shall therefore apportion liability in the ratio of 80:20 in favour of the appellant.
16. On quantum, the appellant submits that the appellant was entitled to an award of Kshs 850,000/- and relied on the authorities cited at the lower court. On loss of earnings, the trial court misapprehended the law and failed to consider the issue of the wage bill, and further relied on their submissions at the lower court. They propose that the appellant was entitled to Kshs 2,861,181/-. The appellant is also entitled to Kshs 500,000/- as future medical expenses.
17. The respondent submits that the trial court's award of Kshs 150,000/- was reasonable; no irrelevant elements were considered; no relevant factor was disregarded; and the award was neither excessively low nor disproportionately large to represent an entirely incorrect estimate of damages. The respondent also submits that the appellant did not sustain permanent injuries to warrant an award of loss of earning capacity. In *Nyatogo v Mini Bakeries Limited (Civil Appeal No. E38 of 2012) KEHC1593 (KLR)* the court stated that it is the responsibility of the respondent to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future in order to get an award under that head. The appellant did not lead any evidence to show that his earnings were in any way affected by the injuries. Moreover, there was no evidence of his earnings before the accident. Future medical expenses were not pleaded and proved. The medical report did not recommend any future medication.
18. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2) (1987)* KLR 30 stated that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”
19. The appellant in his plaint pleaded that he sustained the following soft tissue injuries: loss of conscious, multiple laceration on the face, lack of clear vision, neck, chest and lower back pains, bruises on both elbow joints and knee joint and visual acuity. Pw2 who attended to the appellant testified that the injuries sustained by the appellant were soft tissue injuries. Dr. Mulianga Ekesa in his medical report formed the opinion that the appellant sustained soft tissue injuries, concussion and psychological trauma.
20. In the case of *Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR* an award of kshs 180,00.00 was given for the following injuries: Multiple cut wounds on the



right lower limb; Bruises on the right lower limb; Bruises on both elbows; Bruises on the right iliac region; Bruises on the frontal region; Bruises on the temporal region; lacerations on the frontal region; cut wounds on the left iliac region; cut wounds on the frontal region; cut wounds on the temporal region; and blunt trauma to the abdomen. The injuries in Francis Omari Ogaro v JAO case (supra) are far more severe than those sustained by the appellant herein. In *Nanyuki Express Cabs Savings and Credit Cooperative Society v Ikungu (Civil Appeal 67 of 2020)* [2023] KEHC 23652 (KLR) (17 October 2023) (Judgment) the plaintiff therein sustained the following injuries: lacerations and muscle contusion on the left forearm and dorsum of the hand; deep laceration on the right anteromedial aspect of the shin; small multiple lacerations on the scalp and was awarded Kshs 150,000/- This court having considered comparable awards for similar injuries, finds that the trial court's award of Kshs 150,000/- was adequate.

21. Although the plaintiff in paragraph 6 sought future medical expenses, the same was not supported by evidence. Dr. Mulianga did not indicate in his report that the appellant would need further treatment. The appellant also sought loss of earnings in paragraph 7 of the plaint as it was averred that he will not continue preaching and doing manual work where he earns Kshs 1,000/- per day. However, the appellant sustained simple soft tissue injuries which are expected to heal relatively fast. His injuries were not permanent and the P3 form indicated that the degree of injury was 'harm'. The appellant did not prove that he was entitled to damages for future medical expenses and loss of income.
22. Consequently, I find that the appeal is partially successful. I hereby set aside the finding of the trial court on liability at 50:50 and substitute the same with apportionment of liability at 80:20 in favour of the appellant. I will not disturb the award of general damages as I have found that the sum awarded by the trial court was adequate. The appellant shall be entitled to half the costs of the appeal.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 23<sup>RD</sup> DAY OF MAY 2024**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. R. Wamalwa -For the Appellant

Miss Wambani -For the Respondent

Wilkister/ Diana - C/A

