

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. 289 OF 2023

(FORMERLY KIAMBU HCCA NO. E317 OF 2023)

QUICKMART LIMITED.....1ST
APPELLANT

GEOFFREY KAROKI NJOROGE.....2ND
APPELLANT

VERSUS

SEBASTIAN MUTUA
MUNUVE.....RESPONDENT

(Being an appeal from the judgment of the Magistrate's court at Ruiru delivered on the 31st July 2023 by the Honourable N.M Kyanya SRM in Thika CMCC No. 3 of 2022)

JUDGEMENT

- 1.** This is a case emanating from a road traffic accident claim involving motorcycle registration number KMFB 315G and motor vehicle registration number KBL 912E.
- 2.** By a plaint dated 4th September 2020 the Respondent, lodged a suit claiming that he was lawfully riding motorcycle registration number KMFB 315 G along the Eastern Bypass near QuickMart Supermarket when the 2nd Appellant negligently drove, controlled and or managed motor vehicle registration number KBL 912E and caused it to hit the Respondent's motorcycle.
- 3.** It was averred that the accident was solely caused by the Appellant's negligence, in that he drove without due care and attention by causing the motor vehicle KBL 912E to encroach into the lawful path of motor cycle KMFB 315G

thus causing the Respondent to sustain severe injuries including:

- a. Major head injuries*
- b. Fractures of the maxillae*
- c. Fracture of the mandible*
- d. Fracture of the right radius*
- e. Double fractures of the right ulna*
- f. Shattered fractures of the upper end right tibia*
- g. Fracture of the right fibula*

- 4.** As a result, the Respondent prayed that special damages be awarded at Ksh. 130,400.00 comprising checking the motor vehicle records, medical report and treatment expenses. He pleaded future medical expenses at Ksh. 380,000.00 and general damages for pain and suffering.
- 5.** The Appellants, vide their Statement of defence, denied the averments in the Plaint and contended that the Respondent contributed to the accident by failing to take care of his safety, in that, he failed to give way to motor vehicle registration number KBL 912E.
- 6.** The matter proceeded for hearing where PW1, No. 90855 Christopher Kinyua, testified by relying on the police abstract in respect of the accident. However, he maintained that the abstract did not disclose the person responsible for the accident. PW2, the Respondent herein, on the other hand, adopted his statement and stated that he had been hit by the 1st Appellants lorry causing him to break his leg at 3 places. He also broke his hand and jaw. He received treatment at Thika level 5 hospital where he was admitted for a whole month. PW2 clarified that he was on his lane when he was hit by the subject motor vehicle.
- 7.** DW1, the 2nd Appellant herein, testified that he duly signalled to motorists by flashing on lights. An oncoming lorry gave him way and as he was entering the

supermarket, the Respondent's motor cycle appeared from nowhere at high speed and hit him on the left side. It was his testimony that the Respondent was outside the road and had overlapped.

- 8.** The parties, by consent, adopted the medical report by Dr. Wambugu. He had observed that the Respondent had suffered fractured mandible, fractured right ulna and radius; and compound fracture of the right tibia and fibula. The degree of incapacitation was assessed at 16 % and future medical costs at Ksh. 75,000.00.
- 9.** While rendering the judgement, the court found that the 2nd Appellant's account on how the accident and occurred was contradictory and there was also no independent witness to corroborate his version of events. Therefore, the Appellants were found 100% liable for the accident.
- 10.** Taking into account the Respondent's serious injuries, the trial court awarded him damages at Ksh. 800,000.00 for pain and suffering. The trial court relied on the case of ***Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR***, where an award of general damages of Ksh. 100,000.00 was enhanced to Ksh. 700,000.00. The appellant had sustained injuries in the nature of fractures to the right femur, compound fracture of the tibia, compound fracture of the right fibula, shortening right leg and episodic pain with inability to walk without support.
- 11.** The trial court further awarded the Respondent Ksh. 800,000.00 as general damages for diminished earning capacity, future medical expenses at Ksh. 75,000.00 and special damages at Ksh. 130,400.00. In making the award for diminished earning capacity, the trial court relied on the case of ***Hussein Smabur Hussein v Shariff A. Abdulla Hussein & 2 others [2022] eKLR***.

12. Aggrieved with the finding of the trial court on both liability and quantum, the Appellants lodged the instant appeal vide a Memorandum of appeal dated 29th August 2023 on grounds that:

- i. The learned trial magistrate erred in fact and law in finding the Appellant 100% liable for the accident despite the fact that the police officer who testified in court failed to tender evidence as to the scene of the accident and failed to explain how the accident occurred there having been no other independent eye witness presented by the plaintiff;***
- ii. The learned trial magistrate herself in awarding the Respondent Ksh. 800,000.00 for diminished capacity yet it was neither pleaded, prayed nor tendered in evidence during trial;***
- iii. The learned trial Magistrate's findings on quantum and liability were against the weight of the evidence presented to court;***

13. The Appellant therefore prayed that the trial court's finding on liability and quantum be reversed and that this court determines the Appellants' case and make orders as it deems fit and just to grant.

14. The court directed that the appeal be disposed through written submissions.

15. It was submitted on behalf of the Appellants that the learned magistrate erred in finding the appellant 100% liable for the accident despite the fact that the police officer who testified in court failed to identify or explain the party responsible for the accident. Therefore, liability ought to have been apportioned at 50:50 as the Respondent had failed to discharge the burden of proof to the required

standard. Reliance was placed on the case of ***Evans Osuga Mboi v James Lesaaya & another [2021] Eklr***

16. The Appellants further submitted that the learned magistrate erred in awarding Ksh. 800,000.00 for diminished capacity yet the Respondent had neither pleaded nor prayed for such damages. Reliance was placed on the case of ***Jacaranda Bodaboda operators & another v Nyasero Civil Appeal 774 of 2022*** to assert the position that parties are bound by their pleadings.

17. The Appellants therefore prayed that the finding on liability and the award of Ksh. 800,000.00 for diminished earning capacity be set aside and the overall award for general damages be reduced from 1,600,000.00 to 800,000.00

18. It was submitted that 2nd Appellant admitted the Respondent's version on how the accident occurred vide his witness statement. Moreover, the fact that the injuries sustained by the Respondent were on the right side of his body was compatible with the Respondent's account on how the accident occurred.

19. It was further submitted that the Appellants' failure to call any independent witness was detrimental to their case as there was no proof to exonerate them from full culpability for causing the accident. Therefore, based on the 2nd appellant's own admission and the factual matrix of the case, the trial court was correct in finding the appellants wholly liable for the accident.

20. On the award of diminished earning capacity, the Respondent submitted that loss of earning capacity is in the nature of general damage and need not be pleaded. Therefore, the award was based on the fact that the

Respondent had managed to prove to the required standard that he had incurred an incapacity of 16 %. In any case, the grant of the award of diminished earning capacity fit in the Respondent's prayer for any other relief that the court deems fit to grant.

21. Ultimately, the Respondent submitted that there was no need to disturb the award of Ksh 800,000.00 for general damages for pain and suffering, as it had not been disputed.

22. I have perused the pleadings and record of the lower court, the judgement of the trial court as well as the submissions by the respective counsels for the parties. The issues for determination are:

- a) *Whether the learned trial magistrate erred in apportioning 100% liability on the Appellants*
- b) *Whether the learned magistrate awarded excessive general damages in view of the injuries sustained; and*
- c) *Whether the Respondent is entitled to an award of diminished earning capacity*

23. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in ***Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:***

"...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 ..."

24. The Appellant contends that liability was not proved to the required standard as the police abstract did not find anyone liable for causing the accident. Therefore, liability ought to have been assessed at 50:50.

25. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **Section 107 (1) of the Evidence Act Cap 80**, which provides:

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

26. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections **109** and **112** of the Act, thus:

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

27. The two sections carry forward the often-repeated evidential adage: ***"he who asserts must prove"***

- 28.** Despite there being no other independent witness, the trial court relied on the Respondent's version of events having found that the Appellant's version was rather contradictory. The police officer who testified by producing a police abstract did not apportion any liability for the accident on any party. There was therefore no means of enabling the court to weigh the balance fairly.
- 29.** I have looked at the pleadings on the both sides in this matter. The Respondent asserted that the accident was solely caused by the negligence of the 2nd Appellant and gave particulars of such negligence which the Appellants denied. The Appellants also asserted that the accident was solely caused by the negligence of the motorcyclist Respondent and gave particulars of contributory negligence. Each party was under a duty to prove their own assertions but they did not do a good job for it.
- 30.** In this case, having re-evaluated the evidence on record and considering the submissions by both counsel, I have come to the conclusion that the Respondent did not discharge the burden of proving on a balance of probability, that the Appellant was negligent in the matter he drove or managed the material motor vehicle.
- 31.** It was clear that although the Respondent pleaded several particulars of negligence against the appellant, his own testimony did not prove any of those particulars. The Respondent did not state that he had checked the road to ensure that it was safe before proceeding. He never stated at what speed the 2nd Appellant was driving. He never testified that the motor vehicle emerged suddenly without giving him any warning. In my view, the evidence as adduced was devoid of proving liability on the part of the appellant against the respondent.

32. In the persuasive decision of **Peter Kanithi Kimunya v Aden Guyo Haro [2014] KEHC 1547 (KLR)**, the court remarked that:

There being no eyewitness to this accident, the onus of proving how the accident occurred and how negligent the respondent was never shifted to the respondent and that is the purport of Section 107(1) of the Evidence Act. Similarly, if the defendant was alleging that it was the plaintiff to blame for the occurrence of the accident, then it was upon him to prove that fact. In my view, Sections 109 and 112 of the Evidence Act are not inconsistent with Section 107 thereof but compliment the latter on the adage “he who asserts must prove”.

33. Although the Appellant pleaded contributory negligence against the Respondent, he did not prove the same. Nevertheless, I find no valid basis for apportioning liability against the respondent, in as much as I appreciate the fact that determination of liability in road accidents cases is not a scientific affair as **Lord Reid** put more graphically in **Stapley - Vs - Gypsum Mines Ltd (2) (1953) AC 663 at pg 681** that

“To determine what caused an accident from the point of new legal liability is a most difficult task. If there is any valid logical or scientific theory of 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 items. 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.”

34. As stated above, there were specific acts of negligence pleaded by both parties in their pleadings and the onus of proving the said allegations lay on both, on a balance of probabilities. However, as this was the respondent’s case, and as the appellant had no counterclaim against him, it was upon him to demonstrate to the court how negligent the appellant was in the manner he drove or managed the accident motor vehicle. It was not shown that the area where the appellant was knocked was a busy area or market area. No sketch of accident was produced to prove the point of impact. Even if the police abstract had indicated the person to blame for the accident, the said abstract would not be conclusive proof of liability in the absence of evidence being called to support it.

35. The Court of Appeal in ***Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi -Deceased) v Joseph Kiprono Ropkoi & Four by Four Safaris Company Ltd [2004] KECA 65 (KLR)*** when faced with a similar situation remarked thus:

“There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty

evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50.”

36. The Court of Appeal faced with a situation similar to the one subsisting in this case in the case of ***Hussein Omar Farah v Lento Agencies [2006] eKLR***, and it held as follows:

“It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

37. ***In the circumstance, I apportion liability for the accident at 50:50 as the evidence is unclear on who is responsible for the accident.***

38. As to whether the learned magistrate awarded excessive general damages in view of the injuries sustained, it is a well-established principle in our legal system that an appellate Court should exercise caution and restraint where it has been called upon to review a trial Court’s award of damages. In this case, the nature and extent of injuries was not dispute, the issue is the level of compensation the Respondent was entitled to. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed

in ***Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR*** thus:

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

39. The principles were further summarised by the Court of Appeal in ***Jabane v Olenja [1986] KLR 661*** as follows:

“The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

(1) Each case depends on its own facts;

(2) awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);

(3) comparable injuries should attract comparable awards.

(4) inflation should be taken into account; and

(5) unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave it alone.”

40. According to the medical report by Dr. Wambugu, the Appellant sustained injuries to wit fractured mandible, fractured right ulna and radius; and compound fracture of the right tibia and fibula. The degree of incapacitation was assessed at 16 % and future medical costs at Ksh. 75,000.00. Since the nature of injuries is not disputed, the next issue is to determine whether the damages awarded for pain and suffering are commensurate to the injuries suffered.

41. The Respondent relied on ***Jacaranda Bodaboda Operators & another v Nyasero [2023] KEHC 23806 eKLR***, the Court awarded plaintiff General Damages for Pain and Suffering at Kshs.750,000/=. The plaintiff in that case suffered fracture of the shaft of the right femur, he was operated on, and the fracture fixed with a metal implant. He walked on crutches and was not able to work and had difficulties getting around. His permanent disability was assessed at 10% and required between 12-15 months from the date of the examination to heal fully. Notably, the Plaintiff in that case suffered a much lower degree of permanent incapacity than the Appellant in the instant case who suffered a 16% permanent incapacity.

42. In ***Anyumba & 2 others v Towett [2023] KEHC 24421 eKLR***, the High Court awarded a Respondent General Damages at Kshs.1,000,000/=. The Plaintiff in that matter had sustained soft tissue injuries on his leg, and fractures on his right femur and right tibia and fibula. I note that the injuries in that case are similar to injuries sustained by the Appellant in the instant case. They both suffered fractures on their right Tibia and Fibula as well as other soft tissue injuries. The differences between the two cases are that the Plaintiff suffered incapacity of 20% while in the instant case incapacity was assessed at 16%. Also, the Appellant suffered a fractured mandible as well as ulna and radius, unlike the *Anyumba case*.

43. I am also guided by ***Kathambi v Mwirichia & another (Civil Appeal E093 of 2023) [2024] KEHC 15482 (KLR) (4 December 2024)*** where the High court confirmed an award of Ksh. 900,000.00 for the Plaintiff who had sustained a right Tibia Fracture, Right Fibula Fracture, and an open wound involving deep soft tissue damage on the right leg with permanent incapacity of 20%.

44. In view of the above recent authorities, I find that the award of Kshs. 800,000 for pain and suffering is adequate compensation for the injuries suffered. The award of the trial Court is therefore upheld.

This court will next determine whether the Respondent is entitled to an award of diminished earning capacity. The Appellants faulted the trial Court for awarding the Respondent Ksh. 800,000.00 despite this prayer missing in the Plaint. Upon perusing the Record, I note that the Respondent did not plead diminished earning capacity, instead, he made a general prayer for damages for pain and suffering. From the medical report by Dr. Wambugu, it is evident that the Respondent suffered incapacity of 16 %.

45. In ***Butler v Butler*** [1984] KLR 225, 235, Chesoni Ag. JA observed as follows:

“Loss of earning capacity or earning power may and should be included as an item within general damages ... but where it is not so included, it is not improper to award it under its own heading as the learned Judge did in this case.”

46. In ***Cecilia W. Mwangi and Another v Ruth W. Mwangi*** NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR, the Court of Appeal drew the distinction between loss of earnings and loss of earning capacity as follows:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”

47. Thus, 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.

48. The respondent, in his testimony, did not make mention of his source of income or the manner in which the accident had hampered his ability to earn a living. His pleadings were silent on the aspect of diminished earning capacity. In such circumstances, I hold that the claim was not proved to the required standard.

49. Therefore, the trial magistrate erred in making an award under the head of diminished earning capacity as the same had neither been pleaded nor proved to the required standard. The same is therefore set aside.

50. I find no reason to disturb the finding on future medical expenses and the special damages.

51. The final award shall be as follows:

General Damages	Kshs.
800,000.00	
Special Damages	Kshs.130,400.00
Future Medical Expenses	Kshs. 75,000.00
Total	Kshs.
1,005,400.00	

52. Thirty (30) days stay of execution to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 2ND OCTOBER, 2025.

HON. T. W. Ouya
JUDGE

ORIGINAL