Macharia v Ambe (Civil Appeal E023 of 2024)
[2025] KEHC 14583 (KLR) (14 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14583 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL E023 OF 2024

PJO OTIENO, J

OCTOBER 14, 2025

BETWEEN

JOACHIM FRANCIS MACHARIA ..... APPELLANT

AND

LILIAN OGUTU AMBE ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Irene Kabuteh (RM) in Kitale CMCC No. E116 of 2022 delivered on 18th April, 2024)

JUDGMENT

Background of the Appeal

1. By way of a plaint dated 24th March 2022, the respondent sued the appellant for general damages for pain, suffering and loss of amenities, special damages in the sum of Kshs. 210,405/, future medical expenses, costs of the suit and interest.

2. The respondent's case was that on 12th October, 2021 she was travelling as a pillion passenger in motor cycle registration number KMFL 953J along Kitale-Kapenguria road when the appellant carelessly and negligently drove motor vehicle registration number KBH 528P Nissan Wingroad, that he veered off his lane in an attempt to make a U-turn and onto the lane of the motorcycle causing the said vehicle to knock down the respondent who sustained severe bodily injuries. His conduct was deemed negligent for which the particulars were set out.

3. In his statement of defence dated 26th April 2022, the appellant denied the allegations set out in the plaint, save for the ownership of motor vehicle registration number KBH 528P. He contended that if the alleged accident ever occurred, it was occasioned by the negligence of the respondent and the rider of motorcycle registration number KMFL 953J. The particulars of such negligence of the respondent were the set out to include; failure to take the safety regulations applicable, detracting the cyclist in his ride by endless banter and jumping of the motorcycle while in motion.

4. The appellant further denied the applicability of the doctrine of res ipsa loquitur and instead invoked the doctrine of volenti non fit injuria and blamed the collision on the cyclist by setting a long list of particulars of negligence. The court however notes that the cyclist was never made a party to the suit and therefore his conduct was not a proper issue for discussion in the suit in his absence.

5. In a judgment of the trial court delivered on 18th April, 2024, the trial magistrate found the appellant wholly liable for the accident and proceeded to award the respondent general damages of Kshs. 500,000/-, future medical expense of Kshs. 192,000/-, special damages of Kshs. 210,405/- together with costs and interest of the suit from the date of judgment until payment in full.

6. Aggrieved by the decision of the trial court, the appellant lodged a memorandum of appeal dated 3rd May 2024 seeking to have the appeal allowed, the judgment of the trial court set aside, the awards reassessed downwards and that he be awarded the costs of the appeal. The appeal is premised on the following grounds;

    a. That the learned trial magistrate erred in law and in fact by awarding 100% liability as against the appellant failing to take into account the evidence adduced by the appellant herein.

    b. That the learned trial magistrate erred in law and in fact in awarding Kshs. 192,000/- for future medical expenses without considering the evidence on record, the submissions by the appellant and the applicable principes as established by precedents that bound her.

    c. That the learned trial magistrate erred in law and in fact by awarding special damages of Kshs. 210,405/- which receipts were not specifically proven thereby arriving at an erroneous amount.

    d. That the learned trial magistrate ignored the appellant's submissions and authorities cited.

    e. That the learned trial magistrate failed to take into account all relevant considerations and principles in assessing the future medical expenses and special damages.

7. Parties have canvassed the appeal by way of written submissions which can be summarized as below;

Appellant's Submissions

8. The appellant has identified and submitted on three issues. The first is whether, based on the evidence tendered before the trial court, the appellant and hence motor vehicle registration number KBH 528P was the cause of the accident of 12th October, 2021 therefore 100% liable for the occurrence of the accident. On this issue, the appellant contends that the burden of proving negligence on the part of the appellant lay with the respondent, relying on the authority of Makube v Nyamuro (Civil Appeal No. 8 of 1983) in support of this position.

9. The appellant further faults the trial court's findings and argues that, in apportioning liability at 100% against him, the learned trial magistrate based her decision on the testimony of PW1, a police officer, who attributed blame for the accident to the appellant. The appellant faults this finding on the grounds that PW1 was not the investigating officer and, therefore, her testimony amounted to hearsay; that she did not produce any sketch maps to demonstrate the point of impact; and that the police abstract produced indicated that the matter was still PUI-Pending Under Investigation was never evidence to support blameworthiness.

10. He further contends that the respondent was unable to clearly explain how the accident occurred, admitting during her testimony that she was not wearing a helmet at the time. On cross-examination, the respondent testified that the motorcycle was attempting to overtake the appellant's vehicle, thereby

contradicting her earlier written statement that the vehicle had been parked by the roadside and was attempting a U-turn when the accident occurred.

11. To reinforce his argument that the burden of proof lay on the respondent to establish negligence on a balance of probabilities, the appellant cited several authorities, including William Kabogo Gitau vs George Thuo & 2 others (2010) 1 KLR 526; Nahashon Chege vs Stephen Makabila & another (2018) eKLR, Palace Investment Ltd vs Geoffrey Kariuki Mwenda & another (2015) eKR, Treadsetters Tyres Ltd vs John Wekesa Wepukuku (2010) eKLR and Nickson Muthoka Mutavi vs Agricultural Research institute (2016) eKLR.

12. On the second issue, whether the respondent was entitled to the future medical expenses pleaded and awarded, the appellant cites the case of Kenya Bus Services Ltd vs Gituma (2004) 1 EA 91 to advance the point that future medical expenses need to be specifically pleaded and proved. He submits that the respondent only relied on the medical report of Dr. Kisiang'ani of 5th January, 2022 prepared around three months after the accident and which stated that the respondent would require physiotherapy sessions at an average cost of Kshs. 8,000/- with at least four sessions per month for a minimum of six months. He adds that the respondent was subjected to another medical examination by the insurer which culminated in a report by Dr. Jenipher Kahuthu prepared on 4th July 2022 and adduced by consent of the parties on 25th January, 2023. The report indicated that the respondent's tibia fibula fractures were in good position with satisfactory union with no features of osteoarthritis seen and therefore complete healing was anticipated and that although she had stiffness of movement at the ankle joint with 10% permanent disability, she did not require any future medical expenses.

13. On this basis, appellant urges the court to reduce the costs of future medical expenses contending that the respondent's health had significantly improved by the time of re-examination and he cites the case of Tracom Limited & another vs Hassan Mohammed Adan (2009) KECA 48 (KLR) in support thereof.

14. The third issue is whether the respondent discharged her burden of proof on the special damages awarded. To this issue, the appellant asserts that special damages need to be specially pleaded and strictly proved as held in the case of James Thiongo Githiri vs Nduati Njuguna Ngugi (2012) eKLR. The appellant contests that the respondent availed a custom bill of Kshs. 171, 275/- from Galilee Hospital Kitale Limited and an invoice of Kshs. 14,630/- from Kitale County Hospital but did not accompany receipts to prove that indeed those figures were paid. On such basis the appellant prays that the court allows the appeal with costs to him.

Respondent's Submissions

15. On liability, the respondent submits that she was a pillion passenger and had no control of and was not the one managing the motorcycle at the time of the accident in order to be blamed. She refers the court to the decision in Boniface Waiti & another vs Michael Kariuki Kamau (2007) eKLR where it was held that a passenger who has no control over the manner of driving of a vehicle in which they are conveyed cannot be penalized for the poor workmanship of the control of the vehicle. She further argues that the appellant seeks to attribute blame to the motorcycle rider, who was not a party to the original proceedings, and who the appellant never sought to enjoin as a third party. She terms this as an improper attempt to introduce new evidence at the appellate stage. The respondent further submits that if the appellant believed the rider was negligent, he ought to have instituted third-party proceedings, citing Margaret Waithera Maina v Michael K. Kimaru [2017] eKLR in support of this position.

16. The respondent emphasizes that the appellant failed to call any witness to rebut the evidence adduced by the respondent. On the effect of such failure, she refers the court to the decision in Janet Kaphiphe Ouma & Another vs Marie Stopes International Kenya (Kisumu) HCCC NO 68 OF 2007 Ali Aroni, J. Citing Edward Muriga Through Stanley Muriga vs Nathaniel D. Sculter Civil Appeal No 23 of 1997 where the court held as follows;

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence"

17. See also Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002; Trust Bank Limited vs Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCC No. 1243 of 2001; Karuru Munyororo vs Joseph Ndumia Murage & another Nyeri HCCC No. 95 of 1988 and Interchemie EA Limited vs Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165 B of 2000 for the proposition that where a party fails to call evidence in support of its case, the party's pleadings remain mere statements.

18. On the award of future medical expenses and special damages, the respondent asserts that they were both pleaded and proved.

19. For the future medical expenses, she says that it was supported by the appellant's doctor whose medical report upon second examination of the respondent noted as follows;

> " Healing is ongoing as it should and therefore complete healing is anticipated. She has stiffness of movement at the ankle joint, therefore 10% permanent disability."

20. She adds that her doctor opined that she will develop post traumatic osteoarthritis of the left knee and ankle joints and would need physiotherapy of at least 4 sessions per month for a minimum of six months at an average cost pf Kshs. 8000/- per session and further assessed permanent disability at 10%.

21. On the special damages, the respondent asserts that she tendered invoice/receipts which proved that indeed kshs. 210,405/- was expended. It is thus her submission that the appeal lacks merit and seeks that the same be dismissed with costs.

Issues, Analysis and Determination

22. The court has considered the pleadings, the judgment of the trial court, the memorandum of appeal and the submissions by both parties and identifies the following issues for its determination;

    a. Whether the learned trial magistrate erred in finding the appellant wholly liable for the occurrence of the accident.

    b. Whether the awards for future medical expenses and special damages were properly pleaded, proved, and awarded in accordance with the law.

Whether the learned trial magistrate erred in finding the appellant wholly liable for the occurrence of the accident

23. In any civil proceedings of a court of law, the question of liability of the defendant must be decided based on the evidence adduced when viewed against the law applicable. The question must be

determined by applying common sense and logic to the fact of each particular case. Upon full analysis, one may find that on the evidence, several people could have been at fault and that if anyone 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 been the proximate or so tied to the incident that are thus inexorable from blameworthiness. In many instances of road traffic collisions, while it may be many times proper to discard some and cling to some or one. that decision may not be any mathematically scientific but must be logical, reasonable and judicious. This task, however daunting, must always be undertaken to the fairest possible standard because the inescapable duty of the court is to lay only a fair and just blame where it justly lies. See Lord Reid in Stapley vs Gypsum Mines Limited (2) (1953) A.C 663 at P. 681.

24. In civil proceedings, the plaintiff is deemed to know his grievances with better exactitude. For that reason, he has the latitude and liberties to design the cause, the remedies desired and the wrongdoers to be held liable. It is therefore expected that the cause action be designed to be exhaustive of the alleged injury and to include all the alleged wrongdoers so that the dispute is resolved once and with finality. To court therefore, the duty to join all the apparent wrongdoers is first and foremost with the plaintiff. He surely cannot be expected to enjoy his liberty to elect who to sue and then when his own evidence points to a wrongdoer who ought to have been joined but not so joined, then he turns round and passes that obligation to his adversary. The least he can do is to apply at that time for leave to join the desired person.

25. Here it is not disputed that an accident occurred on 12th October 2021 involving motor vehicle registration number KBH 528P, owned and/or driven by the appellant, and motorcycle registration number KMFL 953J, on which the respondent was travelling as a pillion passenger. It is equally common ground that the appellant never called any evidence to prove his defence filed. What cannot be called common ground is how exactly the collision occurred.

26. The respondent's evidence before the trial court was that the appellant, while driving motor vehicle registration number KBH 528P, suddenly veered off his lane in an attempt to make a U-turn, thereby colliding with the motorcycle. She blamed the appellant for failing to exercise proper control, for driving without due regard to other road users, and for causing her to sustain severe injuries.

27. That evidence was to find support in the evidence of PW1, a police officer attached to the Kitale Traffic Base, who was not the investigating officer but was called to produce the police abstract which ambivalently said the matter was pending investigations, but all the same deemed the driver blameworthy. She produced a police abstract as PEH1. Upon cross-examination, PW1 conceded that she was not the investigating officer and did not have sketch maps or any other documentary evidence showing the point of impact.

28. Having examined the police abstract, I concur with the appellant that it does not attribute blame to any party, as it merely notes that the matter was "pending under investigation." It is settled law that a police abstract, though admissible, is not conclusive proof of liability and that the facts stated therein must be supported by independent evidence.

29. Since PW1 was not the investigating officer and lacked firsthand knowledge of the circumstances surrounding the accident, her testimony could not be relied upon as authoritative evidence on liability and was therefore hearsay. In this regard, I am persuaded by the decision in Dikir & Another v Kimary

(Civil Appeal No. 316 of 2013) [2022] KEHC 12733 (KLR) (Civ) (30 August 2022) where the court held as follows;

> "Since the Investigating Officer was not called as testify as to the circumstances of the accident, the reports produced amount to hearsay evidence and cannot be proof of how the accident took place. At the very least, the report is only proof that the accident involving several motor vehicles took place on the material date (see Peter Kanithi Kimunya v Aden Guyo Haro NRB HCCA No. 307 of 2008 [2014] eKLR). As to which party was to blame for the accident is a question of evidence and the remarks in the OB about blameworthiness is hearsay as the investigating officer was not called a witness. The conclusion therein are matters of opinion which are inadmissible to prove facts."

30. The appellant, having only filed his pleadings and failed to testify at the trial, left his defence unsupported by evidence. It is trite law that pleadings constitute mere statements of a party's case and do not, in themselves, amount to evidence. A party is therefore required to adduce evidence to substantiate the assertions made in their pleadings. In the absence of any evidence from the appellant, the respondent's testimony remained unchallenged and uncontroverted.

31. The standard of proof required of the respondent was that on a balance of probabilities. The Court in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 elaborated on what constitutes proof on a balance of probabilities by stating as follows: -

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

32. The appellant did not adduce any evidence to contradict or discredit the respondent's account of how the accident occurred. His assertions in the pleadings therefore remained mere allegations, unsupported by any evidentiary foundation hence cannot be the basis of a court finding in his favour.

33. In the absence of cogent evidence challenging the respondent's version of events, the trial magistrate was entitled to rely on the uncontroverted evidence before the court and find that the accident was caused by the negligent manner in which the motor vehicle made a u-turn on the way and path of the cyclist. The finding that the appellant was wholly liable for the accident was thus well-grounded and supported by the material on record.

34. Consequently, this Court finds no misdirection or error on the part of the learned trial magistrate in holding the appellant 100% liable for the occurrence of the accident.

Whether the awards for future medical expenses and special damages were properly pleaded, proved, and awarded in accordance with the law

35. The appellant contends that the trial magistrate erred in awarding Kshs. 192,000/- for future medical expenses and Kshs. 210,405/- for special damages, arguing that both heads of claim were not properly proved and that the court disregarded the legal principles governing such awards.

a. On Future Medical Expenses

36. The law is well settled that future medical expenses are indeed in the nature and character of special damages and thus demand to be specifically pleaded and strictly proved by credible evidence. This principle was restated in Kenya Bus Services Ltd v Gituma (2004) 1 EA 91, where the Court of Appeal held that such expenses are compensable once pleaded and supported by medical evidence showing the necessity and probable cost of the anticipated treatment.

37. In the instant case, the respondent pleaded a claim for future medical expenses in her plaint. She relied on the medical report of Dr. Kisiang'ani dated 5th January 2022, which indicated that she had sustained fractures of the tibia and fibula and would require physiotherapy sessions at an average cost of Kshs. 8,000 per session, for at least four sessions per month for six months. Towards the proof of that claim, the respondent produced the medical report by Dr Kisiangani dated 05.01.2022. PEX 6. There was never a challenge, by way of cross-examination, on the necessity, the cost or number of required sessions for the therapy. To the court that piece of evidence was largely uncontested. Uncontested because, even though the appellant had referred the respondent for a second medical examination and a medical report by Dr. Jenipher Kahuthu, prepared on 4th July 2022, was prepared and filed. That report even when it could have had the probative value of on the state of healing was never produced in evidence. It remained to lie in the court file like any other document filed and forgotten in the file.

38. With the uncontroverted evidence that the respondent was as at the date of giving evidence had not fully recovered from the accident and continued to experience stiffness in the ankle joint requiring physiotherapy sessions, I am satisfied that the award of Kshs. 192,000/- for future medical expenses was not speculative but duly proved. The Court finds that learned trial magistrate properly exercised her discretion in making that award.

39. Even on special damages, the settled law is that the same must be specifically pleaded and strictly proved as stated in James Thiongo Githiri v Nduati Njuguna Ngugi (2012) eKLR and Hahn v Singh [1985] KLR 716. The respondent pleaded special damages amounting to Kshs. 210,405/- and produced invoices from Galilee Hospital Kitale Limited and Kitale County Hospital to substantiate the same.

40. The appellant contends that invoices are not receipts that the respondent had failed to prove that she in fact incurred the said expenses.

41. Special damages are awarded to compensate a plaintiff for actual out-of-pocket expenses. This was the position of the court in Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003 where it was stated that: -

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred..."

42. I have carefully perused the record of appeal and noted that the documents produced by the respondent in support of the claim for special damages were invoices and provisional medical bill. In personal injury claims, unlike in commercial transactions, invoices issued to the injured while undergoing treatment connected to the injury sued upon, is sufficient evidence that expenditure has been incurred. It would be unjust to insist that actual receipts be produced even in a case like here when injury is not disputed but acknowledged. The rationale for award of special damages is to restitute the claimant for expenses incurred. It is never the law that special damages must be those expenses incurred and actually paid. It

is to this court sufficient that the same was incurred and a liability vested. To insist otherwise, would be to say that the demand for strict proof of special damages is limited to proof by way of receipts.

43. For the foregoing reasons, the appeal entirely fails and the judgment of the lower court is upheld. The appeal is dismissed with costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF OCTOBER, 2025.

PATRICK J O OTIENO

JUDGE