



**Mashengu & 2 others v Chege (Civil Appeal E052 of 2023)  
[2024] KEHC 13849 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13849 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CIVIL APPEAL E052 OF 2023  
SM GITHINJI, J  
NOVEMBER 7, 2024**

**BETWEEN**

**ISIDOR NGURE MASHENGU ..... 1<sup>ST</sup> APPELLANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> APPELLANT**

**VEHICLE & EQUIPMENT LEASING LTD ..... 3<sup>RD</sup> APPELLANT**

**AND**

**FRANCIS NJERU CHEGE ..... RESPONDENT**

**JUDGMENT**

1. By this appeal, the Appellant challenges the judgment and decree of the Senior Resident Magistrate Hon. P.E Nabwana in Mpeketoni PMCC No. E008 of 2021 delivered on 20<sup>th</sup> September 2023 wherein judgment was entered in the following terms;
  1. Liability -100% against the Defendants in favour of the Plaintiff
  2. General damages –Kshs. 500,000
  3. Special damages 1,876, 229
  4. Total 2,376,229
  5. Costs and interests
2. Dissatisfied with the decision, the Appellant lodged this appeal on the following grounds;
  1. The learned trial magistrate erred in law and in fact in ignoring the evidence of DW1 and DW2 on the occurrence of the accident.



2. The learned trial magistrate erred in law and in fact in relying heavily on the evidence of Pw2 and Pw3 who did not prove all the particulars of negligence pleaded and the whole case on its entirety on a balance of probabilities.
3. The trial magistrate erred in law and in fact in that he disregarded the Defendants submissions and judicial authorities on both liability and quantum of damages thus making an inordinately high award.

### **Evidence at Trial**

3. Pw1 Dr. Patrick Mwangi told the court that he had examined the Plaintiff and produced as Pex 1 the medical report which detailed the injuries sustained by the plaintiff. His conclusion is that the plaintiff sustained crush injuries on the left foot leading to loss of 3 toes and multiple soft tissue injuries and assessed permanent incapacitation at 10%.
4. Pw2 Francis Njeru Chege the Plaintiff adopted his witness statement dated 27<sup>th</sup> February 2023 as his evidence in chief and proceeded to produce exhibits as per the list of documents dated 9<sup>th</sup> February 2023. He added that on the day of the accident he was from Hongwe heading towards Mpeketoni as a pillion passenger on a motor cycle ridden by Mzee Mburu (deceased), and indicated that they were turning right when they were hit from behind by a moving vehicle and as a result he sustained serious injuries.
5. On cross examination he maintained that Mzee Mburu was not careless while riding the motor cycle as he had indicated to join the road.
6. Pw3 Kennedy Muthama Maingi the I.O testified that the driver of the lorry was charged with causing death by dangerous driving. He produced the Police Abstract as PEX11. He blamed the driver of the lorry for causing the accident as he hit the motorcycle from behind and that he ought to have kept a safe distance of about 70 meters.
7. Dw1 Isodor Ngure Mashengu adopted his witness statement dated 24<sup>th</sup> February 2023 as his evidence in chief. On cross examination by the plaintiff's counsel he admitted that he was driving towards Mpeketoni and the Motor Cycle was about 50 meters ahead when he saw it. That the road was murramed and he was driving at a speed of 30-50 Kms/hr.
8. Dw2 CI Martin Kelly testified that both the lorry and motor cycle were headed towards Mpeketoni from Kibaoni. He stated that according to the report made by the driver of the lorry, the motorcycle rider failed to indicate.
9. On cross examination by counsel for the plaintiff, he admitted to having obtained the information from the driver that the rider did not indicate.

### **Analysis and Determination**

10. The appeal was canvassed by way of written submissions. I have considered this appeal and the grounds it's set upon, submissions by parties and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions on that evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.
11. From the grounds of appeal on the memorandum of appeal there are two issues arising for me to determine;



1. Whether the trial court erred in determining that the defendant was wholly to blame for the accident
2. Whether the award in quantum for damages as awarded is inordinately high.

### **Liability**

12. As held by the Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR.

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663* at p. 681 as follows:

To determine what caused 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 facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”

13. From the evidence by Pw2 the plaintiff and Pw3 who was the investigating officer, the driver of the lorry was to blame for the accident. From both testimonies, it is vivid that the rider of the motor cycle had indicated that he was to turn right. Dw1’s own admission is that he was behind the motor cycle. It is reasonably expected that he would have kept a safe distance behind the motorcycle, to enable him apply breaks in case of any dangerous eventuality. In light of this information, driver of the lorry owed a duty of care to the respondent of keeping a safe and reasonable distance from the motorcycle. This seems not to have been the case as it was the driver of the lorry who knocked the motorcycle from behind. Accordingly, I cannot interfere with the trial court’s attribution of negligence solely to the Defendants.

### **Quantum**

14. The parameters under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR* as follows:

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”

15. The trial court in its analysis cited that the Plaintiff proposed an award of Kshs. 700,000 while relying on the authority of *Anthony Munene Nyaga V Oketch Moses [2016] eKLR*. The trial court further indicated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants quoted the authority cited by the Plaintiff while the 3<sup>rd</sup> Defendant had proposed an award of Kshs. 300,000 without reliance on any authority. It is therefore



untrue that the trial court did not take into account the submissions and judicial authorities relied on by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as alleged in the memorandum of appeal. In reaching at the quantum for damages, the trial court restricted itself to the confines of comparable damages and comparable awards to the extent of finding that in the authority cited by plaintiff the injuries were slightly severe and thus settled on the sum of Kshs. 500,000 taking into account the passage of time and inflation. I find no reason to interfere with the said award as I am satisfied that the trial court's award was commensurate to the injuries sustained.

16. As a result, I find no merit in the Appeal and the same is hereby dismissed with costs to the Respondent

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Miss Maina holding brief for Mr Oduor for the Respondent
2. Mr Kiti for the Appellant

