



REPUBLIC OF KENYA



KENYA LAW
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**Mutunga v King'oo (Civil Appeal E090 of 2023)
[2025] KEHC 17646 (KLR) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E090 OF 2023
KW KIARIE, J
NOVEMBER 28, 2025**

BETWEEN

JOSEPH MUTINDA MUTUNGA APPELLANT

AND

MESHACK WAMBUA KING'OO RESPONDENT

(Being an appeal from the judgment and decree of the Makueni Chief Magistrate's Court, CMCC No. E154 of 2022, by Hon. P.N. Gesora (Chief Magistrate))

JUDGMENT

1. Joseph Mutinda Mutunga, the appellant, was the defendant in Makueni Chief Magistrate's CMCC No. E154 of 2022. He was sued for a claim for general and special damages following a road traffic accident involving his motor vehicle, registration number KCG 282G, and the motorcycle on which the respondent was riding, registration number KMEA 003H. As a result of the accident, the respondent sustained injuries. The learned trial magistrate held the appellant 100% liable and awarded Kshs. 800,000.00 in general damages.
2. The appellant was dissatisfied with the judgment and submitted this appeal through MBLAW Advocates LLP. He raised the following grounds for appeal:
 - a. The learned trial magistrate erred in law and fact by awarding excessive damages and apportioning liability at 100% against the appellant.
 - b. The learned trial magistrate erred in law and in fact by overlooking overwhelming and compelling evidence rendered by the appellant.
 - c. The learned trial magistrate erred in law and in fact in failing to analyze exculpatory matters that were before the court before it arrived at the eventual determination.



- d. The learned trial magistrate erred in law and in fact in reaching a determination that was marred by a series of errors of fact.
 - e. The learned trial magistrate erred in law and in fact by failing to consider the submissions by the defendant. The learned trial magistrate erred in law and in fact by failing to consider the submissions of the defendant.
 - f. The learned trial magistrate erred in law and in fact in failing to consider contributory negligence by the plaintiff, which ultimately led to the said accident.
 - g. The learned trial magistrate erred in law and in fact by reaching a determination that was mainly influenced by bias.
 - h. The learned trial magistrate erred in law and in fact in disregarding the evidence of the appellant on record, hence resulting in a wrong decision.
3. The respondent opposed the appeals through Mutuku Wambua & Muindi Associate Advocates. He argued that the appeal lacked merit.
 4. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.
 5. Liability always depends on evidence of each party's contribution to the accident. The failure by the respondent to comply with section 103B (3) as read with section 103B (7) of the *Traffic Act* Cap. 405 Laws of Kenya cannot be considered contributory negligence in the accident. It had no bearing on the issue of causation.
 6. In the trial court, the respondent argued that as he was about to turn right from the road he was travelling on, the appellant, who was behind him, hit him from behind despite having signalled his intention. This contention was supported by the evidence of CPL Paul Mogesi (PW2). He added that the appellant admitted his mistake and that the police decided to refer the matter to the insurance company. The appellant, in his defence, shifted the blame to the respondent, whom he claimed turned abruptly to the right without indicating. No evidence on record supported his version. I am satisfied that the learned trial magistrate arrived at the correct conclusion on liability.
 7. The appeal on liability is therefore dismissed.
 8. Before an appellate court can intervene in an award of damages, it must be satisfied that a wrong principle of law was applied, irrelevant factors were considered, relevant factors were omitted, or the award is inordinately low or high. These principles were established by the Privy Council in *Nance vs British Columbia Electric Railways Co. Ltd.* [1951] AC 601 on page 613, where it stated:

The principles applicable under this head are not in doubt. Whether the assessment of damages is made by a judge or jury, the appellate court is not justified in replacing the awarded figure with another simply because it would have provided a different amount if it had initially tried the case. Even if the tribunal of first instance was a judge sitting alone, the appellate court must be satisfied that the judge, in determining the damages, applied an incorrect principle of law (such as considering irrelevant factors or omitting relevant ones); or, failing this, that the amount awarded is so inordinately low or high that it constitutes a



wholly erroneous estimate of damages (Flint vs Lovell [1935] 1KB 354), as affirmed by the House of Lords in Davis vs Powell Duffryn Associated Collieries Ltd. [1941] AC 601.

9. The Respondent in his plaint pleaded that he suffered the following injuries:
 - a. Left parietal lacerations;
 - b. Left zygomatic bruises above the left eye;
 - c. Left shoulder lacerations;
 - d. Right hip bruises;
 - e. Bilateral knee lacerations;
 - f. Bilateral big toe lacerations; and
 - g. Fracture of the left maxillary antrum and zygomatic bone.
10. The respondent in the trial court relied on the case of Rwaken Investments Limited vs Isaac Kiproo Chelunyei & another [2016] KLR, where the respondent had sustained the following injuries:
 - a. Major avulsion wounds on the right side of the face;
 - b. Fracture of the right maxilla;
 - c. Fracture of the right orbit;
 - d. Fracture of the right zygoma; and
 - e. Bleeding within the sinus of the right maxilla.
11. For these injuries, the respondent was awarded Kshs. 800,000/= in 2016. These injuries were more severe than those sustained by the respondent in the instant case. The injuries sustained by the respondent in the case of Elizaphen Mokaya Bororngo vs Fredrick Omondi Ouna (2022) eKLR, were as follows:
 - a) Head injury with loss of consciousness
 - b) Fracture of the right zygoma (facial bone)
 - c) Multiple facial lacerations
 - d) Blunt injury to the shoulders
 - e) Blunt injury and bruises to both lower limbs.
12. These injuries closely resemble those sustained by the respondent in the present case. I agree with the appellant that the award was excessive. The award by the learned trial magistrate is set aside and substituted with an award of Kshs. 500,000.00.
13. The appeal on the award therefore succeeds with costs.

DELIVERED AND SIGNED AT MAKUENI, THIS 28TH DAY OF NOVEMBER 2025

KIARIE WAWERU KIARIE

JUDGE

