

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E114 OF 2021

KATHIRA AHMED YUSUF.....APPELLANT

VERSUS

CHARLES WATAKO.....RESPONDENT

*(Being an appeal from the Judgment and decree of the Hon. C. Menya (SRM)
in Eldoret SPMCC E123 of 2021 delivered on 27th August)*

JUDGEMENT

1. By way of Plaintiff dated 21st December 2020 the Appellant instituted a suit in the trial court seeking the following reliefs;
 - a) **General damages for pain and suffering**
 - b) **Special damages Kshs. 221,355/=**
 - c) **Future medical expenses of Kshs. 150,000/=**
 - d) **Costs of the suit.**
 - e) **Interests on a, b, c**
 - f) **Any other relief that will be deemed fit to grant.**

2. The cause of action is an accident that occurred on 24th November 2020. It is alleged that on the material date, the Plaintiff was a pedestrian along Eldoret Kipkaren Road and the Respondent who was the driver of motor vehicle registration no. KAM 359C so negligently and carelessly drove, managed and/or controlled the said motor vehicle causing it to lose control and hit the plaintiff, thereby causing her severe injuries, loss and damage.

3. The defendant entered appearance and filed a statement of defence dated 5th May 2021. He admitted the occurrence of the accident but denied the allegations of negligence. Further, he denied any knowledge of the alleged injuries and loss. He denied liability and urged that the accident was contributed to by the respondent.

Hearing at the trial court

4. PW1 was CPL Pius Wanyama of Eldoret Traffic Section. He recalled that on 24/11/2020 an accident occurred along Eldoret - Kipkaren Road involving Motor Vehicle Reg.N0.KAM.395C Toyota 100 which knocked a pedestrian along the road from behind. She sustained some injuries and was rushed to Cedar Hospital. He testified that the victim was walking off the road. He further testified that the Investigating Officer, Kiptoo Cheserek, was transferred to Kapsabet but he was familiar with his handwriting. He produced the abstract as P-Exh 1.
5. In Cross Examination, he stated that he did not witness the accident, and further, that the O/B states that the victim, a 28 year old, was knocked from behind. He could not tell if investigations were conducted and from the abstract there was no conclusive proof on who was to blame.
6. PW2 was the Appellant, then the Plaintiff. She adopted her witness statement dated 21.2.2020 as evidence in chief. She stated that she was walking on the left side of the road, on the material date when a vehicle knocked her from behind. She stated that she was out of the road. Further, she stated that she sustained injuries on the upper limbs and it is the driver of the motor vehicle who took her to the hospital. She stated that she had an implant inserted and that the same shall be removed after 1 year and that she had two surgeries done on her as a result of the injuries sustained from the accident.

7. Additionally, she testified that it will cost her Kshs. 150,000/= to remove the implant. She urged that she also sustained other injuries as indicated in the medical report and that she was admitted in hospital for one week following the accident. She produced the discharge summary as P-Ex-3. She stated that she incurred expenses and produced the Invoice and receipts as P.Ex.4 &5(a) - (c) of Kshs. 212,400/=. She further testified that a doctor prepared a medical report for which she paid Kshs. 6,000/= and that he also filled her P3 form. She produced the exhibits as PEx-6(a), receipts as PEx.6 (b) P3 form as P. Exh.7 and the Police Abstract as PEx-1. She produced her discharge letter as PEX 8.
8. The witness stated that she was not yet healed and still has implants on her foot and she doesn't walk properly like she used to. Further, that she shall need Kshs. 150,000/= to remove the implant. She prayed to be compensated for the injuries sustained.
9. During cross examination, she stated that she was alone on the road taking a child to school and that she knew she should keep a proper outlook and she was not crossing the road. She stated that the driver took her to the hospital and but never paid anything.
10. The Plaintiff closed her case and the defendant called one witness.
11. DW1 was Abdul Kuluyu Watako. He stated that he is a businessman in Eldoret and Charles Watako is his father. He stated that after the accident occurred, he reported the claim to the Insurance Company and filled the claim form. He produced the claim form as DEx-1. He testified that on the material date, he was driving his father's motor vehicle and that it is the plaintiff who was to blame for the accident. That the plaintiff who attempted to cross the

road while on phone. That to avoid hitting the pedestrian who was at a corner, she ran into the road and hit the car(*sic*).

12. That he then stopped the car. He stated further, that he had actually indicated that he was turning right and was driving at less than 10 Kph. He further stated that the point of impact was on the back-right door of the car, and that he tried to accelerate to pass before she could cross and she also attempted to cross very fast. It was his testimony that he took the pedestrian to hospital and paid her family Kshs. 15,000/- but that before that he took her home to open the door first for the child who was inside He reiterated that he was not to blame for the accident.

13. During cross examination, he stated the he confirms that Charles Watako owns motor vehicle reg. KAM 395C and he was driving on the material time and date. That he was a lawful driver driving from Kipkaren towards Eldoret. That the motor vehicle and Pedestrian were not taking the same direction and he was from the opposite side of the road to the left. That when he was negotiating a corner while joining another road, he saw the pedestrian before the accident. That he was at about 5Kph and the impact was at the back. However, he did not produce the inspection report.

14. The court directed that the parties file submissions. Upon considering the evidence tendered, and the pleadings, the trial court entered judgement in favour of the defendant. Liability was apportioned at 50:50

15. On damages, the court awarded the defendant as follows;

- | | |
|----------------------------|-------------------|
| a) General damages | Kshs. 1,500,000/- |
| b) Less 50% Liability | Kshs. 750,000 |
| c) Special Damages | Kshs. 218,000 |
| d) Future medical expenses | Kshs. 150,000/= |

e) Total 1,118,000/=

16. Being aggrieved by the judgement and decree, the appellant instituted the present appeal vide a memorandum of appeal dated 21st September 2021 premised on the following grounds;

- 1) **The learned trial magistrate erred in law and fact in apportioning liability in the ratio of 50:50 against the weight of the evidence which was clear that the Respondent herein was 100% to blame for the occurrence of the accident herein.**
- 2) **The learned trial magistrate erred in law and fact in failing to hold that failure on the part of the Defendant / Respondent to produce Inspection Report and the Driving Licence was fatal to the Defendant/ Respondent's defence.**
- 3) **The learned trial magistrate erred in law and fact in awarding quantum that is inordinately low and which is inconsistent with injuries pleaded and proved to have been sustained by the Plaintiff / Appellant.**
- 4) **The learned trial magistrate erred in law and fact in ignoring the Plaintiff / appellant's Closing Submissions on both liability and quantum.**

17. Pursuant to leave of court granted on 27.1.2025, the Respondent filed a Cross Appeal against the quantum of damages on the following grounds: -

- 1) That the learned trial magistrate erred in law and in fact by awarding Kshs. 1,500,000 general damages which award is excessive and inordinately high considering the nature of injuries suffered by the Appellant.
- 2) That the learned trial magistrate erred in law and in fact by failing to rely on the discharge report as the primary evidence of the injuries suffered by the Appellant.
- 3) That the learned trial Magistrate erred by entering judgment for the Appellant without taking into account comparable judgements of the superior court for similar injuries and failed to take into account the submissions made by the Respondent.
- 4) That the learned trial Magistrate erred by failing to subject the special damages and future medical expenses to the apportioned liability.

Hearing of the Appeal

18. The appeal was canvassed by way of written submissions as filed by both sides.

Appellants' submissions

19. Counsel for the appellant urged that the trial magistrate erred in her apportionment of liability as this was against the weight of the evidence in record. Further, that the appellants witness in the trial court, Cpl Pius Wanyama, was categorical in his evidence that the occurrence book indicated that appellant was hit from behind by the respondents' vehicle. He restated the evidence of the appellant and urged that the Trial Magistrate misapprehended

the Appellant's evidence. Counsel submitted that the appellant testified that she was alone at the time the accident occurred yet the Trial Magistrate found that the Appellant should have availed an eye witness.

20. That further, that the Trial Magistrate also appears to have reached a decision that the appellant was crossing the road which again is against the evidence on record because both the Police officer and the Appellant were categorical in their testimony that the Appellant was not crossing the road. He submitted that the trial magistrate also appears to have reached a decision that the contents of the Occurrence Book were stated by the Appellant which is against the weight of the evidence. Counsel urged that it is trite procedure that a report in the Occurrence Book is made by Police Officers after visiting the scene. That the evidence on record shows that the accident was reported vide OB NO. 9 of 24th November 2020. That further evidence on record is that the Appellant was taken from the scene of the accident and was admitted in hospital from 24th November 2020 to 26th November 2020.

21. Counsel submitted that the learned Trial Magistrate also relied heavily on the fact that the Police Abstract indicated that the matter was pending under investigations, urging that this is neither here nor there as proof of negligence is not done by production of a Police Abstract but by adducing evidence. He placed reliance on the case of **Daniel Kuria Ng'ang'a (Suing as Legal Representative of the Estate of Samson Njoroge Kuria (Deceased) v Nairobi City Council (2013) eKLR** and the case of **Techarad Steam & Power Limited v Million Muli and Mulwa Ngao (2019) eKLR** among a plethora of other authorities.

22. Counsel reiterated that the Respondent's evidence alone was enough to enable the learned trial magistrate determine the respondent's negligence. This is

because the apportionment of liability in the ratio of 50:50 applies only to cases where the Honourable Court is unable to find the party to blame for the accident. He urged that the Respondent was not even a licensed driver, a fact he admitted in cross-examination. He neither filed nor produced his Driving Licence and even after this issue was raised in cross-examination, he never even attempted to show to the court his Driving Licence, He only casually stated in re-examination that he was a licensed driver without exhibiting it. He cited the case of **Al Kamar Trading Company Limited v Harrison Otina [20151 eKLR, Magdalene Yula Mutua v Isaack Mwaniki [1993] eKLR** in this regard.

23. Counsel contended that the award for quantum was inordinately low and the same was inconsistent with the injuries that were sustained by the Appellant. He urged that he will be relying on these same submissions to oppose the Respondent's Cross-Appeal where the Respondent argues that the award was excessive.

24. Counsel cited the cases of **Jeremiah & Brothers Contractor & Another v Francis Egusangu Kaguli (2020) eKLR, Simon Taveta v Mercy Mutitu (2014) eKLR** and **Charles Oriwo Odeyo v Apollo Justus Andabwa & Another (2017) eKLR** among others on assessment of damages.

25. Counsel submitted that the Appellant sustained the following injuries: -

- a) Fracture of the distal fibular.
- b) Fracture of the right medial malleolus.
- c) Dislocation of the right ankle joint.

26. That Dr. Joseph C. Sokobe opined that the Respondent sustained both soft and bony (fractures) tissue injuries which she had not recovered. That she will need further treatment which will entail the removal of the implants which is

estimated at a cost of Kshs. 150,000/= Further, that the Dr opined that the appellant will develop early osteoarthritis of the right ankle and he assessed the disability occasioned to the appellant at a permanent disability of 10%.

27. Counsel cited the case of **HCCC 62 of 2017 Embu HCCA Francis Ndungu Wambui & 2 others v V.K (Minor)** where the Plaintiff Suffered injuries soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula as well as loss of consciousness Muchemi J awarded Kshs. 1,000,000.00 general damages in November 2019. He urged that the injuries sustained by the Appellant are more severe than the ones sustained by the Plaintiff in the cited case. The Appellant has suffered permanent disability and she has a chance of developing early osteoarthritis on the right ankle. That the court should also consider inflationary trends.

28. Counsel submitted that Special damages and future medical expenses are not subjected to the apportionment of liability, placing reliance on the decisions in **Hashim Mohamed Said & Another v Lawrence Kibor Tuwei (2018) eKLR**, **Swalleh C. Kariuki & Another v Violet Owiso Okuyu (2021) eKLR**, **Mara Tea Factory Limited v Lilian Bosibori Nyandika (2021) eKLR**. He urged that an award in the sum of Kshs. 2,000,000/= as general damages would have sufficed and urged the Court to award the same. The award on Future Medical Expenses and the Special Damages would be maintained.

Respondents' submissions

29. Learned counsel for the respondent submitted that there is no justification in interfering with the judgement of the trial court on liability. Further, that both parties blamed each other for the negligence in their respective evidence and pleadings, referring the court to the testimonies in the record of appeal. That

the only neutral witness was a police officer who stated in cross examination, that 'from the abstract, the matter is PUI (pending under investigations). It means there is no conclusive proof on who is to blame. Counsel maintained that the trial court did not take into account irrelevant account neither did it fail to take into account relevant factors while determining the question or liability.

30.He placed reliance on the case of **Lakhamshi v Attorney General [1971] EA 118** and urged that where there is insufficient evidence to establish negligence of any party to a traffic accident, the court must find the parties equally to blame. The evidence before the trial court did not provide it with sufficient evidence to blame one of the parties more than the other. He additionally cited the case of **Joseph Muthuri v Nicholas Kinoti Kibera [2022] eKLR** and **Gerald Muthengi Ndatho v Hellen Chebet [2022] KEHC 346 KLR at paragraphs 29, 30 and 31** in this regard. He prayed that the appeal on liability be dismissed.

31.On the cross appeal, counsel cited the case of **Kemfro Africa Limited t/a Meru Express Services (1976) & Another v Lubia &Another (No. 2) [1985] eKLR** where the court identified the principles to be observed by an Appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial court in exercise of judicial discretion. He urged that the trial court failed to take into account relevant factors particularly the injury sustained by the Appellant as per the treatment notes where she was attended to after the accident. Further, that the most relevant document to be used to assess the injury sustained is the Discharge Report from Cedar Hospital which was admitted in evidence as "Plaintiff exhibit 3".

32. That the said Discharge Report shows that the Appellant was admitted at the hospital on 24th November, 2020 and additionally, that the only injury identified by the hospital as having been sustained by the Appellant was a "fracture dislocation of the right ankle". That the same injury is captured in the medical report of Dr. Adegu William K J. dated 19th May, 2021 under "injuries sustained". He submitted that the injuries listed in the medical report of Dr. Joseph C. Sokobe dated 30th November, 2020 under "injuries sustained" are exaggerated and unsupported with the primary medical evidence. Further, that Dr. Sokobe under "X-Rays" in his medical report he confirms that there was only a fracture dislocation of the right ankle and no other fracture.

33. Counsel urged that the trial court only captured the Appellant's injuries as per Dr. Sokobe's medical report in the judgement, and thereby fell into error by failing to take into account a relevant factor i.e. the injuries sustained as per the primary medical evidence which is the Discharge Report from Cedar Hospital.

34. Counsel posited that the award of general damages of Kshs. 1,500,000/= is excessive and inordinately high looking at the injury captured in the Discharge Report from Cedar Hospital. The said award is not comparable to awards for similar injuries. He prayed that the award of general damages of Kshs. 1,500,000/= be set aside and be substituted with an award of Kshs. 300,000/= as proposed in the Cross Appeal.

35. Counsel urged that the Respondent is aggrieved and dissatisfied by the failure of the trial court to apportion liability to the special damages and future medical expenses. Further, that a case of this nature normally has two elements i.e. liability and quantum. That once a decision on liability is made the same should inevitably affect the decision on quantum and the decision on

liability should apply to all aspects of quantum be it special damages, future medical expenses or general damages. He cited the cases of **Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR** and **Achacha v Litunya (Civil Appeal E044 of 2021) [2022] KEHC 3332 (KLR) (30 June 2022) (Judgment)**.

36. He prayed that a similar position be taken in this matter by subjecting the special damages and the future medical expenses granted by the trial court to the apportioned liability of 50: 50. Further, he prayed that the costs of this appeal and cross appeal be granted to the Respondent. He urged the court to summarily fix the costs recoverable by the Respondent on both the Appeal and Cross Appeal as opposed to subjecting the costs to taxation which will unnecessarily delay the expeditious determination of the matter. He placed reliance on the decision in **Co-operative Bank of Kenya Limited v Joefrick N. Muinde t/a Kimu Auctioneers [2019] eKLR** in this regard.

Analysis & Determination

37. The duty of the first appellate court is as set out in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR; Williamson Diamonds Ltd and another v Brown [1970] EA 1** and **PIL Kenya Limited v Oppong [2009] KLR 442** and it is to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.

38. The above said it my considered opinion, the twin issues that arise for determination for determination the Trial Court’s apportionment of liability

and its award of damages. On the issue of liability, in my re-assessment and re-evaluation of the evidence that was adduced before the Trial magistrate, from a cursory consideration of the same, it is easy for one to conclude that it is not possible to distinctly establish who was liable for the accident for reasons that it is primarily the evidence of the appellant as weighed against that of the respondent because there was no independent eye witness account on how the accident occurred, and further because the PW1 was not the Investigating Officer and only relied on the record of the OB that he produced in court.

39. However, upon a more detailed and in-depth consideration of the evidence, it is important to note the appellant in seeking to discharge the burden of proof of her assertion that it is the respondent who was solely to blame for causing the accident in which she sustained the injuries complained of as placed upon her by **Sections 107, 108 and 109 of the Evidence Act**, did also produce documentary evidence which I have considered.

40. The evidence of PW1 States that the entry in the OB is to the effect that the appellant was hit from behind while off the road. The Discharging Report from Cedar Hospital indicates inter alia that that the appellant was treated for an *injury to the right ankle* and was stable and recovering well after *surgery* having been admitted at the facility on 24th November 2020 and discharged on 26th November 2020

41. The Medical Report by Dr. Joseph Sokobe on behalf of the Appellant states that the appellant sustained the injuries as already herein summarised which injuries and the treatment given as outlined by Dr. Sokobe in his report are the same as reflected in the Medical Report by Dr. Adegun William on behalf of the Respondent. With this evidence of the injuries not having been disputed, the question the court needs to answer is whether the location and

severity of the injuries is consistent with the evidence of the appellant or with that of the respondent on their respective version on how the accident occurred.

42. The appellant states that she was hit from behind while walking on the left side of the road off the road. The injuries she sustained are a fractured right ankle which the court is satisfied is consistent with her testimony of having been hit *from behind* while walking on the *left side of the road*. The respondent on the other hand states that he was at a speed of 10KPH, making a right turn and it is the appellant who walked onto his path and hit his car at the back right door. In my considered opinion, this explanation given by the respondent is not consistent with the injuries sustained by the appellant for reasons that basic common sense dictates that if this were to be the case, the appellant would have generally sustained injuries largely concentrated on his upper body and limbs.
43. Further to the above speed of 10KPH would not cause the kind of grievous injuries such as the ones that were sustained by the appellant. The argument that because it is indicated in the Police Abstract that the matter is still pending under investigation and that the respondent was therefore not found to blame and so should not be held liable is a non-issue in my considered opinion in light of the fact firstly that such investigations are usually done for purposes of the institution criminal charges and secondly because the standard of proof in civil and criminal proceedings are different.
44. The above being my finding, I am satisfied that on a balance of probabilities, it is the respondent who was largely to blame for causing the said accident and should therefore bear the greater burden on liability. I therefore set aside the apportionment of the same by the Trial Court at 50% to each party and apportion the same at 10% to the Applicant and 90% to the Respondent.

45. On the ground of appeal that the damages awarded were too low and the cross appeal that the award was too high, the injuries sustained by the appellant were

- a. Fracture of the distal fibular.
- b. Fracture of the right medial malleolus.
- c. Dislocation of the right ankle joint.

46. Dr. Joseph C. Sokobe classified the same as both soft and bony (fractures) tissue injuries from which she had not yet recovered and stated further that she will need to have the implants that were in situ removed at an estimated cost of Kshs. 150,000/= that she will develop early osteoarthritis of the right ankle and he assessed the disability occasioned to the appellant at a permanent disability of 10%. The Trial Court in awarding the Appellant Ks. 1,500,000/= in General damages stated that she was guided by the decision of Ougo J in *James Gathirwa Ngugi v Multiple Hauliers (EA) Limited & Another* [2015] eKLR.

47. As stated by the Court of Appeal in ***Odinga Jacktone Ouma v Moureen Achieng Odera*** [2016] eKLR and ***Shabani vs City Council of Nairobi*** (1985) KLR 516 the general rule in the award of damages is that comparable injuries should attract comparable awards so as to create a sense of uniformity in the award of damages.

48. The above said, the Court of Appeal in ***Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another*** indicated the situations in which the appellate court may interfere with the damages awarded by the trial court as follows;

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.

The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

49.The plaintiff in the case relied upon by the Trial Court sustained the following injuries; had sustained the following injuries; Compound comminuted fracture of the right tibia; Compound comminuted fracture of the right fibula; Fracture of the left proximal radius; Fracture of left ulna; Head injury; Deep cut wound of the parietal region about 4cm; Soft tissue injury and bruises of both hands multiple facial cuts and lacerations; Pathological /re-fracture of the right leg.

50.The Plaintiff also had Residual injuries: Re-fracture of the right leg, many sinuses on the right leg with pus; Bone exposure; Chronic bone infection and dead bone; Restriction in walking; Difficult in walking; Restriction in mobility of the fore arm; Difficulties in squatting Weakness of the left upper limb; He cannot carry or lift heavy objects; Walks with aid of crutches; Restriction of movement of the left limb.

51. The above being the case, it is clearly apparent that the plaintiff therein sustained injuries in that were more severe than those that those sustained by the appellant herein and I therefore find that Trial Court's award was excessive in the circumstances. In this regard, I have considered the following cases wherein the claimants suffered injuries that are comparable to the ones sustained by the Appellant herein and wherein the court awarded general damages of between Ks. 500,000/- to Ks. 600,000/-.

52. These cases are **Karanja v BA (A Minor Suing through the Father and the Next Friend MMP) & another [2022] KEHC 15287 (KLR); Hussein Sambur Hussein v Shariff A. Abdulla Hussein, Alwi A. Hassan Sharrif & Ali Shariff Alwi [2022] KEHC 2341 (KLR)**. I am persuaded that these awards are reasonable and taking into account the years in which they were given and the subsequent effluxion of time and the inflationary trends in the past few years, I award the appellant Ks. 800,000/- in general damages.

53. On the issue that the Special Damages including the future medical expenses be subjected to contribution the court notes that this issue was not raised at the Trial Court for the court to make a determination on and so ideally it ought not to be an issue on appeal. Be that as it may I subscribe to the position of H. A Omondi J in the case of **Hashim Mohammed Said & another vs. Lawrence Kibor Tuwei [2018]** that special damages ought not to be subjected to apportionment and in this regard I am satisfied that the Trial Court properly applied itself in not subjecting her award under this head to apportionment.

54. **In conclusion therefore, my findings are as follows;**

- a) **The Appellant's Appeal on liability is allowed. The same as apportioned at 50% against each of the parties is now hereby set aside and liability is now hereby apportioned at 90% against the Respondent with the Appellant shouldering 10%**

- b) **The Appellant's Appeal on the General Damages as being inordinately low is now hereby dismissed and the Respondent's Cross-Appeal on General Damages as being inordinately high is now hereby allowed. The same as apportioned at Ks. 1, 500, 000/- in favour of the Appellant is now hereby set aside and the same is substituted with an amount of Ks. 800,000/-**

- c) **The Respondent's Cross - Appeal that the Special Damages as well as the cost of future medical expenses be subjected to the apportionment of liability as determined by the court is now hereby dismissed.**

- d) **The Respondent is to bear the Appellants costs as well as his own costs for the Cross Appeal**

Read Dated and Signed at ELDORET on 16th October 2025

E.OMINDE

JUDGE