



REPUBLIC OF KENYA



KENYA LAW
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**Mwangeka v Karue & 2 others (Civil Case 87 of 2016)
[2025] KEMC 64 (KLR) (14 April 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE 87 OF 2016
YA SHIKANDA, SPM
APRIL 14, 2025**

BETWEEN

ALICE WAKIO MWANGEKA PLAINTIFF

AND

SAMUEL MUGUNDU KARUE 1ST DEFENDANT

CHANIA GENESIS 2ND DEFENDANT

MWAURA JOEL NDURUHU 3RD DEFENDANT

JUDGMENT

The Claim

1. Alice Wakio Mwangeka (hereinafter referred to as the plaintiff) filed this suit on 25/2/2016 vide a plaint dated 22/2/2016. She sued Samuel Mugundu Karue, Chania Genesis and Mwaura Joel Nduruhi (hereinafter referred to as the 1st, 2nd and 3rd defendants respectively) on account of a road traffic accident that allegedly occurred on 23/11/2025 at Kenani along Nairobi-Mombasa road. The plaintiff averred that on the material day she was lawfully travelling as a fare-paying passenger aboard motor vehicle registration number KBV 250A when the 1st defendant so negligently, recklessly and/or carelessly drove the said motor vehicle that it rammed into an oncoming motor vehicle whereby the plaintiff sustained serious injuries, loss and pain, for which she holds the defendants liable.
2. The 1st defendant was sued as the driver of motor vehicle registration number KBV 250A at the material time whereas the 2nd and 3rd defendants were sued as the owners of the said motor vehicle at the material time. The plaintiff relied on the doctrines of Res Ipsa Loquitur and vicarious liability, the [Traffic Act](#) and the Highway Code and averred that the accident was solely caused by the negligence of the 1st defendant. She pleaded the following particulars of negligence against the 1st defendant:
 - a. Driving motor vehicle registration number KBV 250A in a careless manner;



- b. Driving in an excessive speed in the circumstances of the road;
 - c. Failure to slow down, brake, swerve or act in any other reasonable manner to avoid the said accident;
 - d. Failure to keep proper look out to other road users or at all;
 - e. Driving in a zig zag manner in the circumstances;
 - f. Driving on the wrong side of the road;
 - g. Failure to take regard of other road users;
 - h. Failure to prevent the said accident;
 - i. Driving a defective motor vehicle;
 - j. Driving without due care and attention.
3. The plaintiff thus prays for judgment against the defendants for:
1. Special damages Ksh. 3,500/=;
 2. General damages;
 3. Costs and interest of the suit.

The Defence

4. The defendants entered appearance on 16/10/2019 and filed a joint statement of defence on the same day, in which they denied the plaintiff's claim in toto. The defendants denied that the 1st defendant was the driver of the accident motor vehicle at the material time and that the 2nd and 3rd defendants were the owners thereof. They denied that the plaintiff was a lawful fare-paying passenger in the accident motor vehicle, denied that an accident occurred on 23/11/2015 involving the suit motor vehicle, denied that the plaintiff suffered injuries, loss and damage and denied the particulars of negligence pleaded by the plaintiff. The defendants denied the doctrines of Res ipsa loquitur and vicarious liability and pleaded the doctrine of volenti non fit injuria.
5. In the alternative, the defendant averred that if the accident occurred, as the plaintiff may prove, then the same was solely caused by and/or substantially contributed to by the plaintiff's own negligence. The defendants pleaded the following particulars of negligence as against the plaintiff;
- a. Failing to take any or any adequate precaution for her own safety;
 - b. Failing to heed the instructions on safety precautions when travelling;
 - c. Failing to heed the traffic rules and regulations when travelling;
 - d. Failing to wear a seat belt while travelling.
6. The defendants further averred in the alternative that if the accident occurred, then the same was beyond the control of the defendants. The defendants contended that the plaintiff did not disclose and reasonable cause of action against them and prayed that the plaintiff's suit be dismissed with costs.



The Evidence

The Plaintiff's Case

7. Only the plaintiff testified in support of her case. She adopted her statement filed in court as part of her evidence. The evidence of the plaintiff was that on 23/11/2015 she was a passenger aboard motor vehicle registration number KBV 250A and was heading to Nairobi from Mombasa. That when they reached near Mtito Andei area, the driver of the said motor vehicle overtook other motor vehicles so carelessly that he lost control and rammed into an oncoming motor vehicle. The suit motor vehicle veered off the road and overturned. The plaintiff stated that as a result of the accident, she sustained injuries. She later went to hospital for treatment. She also went to Mtito Andei police station and recorded her statement. The plaintiff blamed the driver of the suit motor vehicle for overtaking carelessly. The plaintiff produced in evidence the documents that were filed alongside the plaint.

The Defence Case

8. The defendants did not attend court nor call any witness to testify in support of their defence.

Main Issues for Determination

9. In my opinion, the main issues for determination are as follows:
 - i. Whether an accident occurred on 23/11/2015 at Kenani area along Mombasa-Nairobi road involving motor vehicle registration number KBV 250A;
 - ii. Whether the plaintiff was a passenger in motor vehicle registration number KBV 250A at the material time;
 - iii. Whether the 1st defendant was the driver of the said motor vehicle at the material time;
 - iv. Whether the 2nd and 3rd defendants were the owners of motor vehicle registration number KBB 250A at the material time;
 - v. Whether the driver of motor vehicle registration number KBV 250A was to blame for the accident?
 - vi. Whether the 2nd and 3rd defendants are vicariously liable for the accident;
 - vii. Whether the plaintiff sustained injuries and suffered loss as a result of the alleged accident;
 - viii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
 - ix. Who should bear the costs of this suit?

The Plaintiff's Submissions

10. In her written submissions, the plaintiff relied on the evidence on record and submitted that her evidence was uncontroverted. The plaintiff urged the court to find the defendants 100% liable.
11. On quantum, the plaintiff submitted a sum of Ksh. 250,000/= in general damages and relied on the following authority:



1. G4S Security Services Ltd v Oyugi Obiria [2018] eKLR.

12. The plaintiff and respondent in the appeal sustained a blunt trauma to the neck, blunt injury to the back, tenderness to the right ear, blunt injury to the anterior chest wall and swollen right hand. An award of Ksh. 180,000/= was made on 19/11/2014. On appeal, the award was affirmed on 21/11/2018.
13. The plaintiff further prayed for special damages of Ksh. 3,550/= plus costs of the suit and interest.

The Defendants' Submissions

14. The defendants were given more than sufficient time to file their submissions but failed to do so.

Analysis and Determination

15. I have carefully considered the evidence on record and given due regard to submissions made by the plaintiff as well as the applicable law. From the testimony of the plaintiff and the documents produced in evidence, I have no doubt that an accident occurred on 23/11/2015 at Kenani area along Mombasa-Nairobi road involving motor vehicle registration number KBV 250A. There is also sufficient evidence to show that the plaintiff was a passenger in motor vehicle registration number KBV 250A at the time of accident. The police abstract produced in evidence confirmed the position. In any event, the plaintiff's evidence was not controverted by the defence.
16. The plaintiff produced in evidence a copy of records from the Registrar of motor vehicles which indicates that the 3rd defendant was the registered owner of motor vehicle registration number KBV 250A as at 23/11/2015. The police abstract produced in evidence indicates that the 2nd defendant was the owner of motor vehicle registration number KBV 250A at the time of the accident. The police abstract further indicates that the 1st defendant was the driver of the accident motor vehicle at the material time. The defendants did not attend court to deny that they were the driver and owners respectively, of the said motor vehicle. I am satisfied that the 1st defendant was the driver of the accident motor vehicle at the material time whereas the 2nd and 3rd defendants were the owners thereof.

Liability

17. There is only one version as to how the accident occurred. This was the version that was given by the plaintiff. It is the duty of the plaintiff to establish or prove negligence on the part of the defendants. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the *Evidence Act* which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347, the Court of Appeal held as thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

18. The evidence of the plaintiff is that the driver of the suit motor vehicle registration number KBV 250A was overtaking when it was unsafe to do so. He caused the motor vehicle to collide with an oncoming motor vehicle. The uncontroverted evidence of the plaintiff clearly shows that the 1st defendant was at fault. He was reckless in his manner of driving. It does not show that the other driver was to blame. In any event, the defendants did not take out third party proceedings against the driver or owner of



- the other motor vehicle, which is indicated in the police abstract as KBV 005V/ZD 7224. In fact, the defendants did not even allege in their defence that the driver of the other motor vehicle was to blame.
19. There is clear and uncontroverted evidence on how the accident herein occurred. I find that the evidence of the plaintiff as to how the accident occurred was consistent and was not shaken in cross-examination. In view of the evidence on record, there is a sufficiently high degree of probability, that, but for the acts of omission and commission by the 1st defendant, the accident would have been prevented. I find that the 1st defendant was solely culpable as far as the accident is concerned. In my view, there are concrete facts on which a finding would be made that the 1st defendant was solely negligent. The plaintiff was a mere passenger in the motor vehicle.
 20. The condition of the motor vehicle was in the control and management of the defendants. It was the 1st defendant who was in control of the motor vehicle, and not the plaintiff. In the ordinary course of things, a prudent driver exercising due care and attention cannot just overtake in the face of oncoming traffic. It is obvious that the 1st defendant lost control of the motor vehicle. It is reasonably possible to decide on the evidence on record as to who is to blame for the accident. I find the 1st defendant 100% liable for the accident.
 21. Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, respondeat superior, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. The owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the car has been lent, as if the owner was a principal and the driver his or her agent, if the driver is using the car primarily for the purpose of performing a task for the owner.
 22. In the case of *Morgan v Launchbury* [1972] ALL ER 606, it was held, inter alia, that:

“To establish agency relationship it is necessary to show that the driver was using the car at the owner’s request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner.”
 23. Similarly, In *Kaburu Okelo & Partners v Stella Karimi Kobia & 2 Others* [2012] eKLR the Court of Appeal held that:

“Vicarious liability arises when the tortious act is done in the scope of or during the course of one’s employment or authority.”
 24. Where a motor vehicle is driven by a person other than the owner, there is a rebuttable presumption that the driver was acting as an agent of the owner of the motor vehicle. In the case of *Kenya Bus Services Ltd v Humphrey* [2003] KLR 665; [2003] 2 EA 519, the Court of Appeal cited *Kansa v Solanki* [1969] EA 318 wherein it was held that:

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See *Bernard V Sully* [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”



25. It has not been denied in evidence that the driver of motor vehicle registration number KBV 250A (1st defendant) was driving in the course of his employment with the 2nd and 3rd defendants. Consequently, I find the 2nd and 3rd defendants 100% vicariously liable for the accident.

Quantum

26. The medical evidence on record indicates that the plaintiff sustained the following injuries following the accident:
- i. Blunt injury to the forehead;
 - ii. Blunt injury to the neck;
 - iii. Blunt injury to the left hand;
 - iv. Blunt injury to the right shoulder;
 - v. Blunt injury to the lower back.
27. There is no contrary evidence with respect to the plaintiff's injuries. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the fact that the defendants have been held 100% liable for the accident, the plaintiff is thus entitled to damages as against the defendants.
28. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards. This Court has to bear in mind the principles that guide assessment of damages as espoused in *West (HI) and Sons Ltd v Shepherd* [1964] AC 326 where Lord Morris said:
- “But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional”.
29. I am also guided by Lord Denning's decision in *Kim Pho Choo v Camden & Islington Area Health Authority*, [1979] 1, ALL ER 332 which was adopted in the case of *Nancy Oseko v Board of Governors Masai Girls High School* [2011] eKLR where Wendoh, J stated that:
- “In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant.”
30. The following principles are germane in assessing damages for personal injury claims:
- i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;



- ii. The award should be commensurate to the injuries suffered;
 - iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;
 - iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;
 - v. Awards should not be inordinately too high or too low.
31. Based on the above principles, I proceed to assess the damages payable as hereunder.

General Damages for pain, suffering and loss of amenities

32. I have considered the injuries sustained by the plaintiff. The medical report by Dr. Titus Ndeti produced in evidence by the plaintiff indicates that the plaintiff was treated as an inpatient and that at the time of examination on 3/12/2015, she was in a fair condition. This was less than a month from the date of the accident. No abnormality was noted. The doctor concluded that the plaintiff suffered soft tissue injuries of moderate severity. The injuries were classified as harm in the P3 form. I have considered the authority relied upon by the plaintiff. It relates to comparable injuries. On my part, I have considered the authority of Njoroge & another v Kimani [2023] KEHC 20758 (KLR). In the said authority, the victim sustained blunt injuries to the head, chest and both legs. An award of Ksh. 380,000/= in general damages was made on 28/4/2018. On appeal, the award was reduced to Ksh. 200,000/= on 26/7/2023. Given the age of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. 220,000/= in general damages would suffice. I award the same.

Special Damages

33. The plaintiff pleaded special damages as follows:
- a. Medical report.....Ksh. 3,000/=
 - b. Motor vehicle search.....Ksh. 500/=
34. It is trite law that special damages must be specifically pleaded and strictly proved. In Nizar Virani t/a Kisumu Beach Resort- v - Phoenix of East Africa Assurance Co. Ltd the court said:-

“It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded”

35. In Ouma- v - Nairobi City Council [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L.J’s Judgment on page 532 and 533 in Ratcliffe-v- Evans [1832] 2Q.B. 524 an English leading case on pleading and proof of damage:

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”



36. The plaintiff only produced the receipt for the medical report. I find that the plaintiff has proven special damages of Ksh. 3,000/= only. I award the same.

Disposition

37. In summary, I hold that the plaintiff has proven his case on a balance of probabilities as against the defendants. Consequently, I enter judgment against the defendants jointly and severally and make the following awards:

1. General damages for pain, suffering and loss of amenities.....Ksh. 220,000/=
2. Special damages..... Ksh. 3,000/=
- Total..... Ksh. 223,000/=

38. The plaintiff is also awarded interest on the damages as well as costs of the suit. The guiding principles in respect of interest are set out in section 26 of the *Civil Procedure Act* which provides that:

- (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

39. In the case of *Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others* [2018] eKLR, the court stated that:

First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd* [1988] KLR 380.

Second, Under Section 26(1) of the *Civil Procedure Act*, the Court has discretion to award and fix the rate of interests to cover two stages namely:

- a. The period from the date the suit is filed to the date when the Court gives its judgment; and
- b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.”

40. Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of *Omuniyokol Akol Johnson v Attorney General* (Civil Appeal No.6 of 2012, UGSC 4 (8th April 2015) stated in part, as follows:

41. It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the



interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment.....Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment.” (Emphasis supplied)

42. From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR). Consequently, interest on general damages shall accrue at court rates from the date of judgment/decreed until payment in full and on special damages from the date of filing suit to the date of judgment/decreed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 14TH DAY OF APRIL, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

