



**China Wuyi Company Ltd & others & another v Chavida (Civil Appeal  
153 of 2018) [2024] KEHC 8272 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8272 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 153 OF 2018**

**RC RUTTO, J**

**JULY 12, 2024**

**BETWEEN**

**CHINA WUYI COMPANY LTD & OTHERS ..... 1<sup>ST</sup> APPELLANT**

**JAMES KIMANI NJUGUNA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MORRIS CHAVIDA ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of Hon S Atambo Senior Resident  
Magistrate made on the 26th November 2018 in Kiambu CMCC 421 of 2016)*

**JUDGMENT**

**Background**

1. The appeal is seeking to challenge the liability and quantum of damages in respect to general and special damages granted by the trial court in Kiambu CMCC 421 of 2016 *Morris Chavida v China Wuyi Company Limited and 2 others*. In that judgment, the trial court apportioned liability at 50:50 and awarded general damages of Kshs. 1,000,000/-, special damages of Kshs. 9,980/-, costs and interests.
2. The facts of the Respondent's case are contained in the plaint dated 24<sup>th</sup> October 2016. According to the Respondent, on or about 19<sup>th</sup> July 2016, while lawfully riding his Motor Cycle Registration Number KMDJ 747N along Kitusuru road, a Motor Vehicle Number KBS 152T owned by the Appellant was driven so negligently and at a high speed that it lost control and veered off its lawful lane and knocked his Motor cycle causing him serious injury. The Respondent blames the 2<sup>nd</sup> Appellant for driving in a zig zag manner thus veering off his lane, encroaching into his lane and driving at an excessive speed.
3. In response to the claim, the appellants filed a defence dated 10<sup>th</sup> February 2017. In their defence the appellants denied being the registered owner and beneficial owner of motor vehicle registration KBS



- 152 T. they also denied the occurrence of the accident and particulars of negligence as enumerated in the plaint. The respondent was put to strict proof.
4. During trial, each party called one witness. After the conclusion of the respective parties' cases, the parties filed their submissions on liability and quantum. The respondent submitted and urged the trial court to find the appellants 100% liable for the accident for failing to have sufficient regard for safety of other road users as well as failing to control the motor vehicle so as to avoid the accident. On quantum the respondent made reference to the case of *Margaret Aoko Diero v African Line Transporters Limited* (2004) eKLR and urged the court to award Kshs. 1,500,000/= as general damages.
  5. On the other hand, the appellant urged court to dismiss the suit with costs for the respondent had failed to prove its case on a balance of probability. On quantum, while relying on the case of *Susan Kalekye Mbuvi v Andrew Nzomo Malado* (2017)eKLR and *Salome Munagi Ojonga v Henkle Kenya Limited* (2003) eKLR, the appellant urged the trial court to find that a sum of Kshs 300,000/= as adequate compensation to the respondent. Further, they urged the court to find that special damages must be strictly pleaded and proved, and that the respondent had only proved special damages of Kshs 3,500/- and not the pleaded of kshs. 9,980/=.
  6. Upon analysing the evidence, the trial court held that the both parties were equally responsible for the accident. The court noted that from the record police abstract Exhibit 3 the respondent was to blame for the accident, and that the 2<sup>nd</sup> defendant did not demonstrate what he did or action taken to avoid the respondent from ramming into his side. On quantum, the trial court noted that the respondent sustained several injuries according to prosecution exhibits 2, 4 and 5 and proceeded to awarded Kshs 1,000,000/= less contribution in general damages. Also awarded were the special damages of Kshs 9980/= as proved vide exhibit no. 4 and 6.
  7. Aggrieved by the decision of the trial court, the appellant filed a Memorandum of Appeal dated 27<sup>th</sup> November 2018 seeking to:
    - a. Dismiss the suit against the appellant with costs.
    - b. Assess downwards the quantum of damages awarded to the Respondent.
    - c. Costs of the appeal.
  8. The appeal is premised on the following summarized grounds that the trial court erred in law by:
    - a. finding liability against the appellants yet there was evidence to the contrary.
    - b. awarding general damages amounting to Kshs 1,000,000 and special damages of Kshs 9,980.
    - c. failing to consider the weight of precedents in similar circumstances and granting excessive and erroneous quantum of damages.

### **The appellant submissions**

9. The appellant submitted under the following heads:

#### **i. Liability**

10. The appellant submits that the respondent was blamed by the investigating officers as is evident from the Police Abstract. The appellant urged the court to find that it was the respondent who was to blame for the accident since even the police who conducted investigation came the conclusion that it is the rider of the motor cycle registration KMDJ 747 W who was to blame for the said accident.



11. The appellant also urged the court to find that the respondent had not proved the elements of the tort of negligence which include; whether a duty of care was owed to him, whether the duty was breached and whether as a result of that breach he suffered loss and damage.
12. It was the appellant's further submission that the standard of proof in civil cases was that of balance of probabilities (*Kirgi & Another V Kabiya and 3 others*)1987 e KLR 347) and that it is always on the plaintiff to prove its case on a balance of probabilities. Thus, it was urged that the court should find that the respondent had failed to show any duty owed by the appellant. In urging so, the appellant relied upon the case of *East Produce (K) Limited V Christopher Astiado Osiro* Civil Appeal No 43 of 2001.
13. The appellant further submits that the respondent failed to show the duty the 2<sup>nd</sup> appellant owed him as the 2<sup>nd</sup> appellant was rightfully on his lane on the road and it was the respondent who encroached onto his lane and knocked the 2<sup>nd</sup> appellant's side mirror. He urged court to find that it is the respondent who breached the duty of care he owed to other road users and in particular the 2<sup>nd</sup> appellant.
14. The appellant urged the court to find that the tort of negligence was not proved by the respondent and allow the appeal with costs. He also urged that the respondent be held liable for the accident.

## ii. Quantum

15. The appellants submitted that the Kshs. 1,000,000 awarded by the trial court was excessive and that an award of Kshs. 350,000 would be sufficient. They sought to rely on the case of Susan Kalekye Mbuvi(supra) where the court awarded Kshs. 350,000 on 14/07/2017 for the following injuries; Bimalleolar fractures left ankle joint, Fracture distal fibula, Cut wound right foot, a fracture of the left femur midshaft and blunt injuries to the lower jaw and left shoulder. Also relied upon is the authority of *Salome Munagi Ojonga V Henkel Kenya Limited* 2003 eKLR.

## iii. Special Damages

16. The appellants submitted that special damages must be specifically pleaded and proved. The appellants submitted that the respondent pleaded special damages of medical report for Kshs3000 and motor vehicle expenses of Kshs.6480. However, the respondent only produced receipts of costs incurred for the motor vehicle search and Medical report. The appellant urged the court to award Kshs.3500 as special damages. In sum, the appellant urged the court to find the respondent wholly responsible for causing the subject accident.

## Respondent's Submission

17. On his part, the respondent submitted under three heads as follows;

### i. Liability

18. It was the respondent's case that the trial court finding on liability be upheld for reason that both parties blamed each other before the accident. In urging so, he relied on the case of *Cosmas Mutiso Muema v Kenya Road Transporters Limited & Another* 2014 e KLR

### ii. Quantum

19. The respondent urged the court to uphold the findings that the trial court considered the injuries and comparable precedents and arrived at a just and reasonable conclusion as it did. To support this



argument, the respondent relied upon the case of *Joseph Musee Mua v Julius Mbogo Mugi & 3 Others* 2013 e KLR and *Finlays Horticulture Kenya Limited V Grace Wacugu Chiira* (2020) e KLR.

### iii. Special Damages

20. The respondent submitted that the receipts produced before the trial court totaled to Kshs. 9,989 as granted by the court and the same ought to be upheld. The respondent urged the court to find that the instant appeal is bereft of merit and proceed to dismiss the same.

### Issues for determination and analysis

21. From the analysis of the pleadings and submissions by parties, the issues arising for determination are:
- Whether the court erred in apportioning liability at 50:50.
  - Whether the damages were inordinately excessive in the circumstances.
  - Whether Special damages were properly awarded to the respondent.
22. Section 78(2) of *Civil procedure Act*, provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein. Therefore, my duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR and in *Selle & Anor – v- Associate Motor Boat Co. Ltd* 1968 EA 123.
23. Thus, the issues will be addressed as follows:

### Whether the court erred in apportioning liability at 50:50

24. In the case before the subordinate court, the respondent then the plaintiff adopted his witness statement as evidence. He stated that he was overtaking two vehicles and when he was finishing, the 2<sup>nd</sup> appellant decided to overtake and knocked him down as a result. He blamed the 2<sup>nd</sup> appellant for failing to have regard to other road users, for driving in an excessive speed in the circumstance of the road, for failing to slow down, brake, swerve or act in any reasonable manner to avoid the accident, driving in a zig zag manner.
25. In response, the 2<sup>nd</sup> appellant also relied on his witness statement. He stated that, on that particular day as he was driving, a motor cycle came from behind the car and started to overtake, before it could overtake his car, he realised that there was another vehicle coming down hill, and the rider tried to squeeze himself between his car and the car in front of him. That unfortunately before the rider could overtake, he fell off his motor cycle on the right-hand side of the road and the vehicle that was coming down hill came and crushed on to the motorcycle including the rider.
26. The 2<sup>nd</sup> appellant also stated that the police came to the site made an assessments report in which the rider was blamed for the accident. He blames the respondent for overtaking at a corner. He also states that he saw a distance motorcycle on his side of the mirror and it tried to overtake his vehicle and hit the side mirror.
27. I have analysed the evidenced adduced by both parties and note that there exist conflicting theories on how the accident occurred. The respondent avers that he checked to confirm that the road was clear before overtaking two vehicles but when he was finishing, the 2<sup>nd</sup> appellant decided to overtake and knocked him down as a result. The appellants blame the respondent for overtaking at a corner. The 2<sup>nd</sup> appellant alludes to seeing at a distance motor cycle on his side of the mirror and it tried to overtake his



- vehicle and hit the side mirror. He also states that before the rider could overtake, he fell off his motor cycle on the right-hand side of the road and the vehicle that was coming down hill came and crushed on to the motorcycle including the rider.
28. The appellants urge this court to find that the respondent is wholly to blame for the accident and places reliance on the police abstract which apportioned the blame to the motor cyclist for the accident. While this may be the case I take note that there was conflicting evidence between what was stated in the appellant witness statement which was adopted in court and what the 2<sup>nd</sup> appellant testified in court. The conflicting evidence of the appellant who gave two versions of how the accident occurred and thus raising uncertainty and credibility of his evidence on how the accident occurred. Noting that conflict, it would have been prudent for the investigating officer to shed light on the findings of his investigations.
29. If indeed the 2<sup>nd</sup> appellant saw the cyclist on the side of his mirror as he stated then the question is, what exactly did he do to avert the accident? Further, if the rider fell off the side and was crushed by the oncoming vehicle what was the role of the 2<sup>nd</sup> appellant?
30. The evidence as presented by the parties creates the possibility of three possible scenarios of what led to the accident. In the case of *Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR the court when faced with two probabilities, held that, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
31. Further, in *Stanley -v- Gypsum Mines Limited* (2) (1953) A.C 663 at P. 681 Lord Reid reasoned that:
- “To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it.... The question must be determined by applying common sense to the fact of each particular case. In the circumstances, the trial court noted that the plaintiff contributed to the accident and on a balance of probability both parties were to be held responsible in equal portions.
32. In my opinion based on the above set of facts none of the parties can claim to be totally blameless for the accident. While the 2<sup>nd</sup> appellant position was that he was hit on the driver’s side when the motor cycle rider tried to squeeze himself between his car and the oncoming vehicle, he also admitted to seeing the rider from the side mirror and that the respondent was hit by another vehicle.
33. Liability trickles down to the question of who caused the accident. As I have explained, in this case there seems to be three versions of what transpired on the material day. One cannot therefore say with certainty that one party, to the exclusion of the other caused the accident. It is on that basis that the trial court apportioned the liability in half and held each party as a contributor of the accident. I therefore agree with the trial court that liability of the accident ought to be shared 50:50. This ground of appeal is dismissed.

#### **Whether the damages awarded were inordinately excessive?**

34. In *Sheikh Mustaq Hassan v. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 the court held that:
- “The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of



an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

35. Similarly, in *Jane Chelagat Bor v. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

36. The trial court awarded general damages of Kshs 1,000,000/= less contribution in general damages for the following injuries suffered swollen tender left ankle, bimalleolar fracture (lower ends of tibia and fibular, left ankle and bruises on the head.

37. It is noted that while parties made reference to numerous case laws to support their proposals on quantum, the trial court did not make any reference to any of them in its judgment.

38. In the case of *Tirus Mburu Chege & another v J.K.N (minor suing through the next friend and mother D W N & Another)*(2018)eKLR the plaintiff suffered fractures of the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding, consistent loss of consciousness. The appellate court reduced an award of Kshs. 800,000.00 to Kshs. 500,000.00 general damages.

39. In the case of *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR the plaintiff sustained fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and pain in the injured areas, with a permanent incapacity of 18%, awarded the sum of Kshs.600,000/= on appeal.

40. In the case of *DG (Minor suing through her next friend MOR v Richard Otieno Onyisi* [2021] eKLR the court awarded general damages in the sum of Kshs.400,000/= where the plaintiff suffered left tibia fracture, bruises on the left foot and bruises on the left leg, with no assessment being made on permanent incapacity.

41. Comparable injuries should be compensated by similar award of general damages. In this case, the Respondent suffered swollen tender left ankle, bimalleolar fracture (lower ends of tibia and fibular, left ankle and bruises on the head. Permanent incapacity was assessed at 10%. These injuries are comparable with the injuries suffered in the cited authorities. Taking inflation into consideration, and based on the nature of the injuries, I am satisfied that the award of Kshs. 1,000,000.00 is inordinately excessive. I find that an award of Kshs. 700,000.00 would have sufficed as adequate compensation for the respondent’s pain and suffering.

### **On Special damages**

42. Special damages have to be pleaded and proved. In the case of *John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* [2013] eKLR, the Court of Appeal correctly affirmed the position that, “a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity.” In this case, the plaintiff pleaded for special damages of kshs 9,980/=. The trial court



held that this was proved vide plaintiff exhibit no 4 and 6 and proceeded to award kshs. 9980. I have perused the lower court file and note that the respondent availed numerous receipts as follows; receipt for the medical assessment , Motor vehicle search receipt dated a bundle of receipts from Kenyatta National Hospital dated various dates all of which amount to Ksh.9,980/=. Consequently, this ground of appeal fails.

43. As a result of the above, I allow the appeal on the following terms:

- a. The judgment of the Subordinate Court dated 26<sup>th</sup> November, 2018 is set aside to the extent that the award of Kshs 1,000,000.00 general damages is substituted with an award of Kshs. 700,000.00 to be calculated at the liability set by the trial court of 50:50 contribution.
- b. The award of special damages of Kshs. 9,980/- is affirmed.
- c. Each party shall bear its own costs since the appeal has partially succeeded.

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 12<sup>TH</sup> DAY OF JULY 2024**

For Appellants: N/A

For Respondent: Mr. Kiptanui H/B For Mr. Wachira

Court Assistant: Peter Wabwire

