

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. E314 OF 2023

GEOFFREY MUTHIANI
MUTUAAPPELLANT

VERUS

GODFREY ODHIAMBO ONGINJO
RESPONDENT

(Being an appeal from the judgment delivered by Hon. R.W
Gitau (SRM) delivered on 21st November 2023 in Mavoko
CMCC No. E519 of 2023)

JUDGMENT

1. This appeal challenges both liability and quantum. In the trial court, the Appellant sued the Respondent seeking general damages, special damages of Kshs.106,750/= arising from a road traffic accident that occurred on 12th May 2022 along the Nairobi-Mombasa Namanga Road from Kitengela towards Tuffoam Area at Shalom area near Texas Petrol Station. According to the Plaintiff, the Appellant was sued as the registered and beneficial owner of motor vehicle registration number KCG 641M Isuzu Lorry/Truck. At the time of the accident, the Respondent was riding motorcycle registration number KMFV 755N.

2. It was alleged that the Appellant's motor vehicle was being driven negligently, carelessly and recklessly while attempting to join the main road from the petrol station, thereby ramming into the Respondent's motorcycle. As a result of the collision, the Respondent sustained serious bodily injuries.
3. In its defence, the Respondent, denied the claim, and the matter proceeded to full hearing. Upon conclusion, the trial court found the Appellant wholly (100%) liable for the occurrence of the accident and awarded the Respondent general damages of Kshs.450, 000/= , special damages of Kshs.6, 550/= and future medical expense of Kshs.65, 000/=.
4. Aggrieved by the Judgment of the trial court, the Appellant filed this appeal citing the several grounds that the Learned trial Magistrate proceeded to write the judgment with a predetermined conclusion on who was to be blamed for the accident without first evaluating the evidence on record; failing to appreciate the circumstances under which the accident occurred as well as the evidence on record to the extent of apportioning 100% liability in favour of the Respondent; failing to appreciate the evidence on record especially the police abstract which indicated that the matter was pending under investigation to the extent of apportioning 100% liability in favour of the Respondent; failing to analyse all the relevant evidence availed at the trial on the award of general damages particularly on the pain and suffering;

failing to appreciate the appellant's contentions and arguments; failing to appreciate the law on special damages that the same must be strictly proved and proceeded to make awards based on presumptions; awarding general damages to the Respondent that were manifestly excessive in the circumstance and thus failed to appreciate the principles applicable in the award of damages; assessing damages and failed to apply the principle applicable in award of damages of comparable awards made for analogous injuries and failed to consider the authorities cited by the Appellant on issue of damages; misdirected himself by considering erroneous facts, evidence and judicial authorities hence reached a wrong conclusion of fact on liability and law on general damages.

5. The Appellant therefore prayed that the trial court's judgment be set aside or varied, liability be reassessed and apportioned appropriately, and damages be reassessed and appeal be allowed with costs.
6. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 16th December 2024 and the Respondent's submissions is dated 18th December 2024.

Appellant's Submissions

7. The Appellant commenced his submissions by outlining a brief background of the matter and identifying the key issue for determination as; whether the appeal should be

allowed and the judgment of the trial court set aside, quashed, and substituted with appropriate orders of this Court.

8. On the issue of liability, the Appellant argued that the police abstract produced by PW1 indicated that the matter was still under investigation. He further submitted that PW3's testimony revealed that he saw the Appellant's motor vehicle joining the highway and conceded that the Appellant had done nothing wrong to avoid the accident. The Appellant maintained that no party was expressly blamed for the accident and that, since both were road users under a duty to exercise reasonable care, fairness and justice require that liability be apportioned equally. In support he relied on the decisions in **Anne Wambui Nderitu (Suing as Administrator of the Estate of George Nderitu Kuria) v Joseph Jiprono Ropkoi & Four by Four Safaris Co. Ltd and Silvester Muema Musyoka v Anna Kamanthe Nyamai & Another [2021] eKLR**. He urged this Court to find that liability ought to be apportioned in the ratio of 80:20, contending that the Respondent should have exercised greater caution and that his alleged carelessness was the primary cause of the accident.
9. On quantum, the Appellant submitted that the award of general damages was excessive in the circumstances. He argued that the trial court failed to properly evaluate the

evidence tendered and disregarded the Appellant's submissions on the appropriate range of damages.

10. In respect of general damages, the appellant noted that the Respondent relied on a medical report dated 2nd June 2022 which indicated that he had sustained blunt injuries to the right lower limb and a fractured proximal right tibia. While citing **Harun Momanyi v G4S Security Services Kenya Limited & Another [2018] eKLR**, the Appellant argued that an award of Kshs 300,000 would be sufficient compensation under this head.
11. Regarding special damages, the Appellant invoked the authority of **Hahn v Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716**, where the Court of Appeal held that a plaintiff must strictly prove special damages and that any item not specifically supported by evidence must fail. The Appellant noted that the Respondent pleaded special damages comprising: a medical report (Kshs.3,000), medical expenses (Kshs.3,000), future medical expenses (Kshs.100,000), a police abstract (Kshs 200), and a motor vehicle search (Kshs.550). He argued that the receipts produced for the medical report and the medical expenses did not bear evidence of payment of stamp duty as required under Sections 19 and 20 of the Stamp Duty Act and therefore ought not to be considered. Consequently, the Appellant submitted that only the sum of Kshs 550 for the motor vehicle search was strictly proved.

12. In conclusion, the Appellant urged that the Respondent should only be awarded general damages of Kshs.300,000 and special damages of Kshs.550, less the proposed 20% contributory liability, amounting to a total of Kshs.240,440.

Respondent's Submissions

13. The Respondent commenced his submissions by providing a brief background of the proceedings before the trial court, after which he addressed the two issues in dispute liability and quantum.

14. On the question of liability, the Respondent submitted that he testified on oath and gave a detailed account of how the accident occurred. He stated that on 12th May 2022 at around 1300 hours, he was lawfully riding Motorcycle Registration Number KMF7 755N(Boxer) along the Nairobi-Namanga Road at Shalom Area near the Texas Petrol Station when the Appellant, while attempting to join the main road, recklessly and violently rammed into his motorcycle head-on. This collision caused the accident and resulted in him sustaining serious injuries. The Respondent further submitted that he called PW1, a police officer attached to the Athi River Police Station Traffic Department, who confirmed the occurrence of the accident and produced the police abstract. PW1 testified that the Appellant's motor vehicle was travelling towards the Namanga direction and improperly attempted to overtake, thereby,

colliding with the Respondent. PW1 also indicated that the Appellant was to blame for the accident. The Respondent added that DW1, during cross-examination, admitted that he was not present when the accident occurred and only visited the scene afterwards, conceding that his driver had been blamed for the accident. Accordingly, the Respondent argued that the Appellant failed to provide any sufficient or satisfactory explanation to exonerate his driver.

15. The Respondent further submitted that the Appellant's testimony during trial amounted to an admission of liability. He contended that the Appellant failed to present a coherent or credible version of how the accident occurred, and therefore liability could not shift to the Respondent. Invoking the doctrine of *res ipsa loquitur* and relying on **Mary Ambeva Kadiri (Suing as the Administratrix of the Estate of Saleh Juma Kiri (Deceased)) v Country Motor Limited [2017] eKLR** and **Mary Njeri Murigi v Peter Macharia & Another [2016] eKLR**, the Respondent urged the Court to hold that the Appellant was fully liable.

16. On quantum, the Respondent submitted that the Appellant did not meaningfully dispute the damages awarded by the trial court and therefore prayed that the award be upheld in its entirety.

Analysis and Determination

17. This being a first appeal, this court is under a duty to re-evaluate and reassess the evidence and draw its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of **Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424**).
18. Upon careful analysis of the record of appeal and the submissions the following issues arise for determination:
- a. Whether the issue of liability was properly determined;**
 - b. Whether the Trial Magistrate misdirected herself in assessment of damages.**

Whether the issue of liability was properly determined

19. The Appellant's main contention is that the learned trial magistrate failed to appreciate the circumstances under which the accident occurred, failed to evaluate the evidence and wrongly found him wholly to blame for the accident.
20. The burden of proof as per Section 107 (1), 109 and 112 of the Evidence Act, Cap 80 Laws of Kenya outlines as;
- “Whoever desires any court to give judgment as to any legal right or liability dependant on the**

existence of facts which he asserts must prove that those facts exist.”

21. In this appeal, the dispute is simply over who was to blame for the accident. The scope and extent of the fundamental legal principles on this subject are settled. In the cases of **Nandwa v Kenya Kazi Ltd [1988] KLR 488** and **Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR** the Courts on this issue held that:

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff’s favour unless the defendant provides same answer adequate to displace that inference.”

22. In examining the evidence presented before the trial magistrate, the Respondent testified as PW3 that he was riding from Kitengela when the Appellant’s Motor Vehicle emerged from Texas Petrol Station and, while joining the Highway struck him head-on. On cross examination, he stated that the accident was unavoidable and that there was no way he could have evaded the collision.

23. Conversely, the Appellant (DW1), testified that he is the owner of motor vehicle KCG 641M. On cross

examination, he admitted he arrived at the scene only after the accident had occurred, having been called by his driver. He did not witness the occurrence of the accident but his driver reported the accident at the police station and he was present when the OB was filled. He further testified that the police visited the scene of accident and that he was aware that his driver has been blamed for the accident.

24. After analyzing the evidence of the parties, the honourable magistrate found that the Appellant was 100% to blame for the occurrence of the accident. The trial court in the judgment observed;

“On the second issue, the manner in which the accident occurred is not disputed. DW1’s-1s evidence does not support how the accident occurred at best it can only be termed as hearsay evidence as he visited the scene after the accident. According to the Plaintiff, the motor vehicle had come from Texas Petrol station and was joining the highway, the driver failed to give way and hit him in the process. Failing to give way is a clear indication that the Defendant’s driver was negligent and he abrogated his duty of care to other road users and in particular the Plaintiff, I thus find the Defendant 100% liable for the occurrence of the accident”

25. The central factual dispute in this appeal is who bore responsibility for the collision that occurred on 12th May 2022. The trial court found the Appellant wholly responsible. The Appellant contends that the learned

magistrate failed to properly evaluate the evidence, misapplied the burden of proof and ought to have apportioned liability between the parties. The Respondent maintains that the trial court correctly found the Appellant wholly liable.

26. Turning to the evidence, the Respondent (PW3) gave direct testimony that he was lawfully riding his motorcycle when the Appellant's motor vehicle came from the Texas Petrol Station and was joining the highway; struck him head-on. He stated that he could not avoid the collision. The police abstract confirms that the accident was reported. PW1 (a police traffic officer) corroborated the respondent's accounts and produced the abstract. By contrast, the Appellant's evidence was that he did not witness the accident, arrived after the event and relied on his driver's report. On cross-examination, he conceded that his driver had been blamed. That concession is significant. Where the owner's testimony is hearsay and does not rebut direct eyewitnesses and police evidence, an appellate court must exercise caution before disturbing the trial court's findings.

27. The trial magistrate specifically found that the manner of occurrence was not disputed and that the Appellant's evidence was largely hearsay. The Respondent's evidence that the Appellant's vehicle was joining the highway and failed to give way establishes a prima facie case of negligence on the part of the vehicle joining the highway.

The Appellant did not call the driver to testify, nor did he produce independent evidence to contradict the respondent's account or to adequately displace the inference of negligence.

28. The Appellant relied on authorities supporting apportionment where both parties contributed to the accident. Apportionment is appropriate only where the evidence establishes that the claimant himself was partly to blame. In this case PW3's testimony was that the collision was head-on and that there was no realistic avenue for avoidance; nothing in the record demonstrates that the Respondent was riding in an unlawful or reckless fashion which materially contributed to the crash.

29. Given those facts, the trial Magistrate did not err in law and in fact in finding the Appellant 100% liable for the accident. Accordingly, the finding of liability by the trial court is upheld.

Whether the Trial Magistrate misdirected herself in assessment of damages.

30. The trial court awarded Kshs.450,000/= as general damages for pain, suffering and loss of amenities and Kshs.6,550/= as special damages. The Appellant contends that the award of general damages was excessive and that special damages were not strictly proved. He urged that general damages of Kshs.300,000/= would be appropriate and maintained

that only the sum of Kshs 550/= for the motor vehicle search fee was strictly proved under special damages. The Respondent did not actively dispute the quantum on appeal.

31. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR** held that -

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

32. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR** the court stated:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See *Butler vs Butler (1984) KLR 225*.

The assessment of damages in personal injury case by court is guided by the following principles: -

- 1) **An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.**
- 2) **The award should be commensurable with the injuries sustained.**
- 3) **Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.**
- 4) **Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.**
- 5) **The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR.)**

33. It is not in dispute based on the medical report produced by PW2 dated 2nd June 2022 that the Respondent sustained the following injuries, fractured proximal right tibia bone and blunt injuries to the lower limb. The doctor categorised the injuries as grievous harm and also stated that the Respondent required between Kshs.65, 000/= to Kshs.100, 000/= for removal of implants.

34. In making its determination, the trial court relied on two authorities that is **Samuel Mugo Kinyanjui & Another versus Kairo Thuo [2017] eKLR** and the case of **Hernart Otara Marube versus Dulkan Ochora [2022] eKLR**. The trial court also considered inflationary trends and the nature of injuries sustained.

In these circumstances, I find no reason to disturb the award of general damages.

35. On special damages, the settled principle is that special damages must be strictly proved. The receipts for the medical report and medical expenses were contested on technical grounds. However, these objections did not disprove the actual costs incurred. The motor vehicle search fee of Kshs.550/= was not disputed. Accordingly, I find that the special damages awarded were properly proved, and I will not interfere with the trial court's finding.

36. In conclusion, this appeal is without merit and is hereby dismissed. The judgment of the trial court is upheld in their entirety.

37. The Appellant shall bear the costs of this appeal assessed at kshs.35,000/=

Orders accordingly.

Dated, signed and delivered at Machakos this 29th day of January, 2026.

RHODA RUTTO
JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

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