



REPUBLIC OF KENYA



**KENYA LAW**

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**Muthoni v Thurania (Civil Appeal E054 of 2022)  
[2024] KEHC 7027 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7027 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E054 OF 2022  
TW CHERERE, J  
JUNE 6, 2024**

**BETWEEN**

**TERESA MUTHONI ..... APPELLANT**

**AND**

**JAMES THURANIRA ..... RESPONDENT**

*(Being an appeal from the Judgment in Tigania PMCC NO.  
54 OF 2020 by Hon. F.K.Munyi (PM) on 01st April, 2022)*

**JUDGMENT**

**Background**

1. Respondent pleaded that on 18<sup>th</sup> April, 2020, 2020, an accident involving motor vehicle M/V KCA 012J and motor cycle whose details are not pleaded occurred along Meru-Maua road and Respondent suffered bodily injuries.
2. In his evidence, Respondent relied on his statement recorded on 22<sup>nd</sup> June, 2020 where again he did not disclose the details of the motor cycle he claimed to have been riding as a pillion passenger when the alleged accident occurred. In cross-examination, he conceded that he neither had a rider's licence nor was he wearing a helmet nor a reflector jacket and that the motor cycle was carrying the rider and two pillion passengers. He blamed Appellant for driving on the lane of the motor cycle causing the accident.
3. The police officer who visited the scene of the accident and produced the police abstract confirmed that the abstract did not disclose the registration number of the motor cycle involved in the accident but confirmed that it was carrying two passengers with the Respondent as the rider.
4. Appellant confirmed that an accident occurred involving her motor vehicle and a motor cycle on the material date. She blamed the rider for overtaking dangerously and riding onto her lane causing the accident.



5. At the conclusion of the trial, the learned trial magistrate found the accident motor vehicle was driven negligently. Appellant was found liable at 100% and judgment was entered for the Respondent as follows:
  1. General damages KES. 1,000,000/-
  2. Special damages KES. 12,130/-
  3. Costs
  4. Interest

### **The Appeal**

6. Appellant dissatisfied with the lower court's decision preferred this appeal on both liability and quantum.

### **Analysis and Determination**

7. I have considered the evidence on record, the grounds of appeal and submissions and authorities cited by the parties.
8. In terms of Section 107, 108 and 109 of the *Evidence Act*, the duty of proving negligence on a balance of probabilities lay squarely on the Respondent. In *Karugi & Another v. Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

9. In *Treadsetters Tyres Ltd v John Wekesa Wepukbulu* [2010] eKLR, the Court quoting *Charles worth & Percy On Negligence*, 9th Edition at P. 387 and stated that: -

“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

10. In *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* [2016] eKLR, the court quoted a passage on burden of proof from *Halsbury's Laws of England*, 4th Edition at paragraph 662 at page 476 where it was stated that:

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”



11. Contrary to Respondent's evidence that he was not the rider of the motor cycle in issue, the investigating officer confirmed that he was indeed the rider.
12. Both Appellant and Respondent blamed each other for driving and riding onto each other's lane. The investigating officer did not offer any assistance for he failed to lead evidence to demonstrate on which lane the accident occurred.
13. The Court of Appeal faced with a situation similar to the one subsisting in this case in the case of *Hussein Omar Farah v Lento Agencies* [2006] eKLR held that:

“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.”
14. Applying the same principle to this case, and having considered that Respondent was riding an unregistered motor cycle, did not possess a rider's licence, was carrying two pillion passengers instead of one and was neither wearing a helmet nor a reflector jacket, I find that he exposed himself to danger and I therefore apportion liability at 60% to be borne by the Respondent and 40% to be borne by the Appellant.
15. The Court of Appeal in *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR settled the principles to be applied in assessing damages and stated that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. (Emphasis added).
16. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise. Such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. Where the trial court has violated legal principles, the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by the Court of Appeal in several cases among them; *Kanga v Manyoka* [1961] EA 705, *Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto* [1979] EA 414, *Butt v Khan* [1981] KLR 349, *Kemfro Africa t/a Meru Express & Another v. A. M. Lubia & Another* [1982 – 88] 1 KAR 72 and *Mariga v Mustila* [1984] KLR 257.
17. A medical report by Dr. Kanake dated 22<sup>nd</sup> June, 2020 reveals that Respondent suffered the following injuries:
  - i. Deep laceration on the groin
  - ii. Deep laceration on left leg with exposed fractured bone.
18. At the time of examination about 2 months after the accident, Respondent was on plaster and was walking on crutches and had scar and pain on injury sites.



19. There was no evidence that he had not fully recovered when he testified on 19<sup>th</sup> November, 2020 which was 7 months from the date of the accident.
20. At the hearing, Respondent prayed for KES. 1,000,000 and cited *Daniel Oduor Sbieuda v Christopher Wambugu* [2021] eKLR where the court awarded a sum of Kshs 800,000 for fracture of tibia fibula in the year 2021.
21. Appellant on the other hand offered KES. 180,000/- and cited *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR where Kshs180,000/- was awarded for Head injury (concussion), Cut wound on the right mandible, Neck muscle contusion, Chest pain on the left side and lacerations, cut wound on the right shoulder blade region, Multiple lacerations over the left shoulder and upper arm, cut wounds and lacerations over right forearm and Painful swollen 4<sup>th</sup> left finger.
22. Looking at the cases cited before the trial court, I find that the one cited by Respondent relates to more serious injuries than those suffered in this case. On the other hand, the ones cited by Appellant is irrelevant for it relates to multiple soft tissue injuries.
23. From the foregoing, I find that the sum of Kes. 1,000,000/- awarded in this matter is excessive in the circumstances and that Kes. 600,000/- would be adequate compensation.
24. In the end, this appeal is determined in the following terms:
  1. The order on liability at 100% against the Appellant is set aside and substituted with 40:60% with Appellant bearing 40% and Respondent bearing 60%
  2. The award of Kes. 1,000,000/- is set aside and substituted with an award for Kes. 600,000/- (Six hundred thousand)
  3. The award for special damages remain as awarded by the learned trial magistrate.
  4. Each party shall bear its own costs of the appeal.

**DELIVERED AT MERU THIS 06<sup>TH</sup> DAY OF JUNE 2024**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Wambua for Wambugu & Muriuki Advocates

For Respondent - Mr. Kaberia for Nkunja & Co. Advocates

