

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. 44 OF 2023**  
**(FORMERLY KIAMBU HCCA NO. E111 OF 2021)**

**BETWEEN**

**VINCENT  
MUSYOKA.....APPELLANT**

**NDOO**

**AND**

**JOHN  
.....RESPONDENT**

**NJAU..**

*(An appeal from the judgment and decree of the Chief  
Magistrate's Court at Thika (E. Riany, SRM.) delivered on 12<sup>th</sup>  
May 2021 in CMCC No. 1043 of 2017)*

**JUDGMENT**

1. The appellant filed an appeal challenging the Judgment and Decree of the Senior Resident Magistrate at Thika in CMCC No. 1043 of 2017, delivered on 12<sup>th</sup> May 2021. In the original suit, the appellant had sued the respondent through a plaint dated 6<sup>th</sup> November 2017, seeking damages arising from a road traffic accident that occurred on 17<sup>th</sup> July 2017. The appellant alleged that the respondent was the registered owner of motor vehicle registration number KAJ 394R, a Nissan Pick-up. He claimed that on the said date, while he was lawfully walking along the Nairobi-Thika Highway, well off the road near Kereme, the respondent or his driver negligently drove the said vehicle, lost control, veered off the

road, and knocked him down. The appellant provided specific particulars of negligence attributed to the respondent.

2. As a result of the accident, the appellant sustained the following serious injuries a brain concussion, loss of consciousness, deep cut wounds on the scalp, and a fracture of the right acetabulum with ORIF in situ. He sought general damages, special damages amounting to Kshs.170,570.00, future medical expenses for implant removal estimated at Kshs.70,000.00, as well as costs of the suit and interest. However, in its judgment dated 12th May 2021, the trial court found the appellant's claim to be without merit and dismissed it with costs awarded to the respondent.
3. The appellant being dissatisfied with the trial court's findings filed his memorandum of appeal raising five grounds impugning the findings. He faulted the trial court for finding that his evidence contradicted with his pleadings and failing to consider his pleadings, evidence and submissions. In his view, the trial court's findings were incorrect when the evidence wholly shouldered blame on the respondent who was in control of a dangerous machine and ought to have been careful. Finally, he posited that liability ought to have been shared between the parties. For those reasons, the appellant prayed that his appeal be allowed, the judgment dated 12th May 2017 be set aside and substituted with a finding that his suit is merited, an assessment of damages and costs of this appeal and the suit at trial.

4. The appeal was canvassed by way of written submissions. In his written submissions dated 24<sup>th</sup> October 2024, the appellant recounted the evidence presented before the trial court and maintained that it led to only one logical conclusion; that the respondent was responsible for the accident and the resulting injuries sustained by the appellant. He asserted that, when viewed in totality and in comparison, with the respondent's evidence, his own testimony was consistent, reliable and credible.
5. The appellant questioned the credibility of the respondent's account, particularly how the respondent's driver claimed to have seen him jumping over road barriers despite being obstructed by a lorry. In the appellant's view, the respondent's narrative was riddled with significant contradictions, casting doubt on its reliability in its entirety. He therefore urged this court to find the respondent wholly liable for the accident. Alternatively, he proposed that liability be apportioned equally between the parties.
6. On the issue of quantum, the appellant relied the cases of **Cold Care Hire & Tours Limited & 2 others vs. Elizabeth Wambui Matheri** [2015] eKLR and **Leonard Njenga Ng'ang'a & another vs. Lawrence Maingi Ndeti** [2018] eKLR to submitted that he was entitled to an award of Kshs. 2,000.000.00 in general damages. He further prayed for the award of special damages and future medical

expenses as pleaded in his plaint. The appellant concluded by urging the court to allow his appeal.

7. The respondent opposed the appeal and filed written submissions together with a list of authorities, both dated 2nd November 2024. He argued that the appellant failed to adduce sufficient evidence to establish causation on his part. Notably, no eyewitnesses were called to support the appellant's version of events. The respondent further contended that the appellant's case was fraught with contradictions and inconsistencies, which undermined its credibility. He urged the court to find that the appellant had failed to prove his case on a balance of probabilities.
8. On the issue of damages, the respondent submitted that the appellant was not deserving of any award. Nonetheless, he argued that should the court find the appellant entitled to general damages, then an award in the range of Kshs.800,000.00 to Kshs.1,400,000.00 would be appropriate. In support of this position, the respondent cited several authorities, including **SBI International Holdings (Ag) Kenya vs. William Ambuga Ongeru** [2018] eKLR, **Angela Katunge Musau vs. China Wu Yi Limited & another** [2020] eKLR, **Kennedy Ooko Ouma Dachi vs. Joseph Maina Kamau & another** [2018] eKLR and **Cold Car Hire Tours Limited vs. Elizabeth Wambui Matheri** [2015] eKLR. Regarding special damages, the Respondent urged this court to award the sum of Kshs.12,250.00 being the only

sum pleaded and proved. For future medical expenses, he proposed an award of Kshs.70,000.00. Ultimately, the respondent urged this court to dismiss the appeal with costs.

9. I have carefully considered the parties' submissions, examined the record of appeal, and analyzed the applicable law. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others vs. Salim Abdalla Bakshwein & another** [2015] KECA 728 (KLR) explained the duty of this court sitting as a first appellate court in the following terms:

***"In all these cases the principle has been restated that our duty as a first appellate court is to revisit the evidence that was tendered before the trial court afresh, analyse it, evaluate it and arrive at our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving due allowance for that."***

10. The evidence presented before the trial court was as follows: PW1, the appellant, adopted his witness statement dated 7th November 2017. He testified that on 17th July 2017, while walking along the Nairobi-Thika Highway and well off the road, he reached a location opposite Kereme where he observed the respondent's driver operating motor vehicle registration number KAJ 394R in a negligent manner. He stated that the driver lost control of the vehicle, veered off the road, and struck him.

11. As a result of the accident, the appellant sustained serious injuries including a brain concussion, loss of consciousness, deep cut wounds on the scalp, and a fracture of the right acetabulum with ORIF in situ. He testified that he received treatment at Thika Level 5 Hospital, AIC Kijabe Hospital, and Kalimoni Mission Hospital. He was later examined by Dr. Mutunga of Machakos Level 5 Hospital, who prepared a medical report dated 23rd October 2017 detailing the injuries sustained.
12. The appellant subsequently reported the accident at Juja Police Station, where he was issued with a P3 form and a police abstract, both dated 11th September 2017. In support of his claim, he produced several documents including the police abstract, P3 form, medical report, treatment notes, motor vehicle search certificate, receipts for special damages, a demand letter dated 25th September 2017, a statutory notice dated 26th September 2017, and a forwarding letter dated 25th September 2017.
13. During cross-examination, PW1, the appellant, testified that the accident occurred at Karemia on the service lane, not on the main highway, and that he was standing beside the road at the time. He clarified that he had not yet crossed the road. However, he acknowledged that when the P3 form was completed, he had indicated that the accident occurred while he was crossing the road. This same account was reflected in his patient notes from Machakos Level 5 Hospital. He further

explained that the location from which he intended to cross lacked a zebra crossing, although there was a stage nearby. He noted that a footbridge was situated ahead but was under construction and had guard rails. He maintained that he was hit while standing. The respondent called DW1, Samuel Githinji Gitau, as his witness. DW1 adopted his witness statement dated 24th May 2018 as his evidence-in-chief. He testified that on 17th July 2017 at approximately 7:00 p.m., he was driving the subject vehicle, motor vehicle registration number KAJ 394R, en route to Thika from Kenyatta Road to collect goods for delivery the following day. He was driving in the second inner lane at a speed of 50 kph. To his left was a lorry traveling in the same direction, slightly ahead of him. DW1 described the road as having barriers on both sides, which prevented pedestrians from crossing at that location.

14. Upon reaching Kareme, DW1 stated that he suddenly saw a pedestrian, the appellant, attempting to cross the highway at that point. He described the appellant as running across the road in disregard of his own safety. The appellant ran past the lorry and into DW1's lane. Despite DW1 hooting and applying emergency brakes, a collision occurred. DW1 stopped the vehicle and assisted the appellant in seeking medical attention.
15. DW1 attributed the cause of the accident to the appellant's actions, asserting that he crossed the road at an undesignated point and failed to heed the presence of

oncoming traffic. DW1 opined that had the appellant used the footbridge located approximately 50 meters from the crossing point, the accident could have been avoided. He noted that the impact caused damage to the left headlamp and windscreen of the vehicle.

16. From the evidence presented before the trial court, it is undisputed that an accident occurred on 17th July 2017 along the Nairobi-Thika Highway involving the appellant and the respondent's vehicle, motor vehicle registration number KAJ 394R. The accident took place at around 7:00 p.m. while DW1 was driving. The central issue for determination is which party bears liability in negligence for the occurrence of the accident.
17. The appellant testified that he was walking along the Nairobi-Thika Highway, well off the road. Upon reaching a location opposite Kereme, he claimed to have observed the respondent's driver operating motor vehicle registration number KAJ 394R in a negligent manner, resulting in the vehicle veering off the road and knocking him down. However, in the court's view, the appellant's testimony lacked clarity and detail regarding the events leading up to the accident. It was only during cross-examination that he provided further insight.
18. During cross-examination, PW1 stated that the accident occurred while he was attempting to cross the road. This contradicted his earlier testimony that he had been walking

besides the road. Furthermore, the P3 form and treatment notes, confirmed that the appellant himself has provided information indicating that he was crossing the road at the time of the accident. The inconsistency raises a critical question, that is, was the appellant hit while crossing the road, standing or walking well off the road?

19. In addition, the appellant during cross-examination admitted that there was no zebra crossing at the location, but rather a stage. This appeared to be an afterthought aimed at salvaging a weak case. Again, while PW1 claimed in his examination-in-chief that the vehicle veered off the road, he later asserted that the accident occurred on the service lane. This contradiction further undermined the credibility of his account?
20. In contrast to the appellant's inconsistent testimony, DW1, the respondent's driver, provided a coherent and consistent account. He testified that he was driving in the second inner lane at a speed of 50 kph, with a lorry slightly ahead of him on the left. He noted that barriers on both sides of the road prevented pedestrian crossings at that location, a fact corroborated by the appellant.
21. DW1 stated that upon reaching Kareme, he suddenly saw the appellant running across the highway at a non-designated crossing point. The appellant ran past the lorry and into DW1's lane. Despite DW1 hooting and applying emergency brakes, a collision occurred.

22. The respondent's evidence was subjected to thorough cross examination and remained consistent. However, the chain of thought and degree of precision in explaining the circumstances leading to the accident to my mind proved that indeed the appellant was to blame for the accident. The appellant crossed the road in a non-designated location an area where there were barriers or guard rails failing to exercise due care for his own safety and that of other road users. Although the appellant claimed the footbridge was under construction, he provided no evidence to support that assertion. The court finds that the accident occurred on the highway and could have been avoided had the appellant used the designated footbridge.
23. In conclusion, the court finds no fault in the trial magistrate's analysis or determination. The findings were sound both in fact and in law. The appellant was negligent and caused the accident. Accordingly, the appeal lacks merit and is hereby dismissed. Given the nature of the appeal each party to bear its costs.
24. It is so ordered.

Dated, signed and delivered at Machakos this 3<sup>rd</sup> day of November, 2025

**RHODA RUTTO**

**JUDGE**

**In the presence of;**

.....Appellant

.....Respondent

Selina Court Assistant

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