

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KILGORIS

CIVIL APPEAL NO. E012 OF 2024

(CORAM: HON. CHARLES KARIUKI – J)

CHARLES GATHONGO KAGUU.....1ST APPELLANT

WAMBUGU VETFARM LIMITED.....2ND APPELLANT

-VERSUS-

ERICK NYANGARESI.....RESPONDENT

(Being an appeal against the Judgment and Decree of the Chief Magistrate’s Court at

Kilgoris delivered on 28th June 2024 in Kilgoris CMCC No. E043 of 2022 by

Hon. W.C. Waswa – Senior Resident Magistrate)

BETWEEN

ERICK NYANGARESI.....PLAINTIFF

-VERSUS-

CHARLES GATHONOGO KAGUU.....1ST DEFENDANT

WAMBUGU VETFARM LIMITED.....2ND DEFENDANT

JUDGMENT

1. This appeal arises from the judgment in CMCC No. 43 of 2022, in which the trial court found the Appellant 100% liable to the Plaintiff/Respondent.

a. General damages awarded Kshs. 500,000/=

b. Future medical expenses Kshs. 200,000/=

c. Special damages Kshs. 12,630/=

d. TOTAL Kshs. 712,630/=

2. Aggrieved by the verdict, the Appellant filed an appeal, initially raising four grounds, which have been consolidated into two principal issues.

i. Whether the trial magistrate erred in law and fact in determining liability.

- ii. **Whether the trial magistrate erred in the assessment of the quantum of damages.**
 - iii. **The trial court did not adhere to established parameters and precedents in the assessment of damages.**
 - iv. **Costs.**
3. The parties were directed to address the appeal through written submissions.
 4. **Appellant Submissions:**

It is the Appellant's case that since the Respondent did not call any eyewitness to testify as to the circumstances of the accident herein, the only credible witness the court has is the driver, Gilbert Mwangi. The driver did not dispute that the accident occurred; however, he testified that it did not occur as alleged by the police and the Respondent. The assumption or allegation that the Appellant was liable for the accident was never proved, as neither the Respondent nor the police witnessed the accident. No investigation report was produced by the police to state otherwise or support the allegation that the accident occurred beside the road. "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, reliance is made on Section 107 (1) and (2) of the Evidence Act Cap. 80. *Obure v Agyo & another (Suing as the legal representatives and administrators of the Estate of Edina Osebe Ondari – Deceased) [2024] KEHC 2841 (KLR)*, stated *Lucy Muthoni Munene vs. Kenneth Muchange & another, Nairobi HCC 858 of 1988*

5. It is submitted that the Respondent's suit should be dismissed with costs, as insufficient evidence was presented to establish the Appellant's liability for the accident. The court is urged to find that the Respondent did not prove the case on a balance of probabilities and to dismiss the suit, given the failure to establish the alleged particulars of negligence as pleaded.
6. It is the Appellant's submission that in an action for negligence, the burden of proof falls against the Respondent, alleging to establish each element of tort, it is for the Respondent to adduce evidence of facts on which she bases her claim.
7. *Given the contradictory evidence presented by both parties regarding the circumstances of the accident, it is submitted that the trial court ought to have*

considered recent precedents addressing cases where causation could not be established, including *Vitalis Juma Odera v Sinohydro Company Limited [2017] eKLR*, *Statpack Industries v James Mbithi Munyao NBI HCCA No. 152 of 2003 [2005] eKLR*, *Kenyatta University v Isaac Karumba Nyuthe [2014] eKLR*, *Stapley v Gypsum Mines Ltd (1953) A.C. 663*, and *Michael Hubert Koss & Another v David Seroney & 5 Others (2009) eKLR*.

8. The police abstract produced by the Respondent's witness indicates that investigations into the accident remain pending. The abstract does not attribute blame to the Appellant or clarify the circumstances of the accident, as no police investigation or report was presented before the trial court to establish the Appellant's liability. Consequently, the trial court erred in fact and law by relying on facts contrary to the evidence on record to find the Appellant fully liable.
9. The court is urged that should it be persuaded to hold otherwise, that it be guided by the case of *Karanja – Vs – Malele (1983) KLR 142 and Berkeley Steward Ltd, David Coltel & Jean Susan Colten - Vs – Lewis Kimani Waiyaki [1982-88] 1KAR 101-108 Kenyatta University v Isaac Karumba Nyuthe (Supra)* and In *Peter Okello Omedi v Clement Ochieng (2006) eKLR*, that *where there is no crucial evidence on who was to blame between the two parties, both should be held equally to blame.*
10. The Respondent's witnesses confirmed under oath that they did not witness the accident. As a result, the Respondent's evidence constituted hearsay and could not assist the court. The Appellant therefore seeks to have the trial court's finding of 100% liability set aside and replaced with an apportionment of liability at 50% to each party.
11. **Whether the trial magistrate erred in law and in fact on the assessment of quantum of general damages by failing to follow and uphold legal parameters and binding precedents on the assessment of general damages under similar circumstances.**
12. The Respondent alleged to have suffered the following injuries;
 - **Left radius fracture;**
 - **Left ulna fracture;**
 - **Abrasions on the right forearm.**
 - **Bruises on the right knee; and**

- **Deep cut wounds on the frontal region of the head.**

From the evidence on record, the medical report by Dr. Nyameino outlined the alleged injuries and assessed permanent disability at 20%. Further, the Appellant produced the medical report prepared by Dr. Malik, which indicated that the Respondent herein suffered total incapacity for a period of three months, followed by a partial incapacity of a permanent nature, then further awarded him 2% permanent disability.

13. The Appellant refers to the case of **Duncan Kimathi Karagania v Ngugi David & 3 others (2016) eKLR**, the Honorable Court, while emphasizing the above position at par 35 of the judgment cited with approval the case of **Nancy Oseko v BOG Maasai Girls High School (2011) eKLR**. The Appellant is guided by the case of **Kamaliki v Paul (Civil Appeal E004 of 2021) [2023] KEHC 2540**, where the Respondent had fractures on the arm + deep cut wound on the chin. The court reduced a trial award of Kshs. 850,000 to Kshs. 650,000, finding it excessive and not aligned with comparable authorities.
14. In **Osebe v Njoroge (Civil Appeal E408 of 2023) [2024] KEHC 9654**, the Respondent suffered a fracture of the left distal radius and ulna and 10% permanent disability. The trial court awarded Kshs. The appellate court upheld \$550,000 as reasonable for a single but significant injury.
15. The Appellant pray the Appellant requests that the trial court's finding of 100% liability be set aside and that the Respondent's suit be dismissed with costs. Alternatively, should the court find otherwise, the Appellant submits that liability should be apportioned equally between the parties and damages awarded at Kshs. 500,000/=.
16. The Respondent submits that the trial court's finding on liability accurately reflects the probative value of the evidence presented. The Respondent's pleaded injuries were confirmed by the evidence on record – including medical reports that confirmed the pleaded fractures; The trial court's award of general damages constituted just and fair compensation for the Respondent's injuries.
17. The award is not only commensurate with the nature of injuries suffered by the Respondent but also manifestly consistent with precedent awards made in similar cases.

18. Whether the trial court's finding on liability is sound in principle and evidence.

The accident involved the Appellant's motor vehicle (Reg. No.: KCY 150 X) and a motorcycle (Reg. No.: KMES 839 U), which was being ridden by the Respondent. The *Kenya Highway Code* instructs as follows regarding the conduct of motorists when overtaking- The motor vehicle and the motorcycle were headed in the same direction – this is not denied; The accident in question occurred at a sharp bend – this is equally not denied. Two witness accounts on record – including independent police evidence, clearly confirm that the accident was occasioned as a result of an attempt by the Appellant's driver to recklessly overtake.

19. Indeed, the police preferred charges of reckless driving against the Appellant's driver.

'PW1's testimony; That on or about 28.01.2022, at around 1845h, he was riding motor cycle (Reg, No. KMES 839 U) along KILGORIS-POROKO Road; Upon reaching POROKO Area a motor vehicle (Reg. No. KCY 150 X) came to his trail; He could see from his side-mirror that the same was approaching at a very high speed; They had reached a sharp corner when the motor vehicle steered off its left lane into the opposite lane to his right in a bid to overtake his motor cycle; The motor vehicle was in the course of accelerating to complete the overtake when it all of a sudden abruptly swerved back to its left directly into the motor cycle's path and way; The motor cycle violently rammed into the said motor vehicle with a very brutal impact and he was thrown crushing off the road;

20. From the police officer's testimony as 'PW11; That the said accident indeed occurred on 28.01.2022 at around 1840h; That the accident involved motor vehicle (Reg. No. KCY 150 X) and motor cycle (Reg. No. KMES 839 U) which was being ridden by the Respondent herein; That the accident occurred when the motor vehicle tried to overtake the motor cycle at a bend and in the process pushed off the motor cycle; The Appellant's arguments that the Respondent's witnesses did not witness the accident are untrue and misleading – the Respondent was directly involved in the accident; the police did visit the scene;

21. The Appellant's driver's account that it is the Respondent that was attempting to overtake the motor vehicle from the left-hand side are at the least absurd, and were clearly not corroborated by any independent witness accounts; It is also worth highlighting that the Appellant's driver (DW1) despite claiming to be a licensed driver did not tender a single piece of evidence in proof the same – which raises substantial

and unanswered questions as to whether 'DW1' was at all a licensed driver as at the time of the accident.

22. It was the legal and evidential burden of 'DW1' to prove that he was at least a licensed driver, which burden he did not even attempt to discharge; Not a single piece of document or copy thereof was listed or adduced to prove that 'DW1' is a licensed driver; The Defendant's case consists solely of unsubstantiated statements by 'DW1', with no material evidence provided. No explanation was offered for the absence of proof of driving qualifications by 'DW1'.
23. It is probable that DW1 was not a licensed driver, which likely contributed to the recklessness and lack of reasonable care demonstrated in attempting to overtake the Respondent's motorcycle. The appellant's driver caused the accident as a result of recklessly overtaking, as narrated by the Respondent, which is a fact that is wholly corroborated by the police officer who gave testimony.
24. **Whether the trial court based its general damages award on correct principles and considerations.**
25. The nature of injuries sustained by the Respondent was as follows:
 - **Left radius fracture;**
 - **Left ulna fracture;**
 - **Abrasions on the right forearm.**
 - **Bruises on the right knee;**
 - **Deep cut wounds on the frontal region of the head;**
26. **Reference to Catholic Diocese of Kisumu vs. Sophia Achieng Tete (2004) 2 KLR and Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990] 1994 EA 47-**The appeal does not demonstrate that the trial court's award of general damages was erroneous in principle or fact. The trial court's decision on general damages constituted just and fair compensation for the Respondent's injuries.es;
27. The amount awarded is not only commensurate with the nature of injuries suffered by the Respondent but also consistent with other awards made in similar cases; Legal principles governing assessment, award and interference of awards of general damages are well settled in law; It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question.

See The Court of Appeal's Pronouncements in **Southern Engineering Company Ltd v Mutia [1985] eKLR:**

28. It is forthright from the foregoing that assessment and award of general damages, while not an exercise of mathematical precision, to be just, the same should result in ordinate awards that are demonstrably cognizant of the gravity of injuries in question, commensurate with the said injuries, and manifestly consistent with precedent awards made in similar cases; In the case of **Francis Nzivo Munguti & another v Jotham Wanyonyi Nakasana & another [2020] KEHC 4312 (KLR)**, the plaintiff sustained a fracture of the lower third of the right radius and ulna. The High Court awarded Ksh 600,000/= as general damages.
29. In the case of **Osebe -vrs- Njoroge [2024] KEHC 9654 (KLR)**, the plaintiff sustained a fracture of the left distal radius and a fracture of the left distal ulna. The High Court upheld an award of Ksh 550,000/= as general damages; In **Joseph Njuguna Gcahie v Jacinta Kavuu Kyengo (2019) eKLR**, the High Court awarded Kshs. 600,000 for blunt temporal injury with swelling, facial bruises, blunt injury to the left forearm, comminuted fracture of the left radius, and dislocated left ulna joint, which was four years ago, based on inflationary trends. Reference to **Naomi Momanyi v G4S Security Services Kenya Limited & another [2018] eKLR**, where this Honourable Court observes that: -
- “In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661).”***
30. In light of the foregoing, the trial court's decision on general damages is affirmed as just and fair compensation for the Respondent's injuries. The amount awarded is commensurate with the nature of the injuries suffered by the Respondent and is consistent with awards in comparable cases.
31. Special; The Respondent claimed Kshs. 12,630/= for expenses incurred for treatment, motor vehicle search, and medical examination report. Receipts were submitted as exhibits without objection from the Appellant, thereby meeting the requisite standard of proof. The trial court's award of special damages is therefore merited in fact and law. and law.

32. ISSUES, ANALYSIS, AND DETERMINATION

33. Upon review of the proceedings, pleadings, and submissions, the core issue is liability. The Appellant does not contest the amount awarded, having supported the quantum of Kshs. 500,000 in general damages. Regarding liability, the Appellant proposed that, should the court consider apportionment appropriate, a 50%:50% division would be acceptable, with supporting authorities cited the proposal.
34. Regarding liability, the Respondent contends that the Appellant did not dispute the occurrence of the accident, but maintained that it did not occur as alleged by the police and the Respondent. The allegation of the Appellant's liability was not proven, as neither the Respondent nor the police witnessed the accident, and no investigation report was produced to support the claim that the accident occurred beside the road. Conversely, the Respondent submits that the trial court's finding on liability accurately reflects the probative value of the evidence presented.
35. It is a trite law that it is well established that in an action for negligence, the burden of proof rests with the Respondent, who must establish each element of the tort by adducing evidence in support of the claim. police abstract produced by the Respondent's witness that the investigations with respect to the accident herein are still pending.
36. The abstract does not indicate whether the Appellant is to be blamed for the said accident or how the accident occurred as there was clearly no police investigations conducted and/or report presented before the trial court to prove that the Appellant is to be blamed or caused the said accident. In Kenya, when it is not clear which driver is to blame in a motor vehicle accident, the liability can be apportioned based on the evidence and the circumstances of the accident. The court may consider the actions of each driver, the evidence presented, and the legal principles of liability. In some cases, the court may find that both drivers are equally at fault, leading to a shared liability. However, this is not always the case, and the court's decision will depend on the specific facts of the case and the legal standards applied.
37. In ***Peter Okello Omedi v Clement Ochieng (2006) eKLR*** the overturned the decision of the trial magistrate on apportionment of liability from 80:20 to 50:50 and stated:
“...The failure by both parties to observe their respective obligations to each other might have caused the accident, and in the absence of clear and uncontroverted evidence, I set aside the apportionment of liability by the trial Court and substituted with 50/50 against each party”.

38. See *Karanja – Vs – Malele (1983) KLR 142 and Berkeley Steward Ltd, David Coltel & Jean Susan Colten - Vs – Lewis Kimani Waiyaki [1982-88] 1KAR 101-108* as stated in the case of *Kenyatta University v Isaac Karumba Nyuthe (Supra)* that *where there is no crucial evidence on who was to blame between the two parties, both should be held equally to blame.*

39. This is a proper case to hold the cyclist and the driver equally liable. The upshot is that the cyclist and the driver are equally liable. Accordingly, the quantum awarded by the trial court remains unchanged, subject to apportionment of liability at 50% to each party.; Apportionment at 50 %,50% on quantum, same changed to;

- a. **General damages awarded Kshs. 500,000/=**
- b. **Future medical expenses are Kshs. 200,000/=**
- c. **Special damages Kshs. 12,630/=**
- d. **Total Kshs. 712,630**
- e. **Less 50 % Kshs. 356,315**
- f. **NET KSHS. 356,315**

40. The costs in the lower court awarded to the respondent and half costs for the appeal to the appellant.

DATED AND DELIVERED AT KILGORIS VIA MICROSOFT TEAMS

THIS 6TH DAY OF FEBRUARY 2026

.....

CHARLES KARIUKI

JUDGE