

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E1010 OF 2023**

**ZAKAYO SITATI WAMBULWA.....APPELLANT**  
**VERSUS**  
**KINGDOM CO-OPERATIVE SAVINGS &**  
**CREDIT SACCO LIMITED..... 1<sup>ST</sup> RESPONDENT**  
**CHARLES ROMBO OLIECH.....2<sup>ND</sup> RESPONDENT**  
**BONFACE MAKWARO MIRIERI.....3<sup>RD</sup> RESPONDENT**

(Appeal from the judgement and decree, of Hon. SA Opande,  
Principal Magistrate, of 31<sup>st</sup> of August, 2023 in Milimani in  
CMCCC No. 1906 of 2019)

**JUDGEMENT**

1. The claim, at the trial court, was by the appellant, against the respondent. The claim arose out of a motor traffic accident, involving the appellant and motor vehicle registration mark and number KCA 658W, owned and controlled by the respondents. The accident allegedly happened on 3<sup>rd</sup> December 2018, along Valley Road, Nairobi, when the motor vehicle hit the appellant as he walked along that road. He sustained injury and damage, and attributed negligence on the respondents.
2. The 1<sup>st</sup> respondent resisted the claim, on the basis that it was just a nominal owner of the motor vehicle, for it had merely facilitated its purchase, and had no control over its management. It, nevertheless, pleaded, in the alternative, that, if an accident happened, then the same was wholly caused by the appellant, or he substantially contributed to it. The 3<sup>rd</sup> respondent also resisted the claim, he denied the allegations made in the plaint, but pleaded, in the alternative, that the accident occurred purely as a result of

negligence on the part of the appellant. The 2<sup>nd</sup> respondent did not file a defence.

3. A hearing was conducted, on 20<sup>th</sup> September 2022. The appellant testified. He said that he was not on the wrong, and blamed the driver of the vehicle. He called a police witness, who produced the police abstract. He described himself as the officer who investigated the accident. He stated that the appellant was on the edge of the road, when he was hit, and that he was standing there, waiting to cross the road.
4. The 1<sup>st</sup> respondent called a witness, who testified that the 1<sup>st</sup> respondent merely financed the purchase of the vehicle. The loan was paid in full, and the security was discharged, and the logbook was released.
5. Judgement was delivered, on 31<sup>st</sup> August 2023. Liability was assessed at 100% against the 3<sup>rd</sup> respondent, while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were exonerated. Kshs. 700,000.00 was awarded as general damages, Kshs. 2,000.00 as special damages, plus, costs and interests. It was directed that the 1<sup>st</sup> respondent would bear its own costs.
6. The appellant was dissatisfied, hence the instant appeal. The same turns on the judgement being wholly against the weight of the evidence; the general damages being manifestly low; the case against the 2<sup>nd</sup> respondent being dismissed despite a subsisting interlocutory judgement; the provisions of Order 10 rule 6 of the Civil Procedure Rules being misinterpreted; making a contradictory finding, in respect of liability, on the part of the 1<sup>st</sup> respondent; not wholly evaluating the evidence on record; and arriving at wrong conclusions.

7. Directions were taken, on 2<sup>nd</sup> May 2025, for disposal of the appeal, by way of written submissions.
8. I have seen submissions, in the record, filed by the appellant, and the 1<sup>st</sup> and 3<sup>rd</sup> respondents.
9. The appellant argues around 3 issues: general damages, the interlocutory judgement against the 2<sup>nd</sup> respondent, and the trial court failing to evaluate the evidence in full. The 1<sup>st</sup> respondent wholly supports the decision by the trial court. The 3<sup>rd</sup> respondent submits on liability, quantum and costs.
10. There are only 2 issues for determination, on liability and quantum.
11. The appellant had sued the 3 respondents, but the trial court only found one of them liable, at 100%. That was the 3<sup>rd</sup> respondent. The 1<sup>st</sup> respondent was exonerated, on the basis that it merely financed the purchase of the accident vehicle. The 2<sup>nd</sup> respondent was exonerated, on the basis that the documents showed the co-owner as Charles Rombo Oliech, while the person sued was Charles Kombo Oliech. The 3<sup>rd</sup> respondent was found liable as he did not call a witness at trial, hence he did not controvert the evidence adduced by the appellant.
12. 3 issues are raised, with respect to liability, and I shall deal with them sequentially.
13. The first is on the liability of the 1<sup>st</sup> respondent. The police abstract did not capture details on ownership, but it indicated that the 3<sup>rd</sup> respondent was driving the motor vehicle at the material time. The 1<sup>st</sup> respondent filed a chattels mortgage, over the accident vehicle, between it and Charles Rombo Oliech, which was in fairly general or vague terms, but it appeared to create a charge over the motor

vehicle, with respect to some undisclosed interest. However, the same would suffice as evidence that the 1<sup>st</sup> respondent was only a nominal owner, who had no control over the management of the subject motor vehicle. There was adequate material upon which the trial court could exonerate it.

14. Regarding the 2<sup>nd</sup> respondent, there is evidence that the summons to enter appearance were properly served, an affidavit of service filed, sworn on 26<sup>th</sup> August 2021, showing service, on a Charles Rombo Oliech. There is also a request for judgement, dated 26<sup>th</sup> August 2021. I have very closely perused the handwritten trial record, as well as the record of appeal, and I have seen no evidence of entry of interlocutory judgement against the 2<sup>nd</sup> respondent. Nevertheless, in the judgement, the trial court found and held that an interlocutory judgement had been entered against the 2<sup>nd</sup> respondent. It handled the matter, and it was better placed to pass judgement on that.
15. The issue, then, is whether, having entered interlocutory judgement against the 2<sup>nd</sup> respondent, the court could, after the oral hearing, in which the 2<sup>nd</sup> respondent was not a party, revise the interlocutory judgement against him, and substitute it with a finding and holding that he was not liable.
16. I do not think the court can and should do so. The interlocutory judgement settles the question of liability. The hearing conducted, thereafter, is only for the purpose of the quantum of damages. It only serves the purpose of placing material on record to assist the court with assessment of damages. It is not meant to provide material for assessment of liability, for that issue is resolved, with finality, once interlocutory judgement is entered.

17. If the claim is for a liquidated amount, under Order 10 rule 4 of the Civil Procedure Rules, there would be no need for a formal hearing, given that the issues of liability and quantum would have been settled. There would be a final judgement. Where the claim is unliquidated, the settlement of the 2 issues, that is liability and quantum, would be separated, so that liability would be settled upon entry of the interim or interlocutory judgement, to await assessment of damages, in respect of which an oral hearing is conducted, followed by a final judgement, under Order 10 rule 6 of the Civil Procedure Rules. The judgement, under Order 10 rule 4 of the Civil Procedure Rules is final, for it settles both liability and quantum, while that under Order 10 rule 10 of the Civil Procedure Rules is interim or interlocutory, for it only settles liability, leaving the issue of quantum to be settled later, after some evidence has been adduced or placed on record, to settle it.
18. In view of the foregoing, there cannot be a re-visiting of the interlocutory judgement, made under Order 10 rule 6 of the Civil Procedure Rules, so as to determine liability, for the evidence tendered, at that stage, is not meant for that purpose, but for the purpose of settling quantum.
19. Secondly, the trial court did not have an application, by Charles Rombo Oliech, or Charles Kombo Oliech, to set aside the interim judgement. The trial, that led up to the judgement of 31<sup>st</sup> August 2023, did not involve the 2<sup>nd</sup> respondent. The said 2<sup>nd</sup> respondent did not lead or adduce any evidence which would have justified the re-visiting of the interlocutory judgement. Consequently, there was no basis for the trial court making a determination of the matter of the 2<sup>nd</sup> respondent, having entered judgement or liability against him. He should not have been exonerated.

20. The 3<sup>rd</sup> respondent argues that an interlocutory judgement had been entered against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and, after that, the trial court ought not have entered liability against him. I do not quite follow this argument. There was only 1 accident motor vehicle, which was allegedly driven by the 3<sup>rd</sup> respondent, but owned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. If those facts were true, and the trial court was persuaded that they were, that the 1<sup>st</sup> and 2<sup>nd</sup> respondents owned the vehicle, while the 3<sup>rd</sup> respondent was its driver, when the accident happened, then the issue of apportionment of liability, as between the 3 respondents would not arise. They would be jointly liable. Their liability would be joint and indivisible. That then meant that, if default judgement, on liability, was entered against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, that would not absolve the 3<sup>rd</sup> respondent of liability, if anything, it would have complicated his case, for the appellant would only be required to establish their connection with the 3<sup>rd</sup> respondent, to make him jointly liable with them. There was perfectly nothing wrong with how the trial court handled that aspect of the matter.

21. Was the 3<sup>rd</sup> respondent 100% liable? The evidence pointed to that. His name was captured in the police abstract, as the driver of the accident vehicle. PW2, the police officer, who investigated the matter, mentioned him as the driver of the offending vehicle. The 3<sup>rd</sup> respondent did not testify at the trial, to establish that he was not the driver of the said vehicle at that time, nor to distance himself from the other respondents.

22. On the issue of liability, the trial court cannot be faulted, for finding and holding that the 1<sup>st</sup> respondent was not liable, but the 3<sup>rd</sup> respondent was. However, the court went wrong, on the matter of the liability of the 2<sup>nd</sup> respondent.

23. On quantum, the trial court awarded general damages at Kshs. 700,000.00. The appellant had sustained a right proximal lateral tibia condyle fracture, with 20% permanent disability, according to Dr. Okere. The court was guided by *Naom Momanyi vs. G4S Security Services Kenya Limited & Another* [2018] eKLR [2018] KEHC 6218 (KLR) (Majanja, J), where Kshs. 300,000.00 was awarded for a comparable injury.
24. The appellant argues that he should have been awarded Kshs. 2,000,000.00. He cites *Porim Insurance Brokers Ltd vs. Patrick Rugendo Mugambi* [2021] eKLR (Chepkwony, J), where Kshs. 1,600,000.00 was awarded, for a fracture of the right tibia, left femur, pro lapse vertebrate C6, head injury and blunt injuries to the neck, right shoulder and a cut on the knee, with 16% permanent disability. He also cites *Kimathi Muturi Donald vs. Kevin Ochieng Aseso* [2021] eKLR (Chitembwe, J), where Kshs. 1,200,000.00 was awarded, for a fracture of the upper right tibia and a fracture of the floor of the left hip joint, with 20% disability.
25. The injuries, in the cases cited above, were a lot more serious, for they involved several fractures of different bones. Yet, in the instant case, there was only 1 fracture of the condyle of the right tibia.
26. The 1<sup>st</sup> respondent did not submit on quantum. The 3<sup>rd</sup> respondent submitted that the award of Kshs. 700,000.00 was inordinately high, yet, he did not cross-appeal, to challenge the award. He cites *Kenya Steel Fabricators Ltd vs. Tom Moki* [2018] eKLR (Mwongo, J), where Kshs. 270,000.00 was awarded for a fracture of the distal phalanx of the left index finger. Quite obviously the injury suffered, in the above case, was completely dissimilar to that in the instant

case, for it involved an injury to the index finger, and the said decision can be of no value to the instant case.

27. I have reviewed a number of decisions, relating to a fracture of the condyle of the right tibia, with 20% disability. I have been unable to find any decisions turning on a single fracture of the condyle of the tibia, with 20% permanent disability. I have only managed to come across comparable injuries.
28. In *Boujoule Kenya Limited vs. John Njoroge Kiumu* [2020] KEHC 7906 (KLR) (Mwongo, J), the injuries sustained were a compound comminuted fracture of the right tibia/fibula, and Kshs. 750,000.00, general damages, was awarded. In *Batti vs. Katana* [2023] KEHC 21300 (KLR) (S Githinji, J), there were fractures of the right leg and the left hand, plus soft tissue injuries, and Kshs. 1,000,000.00 was awarded, in general damages. In *Universe Freight Services Limited vs. Ndwiga* [2025] KEHC 17991 (KLR) (Ngaah, J), the injuries were a compound fracture of the midshaft of the tibia/fibula, plus soft tissue injuries, and Kshs. 1,000,000.00 was awarded, in general damages.
29. In *Aluku vs. Kariuki & another* [2024] KEHC 12096 (KLR) (Rutto, J), the injuries were to the soft tissues, with a fracture of the right tibia, and Kshs. 500,000.00, general damages, was awarded. In *Igoki vs. Kanini* [2023] KEHC 20715 (KLR) (Gitari, J), the claimant had sustained a fracture of the right tibia bone, with no mention of the degree of permanent disability, and an award of Kshs. 300,000.00 was made. In *Veew Distributors & another vs. Okeyo* [2025] KEHC 9127 (KLR) (Ongeri, J), the injuries were a fractured left tibia, swelling, and bruises, with no mention of the degree of disability.

30. The injuries sustained by the appellant were close to those sustained in these decisions, if not a little less severe, for those documented in paragraph 28 hereabove, and a little more severe than those in paragraph 29. It would appear, to me, that the award made by the trial court was within acceptable range.

31. The final orders are:

- a) **On liability, the decision in favour of the 2<sup>nd</sup> respondent, in the impugned final judgement, is hereby set aside, but the default judgement, against the said 2<sup>nd</sup> respondent, on liability, shall remain in place;**
- b) **On general damages, the decision of the trial court is hereby upheld; and**
- c) **On costs, the appellant shall have the costs of the appeal.**

32. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN  
CHAMBERS, AT BUSIA, ON THIS 15<sup>TH</sup> DAY OF DECEMBER  
2025.**

**WM MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant, Busia.**

**Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.**

**Advocates**

**Ms. Matunda, instructed by Matunda Mutemi & Company,  
Advocates for the appellant.**

**Mr. Gikonyo, instructed by J. Ngaii Gikonyo & Company,  
Advocates for the 1<sup>st</sup> respondent.**

**Mr. Muriithi, instructed by Waruhiu K'Owade & Ng'ang'a,  
Advocates for the 3<sup>rd</sup> respondent.**