



Mutua & another (Suing as the Legal Representatives of the Estate of the Late Mutua Kiminza - Deceased) v Cosmos Cars Ltd & another (Civil Case E264 of 2021) [2025] KEMC 182 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEMC 182 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE E264 OF 2021
YA SHIKANDA, SPM
JULY 29, 2025**

BETWEEN

JOHNSTONE NDAMBUKI MUTUA & KOKI MUSEMBI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE MUTUA KIMINZA - DECEASED) PLAINTIFF

AND

**COSMOS CARS LTD 1ST DEFENDANT
ANTHONY PATERSON 2ND DEFENDANT**

JUDGMENT

The Claim

1. Mutua Kiminza (hereinafter referred to as the deceased) filed this suit on 25/11/2021 vide a plaint dated 18/11/2021. He sued Cosmos Cars Ltd and Anthony Paterson (hereinafter referred to as the 1st and 2nd defendants respectively) on account of a road traffic accident that allegedly occurred on 16/6/2021 at Makutano area along Kibwezi-Kitui road. The Plaint was later amended following the death and substitution of the deceased plaintiff. The deceased was substituted by Johnstone Ndambuki and Koki Musembi(hereinafter referred to as the 1st and 2nd plaintiffs respectively). The plaintiffs averred that on 16/6/2021 the deceased was riding his motor cycle registration number KMDV 353T along Kibwezi-Kitui road when at Makutano area, motor vehicle registration number KDC 761N, was driven so recklessly and negligently that it crushed into the deceased who sustained serious injuries.
2. The plaintiffs averred that the accident occurred due to the negligence of the defendants and/or their driver and they hold them liable. The plaintiffs relied on the doctrine of Res ipsa loquitor, the [Traffic Act](#) and the Highway code and pleaded the following particulars of negligence against the driver of KDC 761N:



- a. Driving at an excessive speed in the circumstances;
 - b. Driving without due care and attention;
 - c. Allowing himself to drive the said motor vehicle when he knew or ought to have known he was not fine and fit to do so;
 - d. Knowingly driving on a public road a defective motor vehicle tyrewise and brakewise and lightwise;
 - e. Allowing himself to loose concentration at a very crucial time;
 - f. Ignoring traffic rules with impunity;
 - g. Recklessly overtaking the deceased;
 - h. Overtaking when it was not safe to do so;
 - i. Failing to stop and give way;
 - j. Overtaking within a market place and where there is a continuous yellow line.
3. The defendants were sued as the registered and/or beneficial owners of motor vehicle registration number KDC 761N at the material time. The plaintiffs thus prayed for judgment against the defendants for:
1. General damages;
 2. Special damages of Ksh. 11,152/=;
 3. Costs of this suit;
 4. Interest on the above.

Non-Appearance by the Defendants

4. The defendants were served with summons to enter appearance and the plaint but they failed to enter appearance nor file their statements of defence. The plaintiff (now deceased) requested for interlocutory judgment which was entered on 28/2/2022 as against the defendants. The matter was then set down for assessment of damages popularly (though erroneously) referred to as formal proof.

Withdrawal of Suit

5. The 1st defendant later entered appearance and following deliberations with the plaintiffs, the suit against the 1st defendant was withdrawn with no orders as to costs.

The Evidence

6. At the hearing of the suit, only the 2nd the plaintiff testified in support of their case. The plaintiff adopted her statement filed in court as well as the statement of the deceased, as part of her evidence. It was the testimony of the 2nd plaintiff that on 16/6/2021 the deceased was riding his motor cycle at about 6:30 pm along Kibwezi-Kitui road. That he indicated that he was turning right to join a feeder road but the motor vehicle behind him attempted to overtake the deceased and in the process, the motor vehicle crushed into the deceased's motor cycle. As a result, the deceased was injured. The deceased was treated at the hospital. He reported the matter to the police and was issued with a P3 form and police abstract on the accident. The 2nd plaintiff produced in evidence a number of documents in support of their case.



Main Issues for Determination

7. In my opinion, the main issues for determination are as follows:
 - i. Whether the 2nd defendant is liable in negligence for the accident;
 - ii. Whether the plaintiff sustained injuries and suffered loss as a result of the alleged accident;
 - iii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
 - iv. Who should bear the costs of this suit?

The Plaintiffs' Submissions

8. On quantum, the plaintiff submitted a sum of Ksh. 520,000/= in general damages for pain and suffering and relied on the following authorities:
 - a. John Mwangi Kiiru v Salome Njeri Mwangi [2019] eKLR wherein the victim sustained a massive swollen foot, two fractures of the metatarsal bones, soft tissue injuries and pain and swelling. Ksh. 450,000/= was awarded in general damages on 10/8/2016. On appeal, the award was affirmed on 17/7/2019.
 - b. Modern Coast Coaches Ltd v Ouya alias Violet Ouya Ongachi [2022] KEHC 13482 (KLR) wherein the victim sustained a fracture of the proximal phalanx of the right big toe. Ksh. 540,000/= was awarded in general damages on 26/11/2021. The award was affirmed on appeal on 29/9/2022.
9. For special damages, the plaintiff urged the court to award Ksh. 11,152/= as pleaded. The plaintiff also prayed for costs and interest.

Analysis and Determination

10. I have carefully considered the evidence on record and given due regard to the submissions made by the plaintiffs as well as the authorities relied upon.

Liability

11. Ordinarily, where interlocutory judgment has been entered, the issue of liability becomes settled. This position has been confirmed by various judicial pronouncements. In the case of Abdullahi Ibrahim Ahmed (Suing as The Personal Representative of The Estate Of Anisa Sheikh Hassan (Deceased)) v Lem Lem Teklue Muzolo [2013] eKLR, the Court of Appeal stated thus:

“.....save to reiterate what is now settled law that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion.....we can do no better than to repeat what was said by this court in the case of Felix Mathenge v Kenya Power & Lighting Co. Ltd. Civil Appeal No. 215 of 2002 that:-

The role of the Court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages.”



12. Consequently, I find that the driver of motor vehicle registration number KDC 761N was solely to blame for the accident. 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.
13. 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.”
14. 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.”
15. 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.”
16. The police abstract produced in evidence indicates that the 2nd defendant was the owner of the accident motor vehicle at the material time. The 2nd defendant did not enter appearance. That piece of evidence remains uncontroverted. There is nothing to dispute that the driver of motor vehicle registration number KDC 761N was driving in the course of his employment with the 2nd defendant. Consequently, I find the 2nd defendant 100% vicariously liable for the accident.

Quantum

17. The medical evidence on record indicates that the deceased sustained the following injuries following the accident:
 - i. Deep cut wound on the left toe;
 - ii. Open displaced fractures of the left 1st, 2nd and 3rd metatarsal bones;
 - iii. Bruises on the inner aspect of the left arm and forearm.



18. The injuries were classified as grievous harm. I find that there is sufficient evidence to prove that the deceased sustained injuries as a result of the accident. Given the finding on liability, the plaintiffs are thus entitled to damages as against the 2nd defendant.

19. 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”.

20. 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.”

21. The Court of Appeal in *Southern Engineering Company Ltd v Musingi Mutia* [1985] KLR 730 held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed



to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

22. 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.
23. Based on the above principles, I proceed to assess the damages payable as follows.
24. General Damages for pain, suffering and loss of amenities
25. I have considered the injuries sustained by the deceased. The deceased suffered injuries which were classified as grievous harm. In my opinion, the authorities relied upon by the plaintiff are comparable and worth relying upon. Given the nature of the injuries sustained by the deceased herein and the age of some of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. 500,000/= in general damages would suffice. I award the same.

Special Damages

26. The plaintiff pleaded special damages as follows:
- a. Copy of records of motor vehicle....Ksh. 550/=
 - b. Medical report.....Ksh. 4,000/=
 - c. Medical expenses.....Ksh. 6,608/=
27. 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”
28. 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.”

29. The receipts produced amounted to more than what was pleaded. I award proceed to award Ksh. 11,152/= as pleaded.

Disposition

30. In summary, I hold that the plaintiffs have proven their case on a balance of probabilities as against the 2nd defendant. Consequently, I make the following awards:

1. General damages for pain, suffering and loss of amenities.....Ksh. 500,000/=
 2. Special damages.....Ksh. 11.152/=
- Total....._Ksh. 511,152/=

31. The plaintiffs are 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.”

32. 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.”

33. Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of Omunyokol Akol Johnson v Attorney General (CIVIL APPEAL NO.6 of 2012, UGSC 4 (8th April 2015) stated in part, as follows:

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)

34. 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/decree until payment in full and on Special damages, from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 29TH DAY OF JULY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

