



**Mutuota v Mbuthia & 2 others (Civil Appeal E66 of 2022)  
[2024] KEHC 14066 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14066 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E66 OF 2022  
J WAKIAGA, J  
NOVEMBER 12, 2024**

**BETWEEN**

**EDWARD NGOCHO MUTUOTA ..... APPELLANT**

**AND**

**CHARLES MWANGI MBUTHIA ..... 1<sup>ST</sup> RESPONDENT**

**THOMAS KIBAARA ..... 2<sup>ND</sup> RESPONDENT**

**STANLEY GATHOGO WANJI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgement of Hon. P. M. Kiama (SPM)  
delivered on 26th October 2022 in Kangema SPMC NO 4 of 2019)*

**JUDGMENT**

1. By a judgement dated 26<sup>th</sup> October 2022 the trial Court found against the Appellant on liability which he portioned at 60%; 40% against the Respondent on the ground that the Appellant did not have a driving licence nor was his motor cycle insured and proceeded to assess general damages at Kshs.700,000 and specials at Kshs.209,486.
2. Being dissatisfied by the said determination, the Appellant filed this appeal and raised the following grounds of appeal;
  - a. The Court erred in law and fact in apportioning liability at 60% ;40% against the Appellant.
  - b. The Court erred in failing to address its mind on the evidence adduced by the Appellant and therefore made an erroneous finding.
  - c. The Court misdirected himself in law and fact by solely relying on the fact that the Plaintiff did not have a driving licence in apportioning liability.



- d. The award in damages was manifestly and inordinately lower bearing in mind the injuries sustained by the Appellant.

### **Submissions**

3. Directions were given on the disposal of the appeal by way of written submissions. On behalf of the Appellant it was submitted that the accident was wholly caused by the Respondent's driver as confirmed through the evidence of PW1 and PW2 who attempted to overtake abruptly and encroached onto the Appellant lane thereby causing the collision. It was contended that lack of driving licence by the Appellant was insufficient to warrant the finding by the Magistrate as was stated in the cases of Elizabeth Gathoni Thuku v Peter Kamau Maina & another [2021] eKLR and Kennedy Macharia Njeru v Packson Githongo Njau & another [2019] eKLR.
4. On quantum, it was submitted that the Appellant sustained loss of consciousness, right subdural hematoma, fracture of the skull, brain swelling and painful shoulder and therefore an award of K.shs 2,500,000 would have been a fair award based on the following cases:
  - a. Benard Ondieki v Boniface Ndege Orayo [2020] eKLR where an award of Kshs.1,750,000 was confirmed in respect of fracture of the skull among other injuries.
  - b. James Njuguna v Fredrick Githinji Ndegwa [2015] eKLR where an award of Kshs.1,500, 000 was given for similar injuries
  - c. Gerald Musungu Otwani v Kulsum Alibhai v Iqbal Mohamed Hussein [2006] eKLR where an of Kshs.2,500,000 was given.
5. The Respondents did not file submissions and neither did they attend the hearing hereof.

### **Proceedings Before The Lower Court**

6. This being a first appeal the Court is under a duty to re-evaluate the proceedings before the lower Court to come to its own determination thereon while giving allowance to the fact that unlike the trial Court, it did not have the advantage of seeing and hearing witnesses.
7. On behalf of the Appellant, PW1 PC Stephen Maina stated that the accident involved motor vehicle registration number KAH 060 A which was being driven by Stanley Githongo and motor cycle registration number KMEA 716 Z ridden by the Appellant. It was his evidence that the driver of the motor vehicle was charged and fined Kshs.20,000 and was therefore to blame as per the police abstract. In cross examination he stated that the Appellant was charged with the offence of riding without insurance and was not supposed to ride the same.
8. PW2 Edward Ngochi Mutuota, the Appellant stated that he was operating boda boda business and as result of the accident sustained injuries to the head. In cross examination he confirmed that he did not have a driving licence and was not licenced to ride the bike on the public road. He stated that he was hit by the motor vehicle which was driving on the left side as it was overtaking another motor vehicle.
9. The Respondent did not call any evidence.

### **Determination**

10. From the pleadings and proceedings herein, there are only two issues for consideration;
  - a. Whether the Courts determination on liability was right.



- b. Whether the award in general damages was inordinately low.
11. The Court found the Appellant liable at 60 % only on account that the same did not have a rider's licence. This finding was in error as the fact of lack of licence on its own is not evidence of liability. The Court therefore fell in error. The Respondent did not call any evidence to rebut the Appellants account of how the accident occurred and therefore there was no evidence to support the finding of apportionment of liability as held by the Court.
12. I would therefore allow the appeal on liability and set aside the same and in exercise of the powers of this Court as a first appellate Court substitute the same with a finding of liability at 10% : 90% against the Respondent on the account that the Appellant stated that he was moving slowly at the time in a straight road and must have contributed to same extent to the said accident.
13. On quantum, the injuries sustained by the Appellant were not disputed at the trial having been confirmed through the medical report by Dr Wokabi and in arriving at the sum of Kshs.700,000 the Court did not cite the authorities which he relied upon but made a general remark that he had considered the authorities submitted.
14. I have looked at the authorities submitted by the Appellant and those submitted by the Respondent at the trial and is of the considered opinion and find that the award was within a reasonable range and will not interfere with the same. In this I find support in the following decisions of Superior Courts.
- a. Moiz Motors Limited & another v Harun Ngethe Wanjiru [2021] KEHC8702 (KLR) where the Court confirmed an award of Kshs.700,000.
- b. David Kibue Mchomba & another v Alex Mutua Munyao [2019] KEHC 5249 (KLR) where the Court confirmed Kshs. 800,000
- c. Omondi v Anzofu [2024] KEHC 2675 (KLR) where the Court substituted an award of Kshs.1,000,000 with Kshs.300,000.
15. I would therefore not interfere with the trial Courts award on general and special damages which I hereby affirm and make the final determination as follows:
- a. Liability 10% : 90% in favour of the Appellant
- b. General damages Kshs. 700,000.00
- c. Special damages Kshs. 209,486.00  
Total Kshs. 909,486.00
- d. Less 10% contribution Kshs. 90,948.60
- e. Grand total Kshs. 818,537.40.
16. The Appellant is entitled to cost and it is ordered.

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 12<sup>th</sup> DAY OF NOVEMBER 2024**

**J. WAKIAGA**

**JUDGE**

In the presence of:

Mr. Gitimu for the Appellant



No appearance by Kimondo Gachoka & Advocates for Respondent

Jackline – Court Assistant

