



REPUBLIC OF KENYA



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**Kariuki alias Beth Wanduku v Wikika Saving & Credit Cooperative Society  
(Civil Appeal 1 of 2020) [2023] KEHC 18725 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18725 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 1 OF 2020**

**PM MULWA, J  
JUNE 12, 2023**

**BETWEEN**

**BETH WANJIKU KARIUKI ALIAS BETH WANDUKU ..... APPELLANT**

**AND**

**WIKIKA SAVING & CREDIT COOPERATIVE SOCIETY ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Honourable M. W. Wanjala,  
SRM delivered on 19th December 2019 in Thika CMCC No. 348 of 2018)*

**JUDGMENT**

1. This judgment determines the appellant's appeal filed on January 8, 2020 vide the memorandum of appeal dated January 7, 2020 against the impugned judgment of the Hon Magistrate MW Wanjala delivered on December 19, 2019.

**Background**

2. In the trial court the appellant was the Plaintiff in which she claimed damages from the respondent vide a plaint dated March 27, 2018, for the injuries sustained from a road traffic accident that occurred on or about January 9, 2017. She was a pillion passenger in motorcycle registration number KMDM 587D along Witeithie - Maraba rough road when the respondent's motor vehicle KCE 925V was negligently driven, managed and/or controlled and lost control and rammed on motorcycle KMDM 587D, and as a consequence the plaintiff suffered injuries.
3. The appellant blamed the driver of KCE 925V for the accident. As per the plaint, the appellant sustained injuries; fracture of the lateral femoral condyle, fracture of the right patella, fracture of the tibia plateau and wound on the right knee. As a consequence of the injuries, the appellant became incapacitated. The appellant sought special damages for Kshs 109,771/=, general damages for pain and



suffering and loss of amenities, general damages for diminished/reduced earnings capacity, costs of the suit, interest at court rates and any other relief deemed fit.

4. The respondent filed its defence dated 8<sup>th</sup> June 2018 denying the averments of the Plaintiff. It denied being the registered owner of the motor vehicle registration number KCE 925V. According to the defence the accident was caused by the sole contribution and/or negligence of the appellant.
5. After the hearing, the trial court in its judgment of December 19, 2019, apportioned liability at 50% against the respondent and awarded general damages of Kshs 1,500,000/= for pain and suffering and loss of amenities, special damages of Kshs 109,771/= as well as the costs and interests.
6. Aggrieved by the judgment, the appellant filed this appeal citing the following grounds:
  - i. That the learned trial magistrate erred in law and in fact by apportioning liability against a party who was not a party to the suit.
  - ii. That the learned magistrate misdirected himself in law and in fact by misapprehending the evidence adduced, thereby reaching an erroneous finding.
  - iii. That the learned trial magistrate misdirected himself in law and in fact by failing to consider that the Respondent blamed another party for the accident, and failed to enjoin that party
  - iv. That the learned trial magistrate erred in law and in fact by considering an irrelevant fact and hence arrived at an erroneous decision.
  - v. That the learned magistrate erred in law and in fact by failing to consider the Appellant's submissions on liability.
  - vi. That the learned magistrate erred in law and in fact by failing to award damages for diminished earning capacity despite the same being pleaded and proved.
  - vii. That the learned magistrate misdirected himself in law and in fact by failing to address his mind on the issue of diminished earning capacity.

It was proposed to ask that:

- a. the Appeal be allowed,
  - b. set aside the Liability of the trial court and substitute with 100% liability in favour of the appellant against the Respondent,
  - c. Award damages for diminishing earning capacity.
  - d. Costs of the appeal.
7. The court directed that the appeal be heard through written submissions.

### **Appellants submissions**

8. On behalf of the appellant counsel filed submissions dated 17<sup>th</sup> October 2022. He submitted on the duty of this court as an appellate court as stated in the case of *Selle v Associated Motor Boat Company Ltd* (1986) EA 123.
9. On the issue of the quantum of damages the appellant cited the case of *Kemro Africa Ltd & Anor v Lubi & Another* (1982-88) KLR where it was stated that - the appellate court will only disturb the quantum of damages if satisfied the trial court took into account irrelevant factors or left out a relevant one, or the amount is inordinately too low or too high.



10. According to counsel the issue of liability revolves around three issues: ownership of the motor vehicle, the occurrence of the accident and who is to blame for the accident. The issue of ownership of motor vehicle KCE 925 V was determined by the certificate of motor vehicle search. The occurrence of the accident was also confirmed by the police abstract and the OB. The occurrence of the accident has been supported by the appellant, Pw2 and DW1.
11. Counsel submits the trial court erred in placing too much reliance on the Occurrence Book report which was of little value. The purpose of the OB is to prove an accident happened and not how the accident occurred. He cited the case of *Japheth Gituma Joseph & 2 others vs Republic* (2016) eKLR where the court held -

“...reports of commission of alleged crimes are normally made to a duty officer at a police station and may be made by a person who is not the complainant as in cases where the complainant is admitted in the hospital. The report is merely a report of occurrence - a bare report of a crime and not evidence of the commission of an offence against any person.”
12. Counsel submits the appellant was the only eyewitness who testified about the accident and thus the trial court ought to have placed more reliance on the appellant’s case which had more probative value and was not controverted.
13. The trial court erred in relying on irrelevant, un-pleaded, and unproven facts which influenced the judgement. The issue as to why the rider ran away and failed to report the incident if he was in the wrong, or why the rider failed to file a complaint was not pleaded. The trial court decision was not based on any evidence and urged the trial court to interfere with the judgment.
14. According to counsel the appellant chose to leave out the rider in the pleadings since the accident was caused by the respondent. The respondent blamed the rider for the accident and at no point was the appellant blamed for the accident. The respondent ought to be held wholly liable for the accident as it failed to enjoin the rider of the motorcycle into the proceeding. The learned magistrate erred in apportioning liability to a rider who was not a party to the suit. He cited the Court of Appeal case in *Amalgamated Logistic International Ltd & Anor vs MMK* (2020) eKLR where it was held that -

“the evidence tendered by the defence seem to suggest that they intended to enjoin the owner of motor vehicle registration No KAZ 084F as a party to the suit. The Defendants did not deem it fit to do so. Therefore, in the absence of such an enjoiner, this court cannot make the findings apportioning liability against a party who is not a party to the suit.”
15. Counsel urged the court to interfere with the trial court apportionment of 50 % liability and substitute with 100% liability against the respondent.
16. On the issue of diminished earning capacity counsel urged the court to take into consideration that at the hearing the appellant informed the court she had not healed and could not undertake any chores, as her right leg couldn’t stand for long, as well as 8% degree of incapacitation which have placed the appellant at a relatively disadvantaged position in terms of work as before the accident. He urged the court to award a global figure of Kshs 400,000/=
17. In conclusion, Counsel pleaded with the court to allow the appeal and interfere with the apportionment of liability and award a global sum of Kshs 400,000/= for diminished earning capacity as well as costs and interest.



## Respondent's submissions

18. Opposing the appeal counsel for the respondent filed submissions dated January 10, 2023. He submits that the respondent was not responsible for the accident and thus the apportionment of liability of 50% was apt. He cited the case of *Lakhamshi vs Attorney General* (1971) EA 118, 120 as quoted in *Calistus Juma Makhanu vs Mumias Sugar Co. Ltd & Anor* (2021) eKLR.
19. Counsel submits apportioning the respondent 100% liability is unjust and unfair, as it is not clear who occasioned the accident. The appellant failed to discharge their burden of proof to warrant the respondent to be found fully liable for the accident. Counsel further submits no liability should have been attached to the Respondent.
20. It was submitted for the respondent that the award of general damages should be made considering comparable injuries or similar injuries and awards. The award of Kshs 1,500,000/= as general damages were overly inflated as the injuries sustained were not severe to attract such an award. The court was urged to interfere with the award of general damages and make an award which is commensurate to the injuries sustained.
21. On the head of diminished earning capacity counsel submits the appellant failed to prove the same and thus the same ought to fail. The case cited was *Nguku vs Kiria-ini Farm* - Civil Appeal No 267 of 2020 (2022) KEHC342 KLR CIV.
22. In conclusion counsel urged the court to uphold the appeal and disturb the issue of liability and quantum and award costs.

## Analysis of Evidence in the Trial Court

23. This being the first appellate court, its duty is as summarized by the Court of Appeal in *Selle & Another vs Associated Motor Boat Company & Others*, [1968] EA 123: which is "... to 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..."
24. Before determining the appeal on merit, I will first re-evaluate the evidence of the trial court.
25. The appellant case was supported by the testimony of two (2) witnesses the appellant (PW1) and a police officer Pc Mwamobe (PW2).
26. Pw1 the appellant herein testified under oath on October 14, 2019 and adopted her witness statement and list of documents both dated March 27, 2018. She testified that she sustained 3 fractures and that she has not completely healed, that she cannot undertake any chores and she walks with difficulty. She told the trial court that she could no longer work in her stall as she could not fold her leg or stand for long. She blamed the motor vehicle KCE 925V which knocked the motor cycle KMDM 587D where she was travelling pillion. She informed the court she was wearing a helmet and a reflector jacket.
27. In cross-examination she informed the court the incident occurred at around between 6.30 pm and 7.00 pm and the motorcyclist could still see clearly. She could not tell if a motorcyclist could lose control if speeding on a murrum road. She could not remember the registration number of the motorcycle, that she had boarded the same at the stage and it was not her first time to use a motorcycle. She informed the trial court she was taken to the hospital by the driver of motor vehicle KCE 925V.
28. In re- examination she told the court the motorcycle tried to avoid the accident by moving to the extreme left.



29. Pw2, then stationed at Thika Police Station testified and adduced the abstract of the accident that occurred on January 9, 2017 at 18.30hrs involving motor vehicle KCE 925v and Motor cycle KMDM 587D. He told the court he was not the investigating officer and that it the investigating officer who would tell who was to blame for the accident.
30. The defence called a police officer PC Charles Mwandime (DW1) from Thika police station as the only witness. He testified on November 25, 2019. He adduced the OB. No 12/9/1/2017 regarding the accident reported by Alex Ngugi driver of Motor vehicle KCE 925v on 9<sup>th</sup> January 2017 which occurred along Witeithie –Maraba road between motor vehicle KCE 925v and motor cycle KMDM 587 D. According to him the motor cycle which was carrying two pillion passengers lost control and hit the motor vehicle on the right-hand side headlamp. The two pillion passengers got injured when they fell on the road. He informed the court he was not the investigating officer.
31. In cross-examination he re-stated the contents of the OB which did not blame anyone for the accident.

### **Determination**

32. Having considered the appeal, the submissions in support and the opposing submissions, I frame the following issues for determination:
  - i. Whether the respondent was liable for the accident and whether apportioning liability of 50% was appropriate.
  - ii. Whether the award of the general damages was excessive?
  - iii. Whether the court ought to grant damages under the head of diminished income earnings.

### **Liability**

33. The Trial court apportioned liability at 50:50 ratio as against the respondent and the rider of the motorcycle.
34. Counsel for the appellant submits the trial court erred in apportioning liability to the rider who was not a party to the suit. He proposes the respondent shield the entire liability of 100% as it failed to enjoin the rider of the motorcycle. On the other hand, the respondent submits apportioning it 100% liability is unjust and unfair. That the appellant failed to demonstrate how the respondent was liable for the accident. The appellant submits she did not enjoin the rider as a defendant as she was sure the respondent was to blame for the accident.
35. The trial court is vested with the discretion to award and apportion liability based on the evidence adduced before it. The appellate court may only interfere if the same was arrived at contrary to the evidence on record. In *Mabendra M. Malde vs George M. Angira* - Civil Appeal No 12 of 1981, it was held that

“...apportionment of blame is an exercise of discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle”.
36. In the instant case the trial magistrate found and concluded that the accident was occasioned by the omissions of both the rider of the motorcycle and the driver of the motor vehicle and proceeded to apportion them 50% liability. This court finds the trial court erred in apportioning liability to a party,



not before the court. I do associate myself with the holding in the case of *EN vs Hussein Dairy Limited & 3 others* [2020] eKLR where the court held -

“...It was not open to the court to consider how negligent a party not before it could be. The law confines a court to determine only the rights of the parties before it and upon the evidence availed by and against such parties. In fact, I doubt whether it was admissible to receive evidence against a non-party and consider the same without affording him a right to be heard. I take the view that the legal thing for the 2<sup>nd</sup> respondent to have done was to seek the joinder of the owner and driver of the bus, either as a third party or co-defendant before seeking to push a burden in the case against them.”

37. This court, therefore, finds the trial court erred in apportioning liability to the motorcycle rider who was not a party to the suit. As to who was blame for the accident, the evidence of the appellant who was the eye witness was not controverted. The respondent did not call its driver to give an account of what transpired. In the circumstances therefore, I find the evidence of the appellant’s evidence having not been controverted, she gave a true account of what transpired. The appellant blames the driver of the motor vehicle for the accident
38. This court finds the driver of the Motor Vehicle KCE 925v to blame for the accident. In exercising my discretion, I interfere with the finding of the trial court on liability and award 100% liability against the respondent for the accident.

### **General Damages**

39. In awarding general damages, the court considers an award that reflects the nature and gravity of the injuries. In assessing damages, the court considers the approach of comparable injuries and awards.
40. The appellant has not submitted on the issue of the award of general damages but the respondent submits the award of Kshs 1,500,000 by the trial court is excessive considering the injuries sustained.
41. The appellant sustained injuries to a fracture of the lateral femoral condyle, fracture of the right patella, fracture of the tibia plateau, and wound on the right knee. And the doctor assessed the disability at 8%.
42. The authorities cited by the appellant have more serious injuries as opposed to the injuries sustained by the appellant.
43. In *Joseph Mwangi Thuita vs Joyce Mwole* (2018) eKLR, the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with the inability to walk without support and the court awarded Kshs 700,000 as general Damages.  
  
In *Pauline Gesare Onami v Samuel Chagamure & another* (2017) eKLR the plaintiff suffered a fracture of the right tibia and fibula bone, fracture of the left tibia and fibula bone, Laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid-shaft and the court upheld the trial court’s award of Kshs 600,000.
44. The above cited authorities are more comparable to the injuries of the appellant. In my view, I find the award of Kshs 1,500,000/= as general damages was rather excessive.
45. In view of the above I am persuaded that this court ought to exercise its jurisdiction and interfere with the trial court’s award of general damages. In my humble view, an award of Kshs 900,000/= would be sufficient compensation as general damages to the appellant.



## Diminishing Earning Capacity

46. The trial magistrate did not address himself under this head. Courts have addressed the issue of diminishing earning capacity. In *Alpharama Limited vs Joseph Kariuki Cebon* [2017] eKLR the court stated:

“The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors”.

47. The appellant stated that prior to the accident, she worked in her stall selling potatoes but she could no longer work after the accident as she could not stand for long nor fold her leg as she was using crutches. That after the accident she sustained permanent incapacity of 8% as assessed by Dr. Karanja. The appellant urged the court to award the award to cushion the appellant for the risk occasioned by the disability.

48. In the trial court the appellant urged the court to grant a global sum of Kshs 400,000/=. Having perused the impugned judgment, I note the learned trial magistrate did not address his mind on this prayer. But awarded a global sum of general damages of Kshs 1,500,000/=.

49. The appellant was running a potato kiosk before the accident. She did not indicate to the trial court what she earned. The appellant’s claims were not challenged by the respondent either in its statement of defence, under cross-examination or even in its evidence.

50. My view is since the injuries and the level of incapacity were proved by the doctor’s report, I find the appellant is entitled to compensation for the loss of income for the period she was not in a position to make any earnings from her potato-selling business. The appellant engaged in menial jobs which entails lifting sacks of potatoes and as she could not have managed to run her kiosk, it is not in dispute that she lost income after the accident.

51. In *Catherine Gatwiri v Peter Mwenda Karaai* [2018] eKLR the court held that:

“in arriving at an award for diminished earning capacity, the court will consider the disadvantage the respondent will suffer in future for not working because of the injuries and take into account factors such as age and qualifications of the injured person, remaining working life, disabilities among others.”

52. In the circumstances therefore, this court will consider the period within which the appellant suffered the injuries, as a period when she was not able to engage in her kiosk business. The court will consider a period of 2 months as a period in which the appellant was not able to make a living out of her business. As the appellant has not indicated the amount of money earned from her kiosk business this court will award a global figure of Kshs 100,000/= for damages of diminishing earning capacity.

53. In the end, I find the appeal herein partially succeeds and make orders as follows:

- a). The apportionment of 50% liability to the respondent is set aside and substituted with 100% liability against the respondent.
- b). The award of general damages of Kshs 1,500,000/= is set aside and substituted with an award of Kshs, 900,000/=.
- c). An amount of Kshs 100,000/= is awarded as damages for diminished earning capacity.

Orders accordingly.



**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU**

**THIS 12<sup>TH</sup> DAY OF JUNE, 2023.**

.....

**P.M. MULWA**

**JUDGE**

**In the Presence of:**

Kinyua/Duale – Court Assistants

N/A - for appellant

N/A - for respondent

