



**Too v Muthethia & 2 others (Civil Appeal E1509 of 2024)
[2025] KEHC 13382 (KLR) (Civ) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1509 OF 2024

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

JUDY CHEROTICH TOO APPELLANT

AND

JOHN MUTHETHIA 1ST RESPONDENT

BERNARD KIMATHI MUNGATHIA 2ND RESPONDENT

PAULINE WANJIRU MUTHONI 3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon. P. K. Rotich (PM) in Nairobi Chief Magistrates Court Civil Suit No. E2125 of 2021 delivered on 25th November 2024)

JUDGMENT

Background:

1. Through the Complaint dated 22nd February 2021, John Muthethia, the 1st Respondent herein, sought compensation for various bodily injuries he sustained as a result of road traffic accident. He claimed that on 15th January 2021, he was a pillion passenger aboard motor cycle registration number KMEM 114J which was ridden by Bernard Kimathi Mungathia, the 2nd Respondent herein, and which motor cycle was owned by Pauline Wanjiru Muthoni, the 3rd Respondent herein. That, on the said date, an accident between the said motor cycle and motor vehicle registration number KBU 218H which vehicle was owned by Judy Cherotich Too, the Appellant herein. He claimed that the accident occurred as a result of negligence.
2. The 1st Respondent isolated the particulars of negligence on the Appellant and the 2nd and 3rd Respondents as; failing to be on the lookout, riding and driving recklessly and in excessive speed, failing to have sufficient control on the car and the motor cycle, failing to keep to their rightful lane and failing



to swerve, stop or act in a manner as to prevent the collision. He pleaded that the accident caused him a fracture of the upper end of the right humerus, blunt abrasion injuries on the left leg and displaced fracture of the neck of the right humerus. Apart from negligence, he relied on the doctrine of *res ipsa loquitur* and the Traffic Act to seek compensation of Kshs. 285,350/= in special damages and general damages.

3. The Appellant challenged the suit through her Statement of Defence dated 6th May 2021. She denied the claims in the Plaint and averred that if any accident occurred it was as a result of the 2nd Respondent's negligence. The 2nd and 3rd Respondents did not enter any appearance and as such an interlocutory judgment was entered against them.
4. Upon considering the case, the Learned Trial Magistrate apportioned liability equally between the 2nd and 3rd Respondents, on one hand, and the Appellant, on the other hand. Subsequently, the Court awarded Special damages of Kshs. 105,350/- and general damages of Kshs. 1,500,000/- and future medical expense of Kshs. 180,000/- together with costs and interest.

The Appeal:

5. The Appellant was dissatisfied with the findings of the trial Court. Through the Memorandum of Appeal dated 19th December 2024, he asserted the following grounds of appeal: -
 1. That the learned trial magistrate erred in law and in fact by holding the Appellant 50% liable when evidence clearly showed that the 2nd Respondent was wholly to blame for the accident.
 2. That the learned trial magistrate erred in law and in fact in awarding Kshs. 1,500,000/- as general damages which was manifestly too high and excessive and not consistent with the injuries sustained and the legal precedents.
 3. That the learned trial magistrate greatly misdirected himself in treating the evidence tendered and the submissions of the appellant very superficially thereby erroneously arriving at a wrong conclusion on quantum.
 4. That the learned trial magistrate erred in law and in fact in not taking into consideration the evidence and submissions tendered in court in behalf of the Appellant to the effect that the Appellant was not liable for the accident.
 5. That the learned trial magistrate erred in law and in fact in not making an award which was within limits of already decided cases of similar nature.
 6. That the learned trial magistrate erred in law and in fact in considering extraneous issues while arriving at the said general damages, special damages and future medical costs a decision contrary to the evidence on record.
 7. That the learned trial magistrate erred in law and in fact in awarding quantum of damages without having regard to the fact that the Respondent had already healed and was gainfully engaged.
 8. That the learned trial magistrate erred in law and in fact in applying wrong principles of law on arriving at the said judgment.

The Appellant's submissions:

6. In her written submissions dated 8th May 2025, the Appellant attributed the accident to the 2nd Respondent for overtaking using the pavement on the left side of her vehicle. It was her case further



that the 1st Respondent did not discharge his burden of proof in demonstrating negligence on her part for failing to give evidence or the reason why vicarious liability should attach to her. Referring to the Police Abstract produced by PW1, the Appellant contended that it was the 2nd Respondent (the rider) who was blamed for the accident. She submitted that the failure to call an eye witness and to produce the sketch plan clearly indicating how the accident happened weakened the 1st Respondent's chances of proving liability.

7. The Appellant further asserted that the 1st Respondent failed to establish any prima facie case against her and as such the evidential burden of proof never shifted to her. She relied on *Winfred Nyawira Maina -vs- Peterson Onyiego Gichana* where it was observed that a Petitioner is under the obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. To fortify the foregoing, the Appellant submitted that the evidence of her witness, DW1, who was the investigator from Rocann Assessors, that the 2nd Respondent was to blame for overtaking from the left side of the vehicle was uncontroverted.
8. On quantum, the Appellant submitted that damages awarded were excessive and unwarranted. In urging this Court to interfere, reference was made to the decision in *Kemfro Africa Limited t/a Meru Express Services (1976) & Another -vs- Lubia & Another (No.2) 1985 eKLR* where it was observed that a Court can interfere with the quantum of damages if an irrelevant factor was taken into account or a relevant one left out as to reflect an amount inordinately low or high as to be an erroneous estimate of the damages.
9. The Appellant faulted the trial Court for not considering its submissions and authorities in making its findings in quantum, thus arriving at an inordinately high figure. As regards special damages, the Appellant submitted that the award of Kshs. 105,250/- and 180,000/- were not strictly proved by production of original receipts.
10. In the end, the Appellant urged this Court to allow the appeal with costs and to find the 2nd and 3rd Respondents wholly liable for the accident.

The 1st Respondent's case:

11. John Muthethia challenged the appeal through written submissions dated 12th May 2025. In asserting propriety of the apportionment of liability, he submitted that the Police Abstract dated 21st January 2024 was produced in evidence indicating that the motorcycle was to blame for causing the accident. He further submitted that his testimony to the effect that the motor vehicle registration number KBU218H abruptly entered their rightful lane while she was trying to turn into a nearby hotel thus hitting them and throwing them into a ditch was not contradicted as to suggest negligence on her part. It was his further submission that as he was a pillion passenger, there was nothing he could have done to prevent the accident and as such liability could not to be attributed to him.
12. The 1st Respondent drew support from the case of *Janet Kathambi v Charity Kanja Njiru [2021] eKLR* where it was observed there is nothing a pillion passenger could do to prevent an accident from occurring since such does not have control over the motor cycle. Further support was drawn from the decision in *Masembe -vs- Sugar Corporation and Another [2002] 2 EA 434* where it was observed: -

..... a reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.
13. On the question on assessment of damages, the 1st Respondent submitted that the trial Court did not err since he specifically pleaded and proved his case. On the aspect of future medical expenses, the 1st



Respondent submitted that as assessed by Dr. Wokabi, the expense to be incurred for rehabilitation was Kshs. 100,000/= and the removal of metal implant will cost Kshs. 80,000/- a fact that was specifically pleaded and proved. The 1st Respondent submitted that the general damages awarded were in tandem with the nature and extent of injuries he suffered. It was his case that he still experienced pain on his hand, shoulder and neck as a result of the accident. Further, permanent disability was assessed at 35%.

14. In conclusion, he urged the Court not to interfere with the trial Court's assessment and to dismiss the appeal with costs.

Analysis:

15. On consideration of the record, the parties' written submissions and the decisions referred to, two issues arise for determination, which are: -
- i. Whether the trial Court rightfully found the Appellant liable.
 - ii. Depending on (i) above, whether the trial Court properly directed itself on quantum, both of special and general damages.
16. Before venturing into the consideration of the above issues, I will first look at the role of this Court as a first appellate Court; which is by now well settled. This Court is to re-consider the evidence afresh with a view to arriving at its own conclusions. In *Selle -vs- Associated Motor Boat Co.* [1968] EA 123, the Court of Appeal for East Africa discussed the foregoing as follows: -

... An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

17. Next, is a consideration of the issues.

Liability:

18. PC Bobby Okari testified as PW1. He stated that on 15th January 2021, the 1st Respondent was a pillion passenger on the motor cycle registration No. KMEM 114J, ridden by the 2nd Respondent along Ngong road, when it collided with the motor vehicle registration No. KBU 218H, driven by the Appellant. He further stated that the case was investigated by one P.C Lucasvide O.B No. 96/15/1/2021. PW1 produced the Police Abstract dated 21st January 2021, issued to the 1st Respondent as an exhibit. On cross-examination, PW1 stated that he did not have the Occurrence Book in Court and that he was not the Investigating Officer. He admitted not visiting the scene of accident and did not go through the Police file. He only stated that the rider was to blame for the accident.
19. The 1st Respondent testified as PW3. In his evidence-in-chief, he stated that he was a pillion passenger and as a result of the negligence enumerated elaborately in the preceding paragraphs, the Defendants caused the accident. On cross-examination, it was his evidence that the motor vehicle hit them from the right side when the motorbike was stationary as a result of which he fell into the ditch. He stated



that he blamed the driver of the vehicle and the rider of the motor bike. He asserted that the motor vehicle hit him when it was turning to a road heading to a certain place.

20. In re-examination, the 1st Respondent stated that the motor vehicle indicated that it was turning to the left, but still the motor cycle rode to the left side where the vehicle was turning to and it collided with the motor vehicle.
21. Richard Murage was DW1. He was an investigator with Rocann Loss Assessors who were appointed by Geminia Insurance Company Limited to conduct investigations. He referred to the investigation report dated 29th June 2021 where they established that the motor cycle rider was to blame for the accident. DW1 further stated that the rider was overtaking from the left side of the road from the pedestrian path thereby hitting the vehicle. On impact, the motorcycle was thrown on the left side of the road into a ditch.
22. When a Court is called upon to establish the aspect of liability, its role, pursuant to Sections 107, 108 and 109 of the *Evidence Act* is to sift through the evidence in a bid to make an assessment on whose fault it was that the accident happened. In *Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal discussed the foregoing evidentiary provisions as follows: -

... As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that places upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.
23. In discussing the fluidity of liability in road traffic accidents, the Court of Appeal in *Michael Hubert Kloss & Another -vs- David Seroney & 5 Others* [2009] eKLR observed thus: -

... 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...
24. From the totality of the evidence, it is first notable that, save for the 1st Respondent, all the other witnesses did not witness the accident occur. From the totality of the evidence, it is the position that the accident occurred when the Appellant's motor vehicle was making a left turn. In doing so, it hit the motor cycle which was on the left side of the vehicle. According to the 1st Respondent who was a pillion passenger, the vehicle indicated that it was turning into the left, but still the rider did not stop to give way thereby hitting the vehicle.



25. There is no doubt the driver of the vehicle was relatively vigilant on the road. Before turning off the main road into the left side, she indicated as much. However, apart from indicating that one is either changing lanes or making a turn off, a driver or rider must first ensure that it is safe to do so through the aid of either the side mirror or the rear-view mirror. It is only after one is certain that the way is clear that he/she makes the turn or change of lane as the case were. In this case, the rider was on the left side of the road.
26. Before proceeding further, as a frequent user of the Ngong road, I take judicial notice of how the Ngong road is designed. The road has a separate lane for motor cycles and bicycles immediately after the main twin lanes used by motor vehicles. That lane is on the left side. There is also a walkway further away from the path of travel of the motor cycles and bicycles. Therefore, whenever a motor vehicle is to get off the main Ngong road to the left, the driver has to ensure that the side lane on the left is clear since that lane is solely designated for motor cycles and bicycles. Therefore, from the evidence, it is apparent that the motor cycle was hit when it was lawfully on its lane. In other words, the Appellant apart from indicating that she was moving off the main road to the left, she did not, in the first instance, establish that the lane was clear and that it was safe to take the turn. As such, she turned off to the left when it was not safe to do so thereby coming into the path of travel of the rider. On the other hand, a rider or a cyclist is also supposed to exercise care and caution while on the road. Apart from being on the rightful lane, one must always be alive to the fact that a vehicle may turn into the left lane. The rider or cyclist must, hence, be on the look out and in so doing, must be on a reasonable speed capable at stopping within a short distance.
27. The above discussion, therefore, casts blame on both the driver and the rider. However, the driver carried the greatest blame in the circumstances of this case. Given that the trial Court apportioned the blame equally, the Appellant ought to be grateful. I say so since had there been an appeal or cross appeal on liability, this Court would have found the Appellant more to blame.
28. Deriving from the above, this Court finds the appeal on liability to be unmerited. It is hereby dismissed.

Quantum:

29. The Appellant decried general damages awarded as excessive and outside the limits for decided cases. It also was her case that the special damages and future medical costs was contrary to the evidence on record. Based on the nature of the injuries suffered, the trial Court, upon considering various decisions among them, Njuge Consolidated Co. Limited & Another -vs- Linet Chemutai Maritim (2019) eKLR, China Road and Bridge Corporation (Kenya) -vs- Job Mburu Ndungu (2021) eKLR, Nairobi Civil Appeal No. 147 of 2013 Said Abdullahi & Another -vs- Alice Wanjiru and Nakuru High Court No. 6 of 2010 Fast Choice Co. Limited & Another -vs- Hellen Nungari Ngure (2021) eKLR the Court awarded the 1st Respondent Kshs. 1,500,000/- on general damages.
30. The evidence that spoke to the injuries of the 1st Respondent include the treatment notes dated 11th February 2021 and the Discharge summary dated 16th January 2021. The former indicated that the 1st Respondent suffered fracture of the upper end of the right humerus and blunt abrasion injuries of the left leg. He was operated on and the fracture and right humerus was fixed with a metal implant. Examination revealed displaced fracture of the neck of the right humerus and smaller right and arm muscles due to wasting. Disability was assessed at 35%. The Discharge summary indicated in the diagnosis section that the was a fracture of the proximal humerus and the treatment was plating of the fracture. He also was given medication and an arm sling.
31. From a perusal of the authorities relied upon by the trial Court, Courts have generally been awarding damages in the range of Kshs. 1,500,000/- and Kshs. 3,000,000/- for like injuries as those sustained by



the 1st Respondent. The guiding principles in the award of general damages was discussed by the East African Court of Appeal in Woodruff -vs- Dupont [1964] EA 404 as follows: -

.... The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.” The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.

32. This Court, therefore, sees no fault in the manner the trial Court assessed the general damages. The award was not only reasonable, but also fell well within the range of awards that Courts usually make for similar injuries.
33. Similarly, the special damages, as was rightly observed by the trial Court, were specifically pleaded and strictly proved. The future medical attention needed was elucidated by PExh. 4. This Court will not disturb the awards therein.
34. Equally, the appeal on quantum is also unsuccessful.

Disposition:

35. Having carefully considered the grounds of appeal and noting that none is sustainable, this Court now makes the following final orders: -
 - (a) The appeal is wholly dismissed.
 - (b) The Appellant shall shoulder the costs of the appeal.
36. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Ms Mungania, Learned Counsel for the 1st Respondent.

No appearance for the 2nd & 3rd Respondents.

Michael/Amina – Court Assistants.

