

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. E191 OF 2024**

**ABEL NYAKUNDI OBIERO ..... APPELLANT**

**VERSUS**

**JACKSON MUCHEMI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Chief Magistrate, Ocharo C. at the Chief Magistrate's Court at Kisii, Civil Suit Number E739 of 2022)*

**JUDGEMENT**

1. The Appellant (then Plaintiff) sued the Respondent (then Defendant) for general and special damages that arose from a road traffic accident on 16<sup>th</sup> March 2022 along Kisii-Nyamira Road.
  
2. The trial court conducted a hearing where the Appellant called three witnesses before closing his case while the Respondent called three witnesses in aid of his defence.

3. In its Judgement delivered on 28<sup>th</sup> October 2024, the trial court dismissed the suit stating that the Appellant was 100% liable for causing the accident. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 1<sup>st</sup> November 2024 appealing against the apportionment of liability.

4. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify.

5. I hereby proceed to summarise the case in the trial court and the parties' respective submissions in the present Appeal.

**The Plaintiffs'/Appellant's case.**

6. Through his Plaint dated 26<sup>th</sup> September 2022, the Appellant stated that on 16<sup>th</sup> March 2022, he was riding motorcycle registration number KMFX 582L along Kisii-Nyamira road

when he was hit by motor vehicle registration number KCZ 563X.

7. It was the Appellant's case that the Respondent or his driver was negligent in causing the accident. The particulars of the negligence were stated in paragraph 4 of the Plea. That as a result of the accident, the Appellant suffered the following injuries: -

- i) Left segmental femur fracture
- ii) Deep cut wounds on the left upper limb.
- iii) Blunt chest injury.
- iv) Blunt trauma to the abdomen.
- v) Bruises on the left parietal region of the head.

8. The Appellant prayed for special and general damages arising from the accident.

9. Through his written submissions dated 2<sup>nd</sup> September 2025, the Appellant submitted that the trial court erred when it

dismissed his case. That together with his witnesses, they gave evidence on the circumstances of the accident which proved that the Respondent was negligent in causing the accident. He relied on **PNM and another (The Legal Representative of the estate of LMM v Telkom Kenya Ltd and 2 others (2015) eKLR)** and **Nandwa v Kenya Kazi Ltd (1988) eKLR**. The Appellant further submitted that he proved his case on a balance of probabilities.

10. It was the Appellant's submission that he did not become liable for the accident by simply being unlicensed. He relied on **Elizabeth Gathoni Thuku (suing as the legal representative of the estate of Charles Gitoinga Wathuta) v Peter Kamau Maina & another [2021] KEHC 2995 (KLR)**. It was the Appellant's further submission that while overloading was a traffic violation, it did not amount to a proximate cause of the accident unless it was linked directly to negligent conduct. That this court should set aside the trial court's findings and find the Respondent 100% liable for causing the accident.

11. Regarding quantum, the Appellant submitted that the trial court failed to consider his submissions. He proposed an award of Kshs 1,000,000/= for general damages and relied on **Kariuki M'ng'onde alias Kariuki Josphat M'ng'onde vs Philip Miriti & 2 others (2005) eKLR** and **Vincent Cheruiyot Rono vs Mombasa maize Millers Ltd (2006) eKLR**.

**The Respondent's/Defendant's case.**

12. Through his statement of defence dated 11<sup>th</sup> January 2023, the Respondent denied the occurrence of the accident on 16<sup>th</sup> March 2022 and further denied being the registered owner of motor vehicle registration number KCZ 563X.

13. It was the Respondent's case that if the accident occurred then it was caused by the negligence and carelessness of the Appellant. The particulars of negligence were contained in paragraph 8 of the Defence.

14. Through his written submissions dated 28<sup>th</sup> August 2025, the Respondent submitted that the trial court did not err in its findings as the Appellant had failed to discharge his legal burden of proof. That the Appellant admitted that he did not have a driving license and that he also admitted that the Respondent was on his left lane driving from Kisii to Nyamira. The Respondent further submitted that the Appellant never mentioned any steps he took to avoid the accident.

15. Regarding quantum, the Respondent submitted that an award of Kshs 350,000/= was reasonable and he relied on **Reamic Investment Limited vs Joaz Amenity Samuel (2021) eKLR, Civicon Limited cs Richard Njomo Omwancha & 2 others (2019) eKLR et.al.**

16. I have gone through and carefully considered the Record of Appeal dated 24<sup>th</sup> April 2025, the Supplementary Record of Appeal dated 15<sup>th</sup> May 2025, the Appellant's written submissions dated 2<sup>nd</sup> September 2025 and the Respondent's written submissions dated 28<sup>th</sup> August 2025.

The only issue that I have sieved for my determination was whether the trial court erred in dismissing the suit.

### **Liability**

17. The Appellant (PW1) testified that as he was riding his motorcycle along Kisii-Nyamira road, the Respondent's vehicle registration number KCZ 563X veered off its lane and hit him causing hi injuries. When PW1 was cross examined, he reiterated that the vehicle veered into his lane and hit him head on.

18. No. 88300 PC Moses Kasera (PW3) testified that the motor vehicle was being driven towards Nyamira and on reaching the location of the accident, the motor vehicle hit the motorcycle which was ferrying two pillion passengers. PW3 testified that he blamed the motor vehicle for causing the accident. When PW3 was cross examined, he testified that he did not visit the scene of the accident and he was not the Investigating Officer.

19. On the other hand, George Ndegwa Muhia (DW1) testified that he was an investigator with MC Henry Loss Assessors and Investigators. DW1 further testified that the insured's driver was driving along Kisii-Nyamira and on reaching Jogoo area, the Appellant on his motorcycle emerged from the left side of the road when the driver of the motor vehicle was already close.

20. It was DW1's testimony that the motorcycle was ferrying passengers and wanted to cross the road. It was DW1's further testimony that the vehicle brushed the motorcycle and the impact caused the motorcycle to fall on the tarmac. When DW1 was cross examined, he testified that he did not witness the accident.

21. Stephen Minae Wambugu (DW2) testified that he was the driver of the motorcycle. He testified that when he approached Jogoo area, the motorcycle swerved from the left side to his lane intending to exit. DW2 further testified that the Appellant did not indicate or alert him before swerving. DW2 blamed the Appellant for causing the accident. When

DW2 was cross examined, he testified that he saw the motorcycle attempting to join the other side of the road and he did not try to swerve because the rider was very close.

22. No. 243976 PC Elly Orido (DW3) testified that the motor vehicle was being driven towards Nyamira and when it reached Jogoo area, the motorcycle joined the motor vehicle's lane and it hit the vehicle. DW3 further testified that the rider had two pillion passengers at the time of the accident. When DW3 was cross examined, he testified that he did not visit the scene of the accident.

23. From the above testimonies, it is clear that only the Appellant (PW1) and the Respondent's driver (DW2) witnessed the accident. The police officers (PW3) and (DW3) were not the Investigating Officers and could not authoritatively describe the circumstances of the accident. They did not visit the scene of the accident and their testimonies relied on the contents of the Police File and Occurrence Book. This effectively made their testimonies

hearsay. The same applies to the investigator (DW1). He did not witness the accident and his testimony was reliant on DW2's statement.

24. The Appellant (PW1) and the Respondent's driver (DW2) have blamed each other for causing the accident. Both testimonies illustrate different circumstances that led to the accident. From the above, it is difficult for this court to determine the circumstances of the accident. In the circumstances thereof, this court is at a loss on whom to blame for causing the accident. In such circumstances, the Court of Appeal in Hussein **Omar Farah v Lento Agencies [2006] KECA 388 (KLR)**, observed that: -

***"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. 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.....”***

25. In view of the above, this court would have apportioned liability at 50:50. However, it came out through evidence that the Appellant had carried two pillion passengers. It is the position of this court that a motorcycle ought to carry one pillion passenger and carrying two pillion passengers was against the law. The **Traffic Act Cap 403 Laws of Kenya** provided for the law relating to traffic on the road. **Section 68(3) of the Traffic Act provides: -**

**A failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to**

negative any liability which is in question in those proceedings.

26. **Section 60 (1) of the Traffic Act** provides that: -

**It shall not be lawful for more than one person in addition to the driver to be carried on any two-wheeled motorcycle, nor shall it be lawful for any such one person to be so carried otherwise than sitting astride the motorcycle and on a proper seat securely fixed to the motorcycle behind the driver's seat.**

27. I am persuaded by Odunga J. (as he then was) in the case of **Rentco East Africa Limited v Dominic Mutua Ngonzi [2021] KEHC 1079 (KLR)**, where he held that: -

***“The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law,***

***the Respondent exposed himself to danger. Such conduct cannot go un-condemned and it should not be rewarded.”***

28. The Court of Appeal in **Michael Hubert Kloss & another v David Seroney & 5 others [2009] KECA 146 (KLR)** held that: -

***“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:***

***‘To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation 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.....”***

29. The Appellant and his two pillion passengers exposed themselves to risk when they boarded and rode an overloaded Motor Cycle. It is proper and just that they assume some form of liability. It is my finding therefore that the Appellant assume 60% liability while the Respondent assumes 40%.

**Quantum**

30. From the parties' submissions, there was no dispute as to the nature of the injuries suffered by the Appellant. They were as follows: -

- i. Left segmental femur fracture

- ii. Deep cut wounds on the left upper limb.
- iii. Blunt chest injury.
- iv. Blunt trauma to the abdomen.
- v. Bruises on the left parietal region of the head.

31. As earlier stated, the trial court awarded Kshs 600,000/= as general damages, an amount the Respondent felt was reasonable but the Appellant felt was excessive. The Respondent proposed an award of Kshs 350,000/=.

32. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice.

33. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. In addition to the parties' authorities, I have found the following cases quite helpful in terms of comparison: -

- I. In **Francis Ndungu Wambui & 2 others v Benson Gichure Maina [2019] KEHC 2132 (KLR)**, the court reduced the award of Kshs 1,000,000/= to Kshs 600,000/= for a fracture of the right femur and soft tissue injuries.
- II. In **Jacaranda Boda-boda Operators & another v Nyasero [2023] KEHC 23806 (KLR)**, the court reduced the award of Kshs 1,200,000/= to Kshs 750,000/= for a fracture of the right femur that was mixed with metal implants.
- III. In **Kiautha v Ntarangwi (Civil Appeal E050 of 2021) [2022] KEHC 10595 (KLR) (30 June 2022) (Judgment)** the court reduced an award of

Ksh.2,000,000/= to Ksh.800,000/= where the Respondent had sustained bruises on the right upper arm and right shoulder, tender upper back, bruised left foot, tender and swollen right thigh and a mid-shaft femur fracture.

IV. In **Monyoro Mong'are Shem & another v Rose Kebaki [2021] KEHC 6773 (KLR)**, the court reduced the award of Kshs.1,500,000/= to ksh.600,000/=. where the Respondent sustained displaced fracture of the right femur, soft tissue injuries on the neck, soft tissue injuries of the chest, soft tissues injuries of the shoulder joint and soft tissue injuries of the forearms.

34. I have considered the authorities above and the nature of the injuries suffered by the Appellant and I find that the Kshs 600,000/= awarded as general damages by the trial court was fair and commensurate to the injuries suffered by the Respondent. I therefore uphold the award.

35. Regarding special damages, I have looked at the bundle of receipts produced as **P. Exh 5** for medical treatment, **P. Exh 8b** for the Medical Report and **P. Exh 9b** for receipt of motor vehicle records and I agree with the trial court's award of Kshs 50,120/= as special damages. I therefore uphold the award.

36. A prayer for future medical expense is not an ordinary prayer that a court can grant in its discretion but it is a special award that must be pleaded specifically and proved. In the case of **Tracom Limited & another v Hassan Mohamed Adan [2016] KECA 150 (KLR)**, the Court of Appeal stated:

*“...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can*

**award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated: -**

**“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person’s legal right should be pleaded.”**

**We understand that to mean that once the plaintiff pleads that there would be need for**

***further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”***

37. This award was pleaded in the Plaint and was not faulted by either party. It was also supported by the Medical Report of Dr. Morebu Peter Momanyi that was produced as **P. Exh 8a.**

It is my finding therefore that the award of Kshs 200,000/= for future medical expenses was sufficient and reasonable. I therefore uphold the award.

38. The final computation is as below: -

General Damages	Kshs 600,000/=
Add Special Damages	Kshs 51,120/=
Add Future Medical Expenses	Kshs 200,000/=
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	<b>Kshs 851,120/=</b>
Less 60% Contribution	Kshs 510,672/=
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	<b>Kshs 340,448/=</b>

39. In the end, the Memorandum of Appeal dated 1<sup>st</sup> November 2024 is successful. The trial court Judgement dated 28<sup>th</sup> October 2024 is set aside and the Appellant is awarded Kshs

340,448/=. There will be no orders as to costs. Each party to bear its own costs.

**Judgement delivered Virtually, dated and signed  
this 5<sup>th</sup> day of November, 2025.**

.....  
**J.K.NG'ARNG'AR**

**JUDGE**

**Judgement delivered in the presence of;**

**Siele (Court Assistant).**

**Atika for the Appellant**

**Kipyegon for the Respondent**