

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E023 OF 2024

OSCAR MULI KITHUKA.....1ST
APPELLANT

URBANUS MUNYAU.....2ND APPELLANT

VERSUS

CAROLINE KERUBO OSORO.....1ST
RESPONDENT

COLLINS OWUOR.....2ND RESPONDENT

**(Appeal from the judgement and decree, Hon. H Mwangi,
Principal Magistrate, PM, of 8th December 2023, in Milimani
CMCCC No. 2314 of 2019)**

JUDGEMENT

1. The suit, at the primary court, was by the respondents. It arose out of road traffic accident, on 24th July 2018, along the Eastern Bypass, Nairobi. The respondent was travelling in a vehicle registration mark and number KAX 486R, when it collided with a motor vehicle registration mark and number KBT 957X. She was injured in the accident, and attributed negligence on the appellant. The suit was compensation.
2. The appellants resisted the claim, in a joint defence. They denied everything pleaded in the plaint, and attributed negligence on the driver of KAX 486R, which had collided KBT 957X, and on the respondent. Third party proceedings were taken out, by the appellants, to join Douglas Kagwaini Kimani, the owner of motor vehicle KAX 486R, as such. The joinder of the third party was allowed, on 4th June 2021.
3. A trial was conducted, the respondent testified on her part; while the appellants called 2 witnesses. A judgment was

delivered, on 8th December 2023. Liability was assessed at 70:30, against the appellants and the third party. General damages were assessed at Kshs. 800,000.00, future medical expenses at Kshs. 150,000.00 and specials at Kshs. 3,550,000.00, with costs and interests.

4. The appellants, who were the defendants, at trial, were aggrieved, hence they filed the appeal herein. The grounds are that the court ought to have found the third party wholly liable; their submissions were not considered; and the award of Kshs. 800,000.00 was manifestly high, and so was that of Kshs. 150,000.00.
5. The appeal was canvassed by way of written submissions, filed by both sides. I have read the submissions, and noted the arguments made.
6. The appeal turns on 2 issues, liability and quantum.
7. The grounds on quantum of damages are not clear. They refer to the award of Kshs. 800,000.00 as of general damages, and that of Kshs. 150,000.00 as for pain and suffering. It is alleged that the sum of Kshs. 800,000.00 was not proved, well the respondent was not obliged to prove it. She did not claim an award in that figure. It was up to the court assess it, for she had claimed general damages for pain and suffering. The award was an assessment by the court, which the respondent did not have to prove. The award of Kshs. 150,000.00 was not for pain and suffering, but future medical expenses. It is argued that it was high, but an award for future medical expenses is not at discretion of the court. It is not assessed by the courts, but subject to proof by the parties. It is dependent on the opinion of the doctors. It is not up to the court to determine or assess whether the future medical expenses are high or not, as everything would depend on the opinion of the doctors.

8. The pleadings on the award of damages are muddled up and imprecise. Parties are bound by their pleadings. Pleadings ought to be concise and precise, leaving no uncertainty. It should not be left to the court to speculate on what the parties have pleaded. Consequently, as the pleadings on damages are imprecise, I shall not determine the issues around them, as I am not clear on what is pleaded. I shall confine myself to the appeal on liability.
9. The collision happened between 2 vehicles, one belonging to the appellants and the other belonging to the third party, who was joined or added to the proceedings at the trial. The respondent was a passenger in the vehicle belonging to the third party. The third party did not file pleading, but appeared at trial through an Advocate. At trial the collision was contested. The 1st appellant testified, and confirmed it, but passed blame to the third party. The trial court held that, as the 1st appellant's vehicle was the one joining the main road, from a minor road, its driver ought to have given way, and, therefore, the driver of that vehicle bore greater responsibility, hence liability was apportioned between the appellants and the third party, with a greater portion being borne by the appellants.
10. The appellants complain that, as the third party did not file pleadings, then judgment, on liability, should have been entered against it. The appellants were entitled to seek judgment against the third party, in default of a response to the suit, by the third party, upon being added or joined as such. Instead of seeking and obtaining a default judgment, against the third party, the appellants chose, at the trial, to lead or adduce evidence against the third party, as if the said third party had filed a response. The evidence, that the appellants tendered, exposed negligence on their part, and it was appropriately apportioned by the trial court. I see no

fault on the part of the court. It would have been different, if a default judgment had been obtained against the third party.

11. I am not persuaded that there is merit, in the appeal herein, for the reasons given above, and I do hereby dismiss the same with costs, to the respondent. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT BUSIA ON THIS 9TH DAY OF FEBRUARY
2026.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Maurice Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Mr. Righa, instructed by SM Righa & Company, Advocates for the appellants.

Mr. Kisiang'ani, instructed by Waiganjo Wachira & Company, Advocates for the respondent.