

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E007 OF 2023

JOANNES MUTUA
APPELLANT

VERSUS

CHARLES NZUKI SENG'ETE
RESPONDENT

***(Being an Appeal from the Judgment in Kilungu PM
Court Civil Suit 171 of 2016, delivered by Hon. E. Muiru,
SRM, on 16th December, 2022)***

JUDGMENT

1. The present appeal arises from the Judgment of the Senior Resident Magistrate delivered on 16th December, 2022 in **Kilungu SRMCC No. 171 of 2016**. In the primary suit, the Plaintiff sought compensation for injuries sustained in a road traffic accident that occurred on 25th June, 2015 along the Nzeveni-Salama Murram road while he was aboard motor vehicle registration

number KBR 043S. The Plaintiff pleaded that the said motor vehicle, owned by the Defendant and driven by his agent or servant, was negligently managed, causing it to lose control and overturn, as a result of which he was thrown out of the cabin and suffered severe injuries, including a below-knee amputation of the right leg.

2. The Defendant denied liability and contended that the Plaintiff was not his employee, had boarded the motor vehicle without authority, and that any arrangement between the Plaintiff and the driver fell outside the scope of employment. After hearing the parties, the trial Court found the Defendant 100% liable on the basis of vicarious liability and entered Judgment in favour of the Plaintiff. The Court awarded Kshs.2,500,000/= as general damages, Kshs.2,430,900/= for loss of earning capacity, and Kshs.350,000/= for future medical expenses, while declining the claim for special damages for want of proof.
3. Aggrieved by both the finding on liability and the quantum of damages, the Appellant lodged the present appeal vide a Memorandum of Appeal dated 23rd January, 2023 set out as follows:

a. The Honourable Trial Court erred in law and fact in failing to consider material evidence clearly demonstrating that the Respondent had not proved his claim on a balance of probabilities.

b. The Honourable Learned Trial Magistrate erred in law and fact and misdirected herself by finding the Appellant 100% liable and disregarding evidence on record demonstrating that the Respondent largely contributed to the accident.

c. The Honourable Trial Court erred in law and fact in failing to find that the Respondent contributed to the accident given the facts and circumstances surrounding the accident in question.

d. The Honourable Learned Trial Magistrate erred in law and in fact in failing to appreciate the relevant principles and case law in assessing general damages, loss of future earnings and future medical expenses and

thereby giving an inordinately high and manifestly excessive award unsupported by law.

e. The Honourable Learned Magistrate erred in law and in fact in failing to appreciate and properly evaluate the evidence on record, in particular the evidence on the Plaintiff's injuries, thereby erroneously awarding an inordinately high and manifestly excessive sum on general damages and loss of future earnings.

f. The Honourable Learned Magistrate erred in law and in fact in awarding general damages of Kshs.2,500,000/= which was inordinately excessive in the circumstances of the case.

g. The Honourable Learned Magistrate erred in law and in fact in using the wrong minimum wage and awarding loss of earnings of Kshs.2,430,900/= which was inordinately excessive.

h. The Honourable Learned Magistrate erred in law and in fact in proceeding on wrong

principles vis-à-vis the evidence before her and thereby arriving at an erroneous judgment.

i. The Honourable Learned Magistrate erred in law and in fact by taking into account irrelevant considerations and factors while awarding general damages.

j. The Honourable Learned Magistrate further erred in law and in fact by failing to appreciate, consider and take into account the Appellant's submissions on the quantum of damages awardable.

k. The Honourable Learned Magistrate erred by making a decision on quantum that was erroneous, without proper basis and against the weight of evidence.

Submissions:

4. The Appellant submits that the appeal turns on the twin issues of liability and quantum. On liability, it is contended that the Respondent failed to prove that he was lawfully aboard the Appellant's motor vehicle or that the driver acted within the scope of employment. The

Appellant argues that the alleged permission given by the driver to the Respondent did not amount to lawful authority binding upon the vehicle owner, and therefore the trial Court erred in imposing vicarious liability.

5. In support of this position, reliance is placed on *Karisa v Solanki* [1969] EA 318 for the proposition that negligence must be proved by evidence of breach of duty, and on *Muwonge v Attorney General of Uganda* [1967] EA 17 and *Paul Muthui Mwavu v Whitestone (K) Ltd (Civil Appeal No. 14 of 2014)* [2015] KECA 880 (KLR) for the principle that an employer is only liable where the employee acts within the course and scope of employment. Further reliance is placed on *Dominic Ndunda Mutiso & another v Transallied Limited* [2020] eKLR to argue that an employer is not liable where a driver gives an unauthorized lift outside the scope of duty.

6. The Appellant also submits that the Respondent bore the burden of proving negligence and lawful presence in the vehicle, which burden was not discharged. It is argued that the trial court improperly shifted the evidential

burden onto the Appellant by faulting him for not calling the driver as a witness. On this issue, reliance is placed on *Kirugi & another v Kabiya & 3 others* [1987] KLR 347 for the principle that the burden of proof always rests upon the plaintiff and is not lessened merely because the defence evidence is weak or absent.

7. On quantum, the Appellant submits that the awards made by the trial Court were excessive and based on wrong principles. It is argued that the award of Kshs.2,500,000/= as general damages was manifestly excessive and inconsistent with comparable authorities. The Appellant relies on *Kennedy M. Omollo v Attorney General & another* [2022] KECA 40 (KLR) for the proposition that parties are bound by their pleadings, and on *Co-operative Bank of Kenya Ltd v Sammy Ondimu Ongeru* [2022] KECA 164 (KLR) where general damages for a below-knee amputation were reduced to Kshs.2,000,000/=, to demonstrate that the award in the present case was exaggerated.

8. Regarding loss of earning capacity, the Appellant challenges the adoption of a multiplier of 30 years, arguing that it was unrealistic and excessive. Reliance is

placed on *Kenya Power & Lighting Co. Ltd v James Karanja Bundi (2022) KECA 116 (KLR)*, where the Court of Appeal reduced a similar multiplier, emphasizing the need to consider contingencies of life and reasonableness in assessing future earnings.

9. On future medical expenses, the Appellant submits that the trial Court erred by adopting the Respondent's medical report without addressing the Appellant's contrary medical evidence which assessed future costs at a lower figure. In this regard, reliance is placed on *PZ Cussons (EA) Ltd v Felix Otieno Odhiambo [2022] KECA 131 (KLR)* for the principle that where conflicting medical opinions are presented, the trial Court must give reasons for preferring one over the other.
10. The Respondent on his part submits that on liability, the ownership of motor vehicle registration number KBR 043S was proved through the copy of records from the Registrar of Motor Vehicles which showed the Appellant as the registered owner, and that under **Section 8** of the **Traffic Act**, the registered owner is deemed to be the owner unless the contrary is proved. The Appellant, it is argued, adduced no evidence to rebut this presumption,

and mere denials in pleadings do not amount to proof. Reliance is placed on *Ezekiel Ajwala Otwari & another v C.M. Motors Ltd* [2012] eKLR for the proposition that averments in pleadings are not evidence.

11. The Respondent further submits that **PW2's** testimony established that the driver, Wambua Nzivo, was the authorized driver of the suit motor vehicle and that this evidence remained uncontroverted. In this regard, reliance is placed on *Unleek Electrical Company Limited v Joseph Fanuel Alela, Nairobi HCCC Appeal No. 676 of 2002 (unreported)*, where the Court held that uncontroverted evidence ought to be accepted where no contrary testimony is offered.

12. As to the occurrence of the accident, the Respondent submits that the evidence of **PW1, PW2**, the police abstract, and the admission by **DW1** collectively proved that the accident occurred as pleaded. On the question of negligence, the Respondent argues that **DW1's** evidence was largely hearsay since he was not present at the scene, and therefore carried little probative value. Reliance is placed on *Concord Insurance Company Ltd v Jared Wagina t/a Hardwings Services* [2009] eKLR and *Ali*

Emoy Abdi Noor v Sigma Feeds Limited & another [2012] eKLR for the principle that hearsay evidence has limited evidential value. The Respondent maintains that his own version of events was consistent and supported by the surrounding evidence, and therefore the trial court properly found the Appellant vicariously liable.

13. On quantum, the Respondent submits that the awards made by the trial Court were justified and based on sound principles. With respect to general damages, it is argued that the injuries, including a below-knee amputation with 50% permanent disability, were serious, and that the trial Court relied on comparable authorities such as *Kariuki M'Ngundu v Phillip Miriti & 2 Others (2005) eKLR* and *Akwaba Olubuliera Nicodemus v Dickson Shikuku [2020] eKLR*. The Respondent submits that the Appellant has not demonstrated any of the grounds set out in *Kemfro Africa Ltd t/a Meru Express Service & another v Lubia & another* for appellate interference with an award of damages.

14. On loss of earning capacity, the Respondent argues that the evidence established that his ability to work was

diminished by the amputation and that the trial Court correctly applied the law on compensation for diminished earning ability. Reliance is placed on *Mariga v Musila [1984] eKLR*, *Butler v Butler*, and *Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR* for the principle that a claimant whose earning capacity has been reduced by injury is entitled to compensation even where documentary proof of income is lacking.

15. Regarding future medical expenses, the Respondent submits that the award of Kshs.350,000/= was supported by the unchallenged medical report of Dr. Ikonya recommending a prosthesis, and that there was no basis for the appellate Court to interfere with that finding.

Analysis & Determination:

16. The issues falling for determination are confined to the following issues:
 - a. **Whether the driver of motor vehicle registration number KBR 043S was acting within the authority, instructions, or scope of employment of the Appellant so as to attract vicarious liability.**

b. Whether the awards made by the trial court on quantum, were so excessive or founded on wrong principles as to warrant interference by this Court.

17. This being a first appeal, the duty of this Court is well settled. A first appellate Court is obligated to subject the entire evidence tendered before the trial Court to a fresh and exhaustive re-evaluation and re-analysis, and to draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and must therefore give due allowance for that disadvantage.

18. This duty was succinctly set out in *Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123 at 126* where it was stated that an appellate Court is required to reconsider the evidence, evaluate it itself and draw its own conclusions, though always remembering that it has not seen the witnesses.

Liability:

19. The Appellant has assailed the finding on liability on the basis that the Respondent was allegedly an

unauthorized passenger and that the driver acted outside the scope of employment. The law on vicarious liability, however, is well settled. As stated in **Salmond on the Law of Torts**, 17th Edition at page 466:-

“A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at the time when the servant is engaged on his master’s business, it must be committed in the course of that business, so as to form part of it, and not be merely coincident in time with it.”

20. Similarly, in **Muwonge v A.G. of Uganda [1967]**

EA the Court held inter alia that: “The master is exempted only when the servant was on his own business.” The principle was further elaborated in **Selle & Another v Associated Motor Boats Co. Ltd** (*supra*) where it was observed that:

“Where, however a person delegates a task or duty to another, not a servant or employs another, not a servant, to do something for his benefit of himself and the other, whether the other person be called agent or independent

contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be.”

21. The Court of Appeal in ***Joseph Cosmas K. v Gigi & Co. Ltd & Another Civil Appeal 119 of 1986 KLR*** also held that:

“In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner’s servant or that at the material time, the driver was acting as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner’s request, express or implied on his instructions and was doing so in performance of the task or duty delegated to him by the owner.”

22. Further, on the doctrine of vicarious liability, the Court of Appeal in ***Kaburi Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR*** stated as follows:

“Where the issue for determination was among others, what level of control over the negligence acts of person B who is directing person A on the doing of those acts, as being held vicariously liable for the negligence, the court of appeal held - vicariously liability arises when the tortuous act is done in the scope or during the course of one’s employment.”

23. Turning to the facts of the present appeal, it is not disputed that the motor vehicle belonged to the Appellant and that it was being driven by his driver, one Wambua Nzivo, in the course of transporting sand, an activity squarely within the Appellant’s business. The Appellant himself admitted that the driver and turnboys were his employees and that the vehicle was engaged in its ordinary commercial use. There was therefore clear evidence that the driver was performing the very task delegated to him by the Appellant at the material time.

24. The evidence of **PW1** was that he was allowed into the cabin by the driver for purposes connected with loading sand, while **PW2** confirmed that the Respondent was indeed a passenger in the vehicle when the accident

occurred. The Appellant, who bore peculiar knowledge of the terms of the driver's engagement, led no evidence demonstrating that the driver had embarked on a frolic of his own or that he had abandoned the Appellant's business at the material time.

25. On the contrary, the totality of the evidence shows that the vehicle was being driven in furtherance of the Appellant's enterprise and that the driver's acts occurred during the execution of that task. In the absence of proof that the driver had departed from the scope of employment, the presumption of vicarious liability remains intact, as no evidence was led to the contrary.

26. In those circumstances, this Court is not persuaded that the learned trial magistrate misdirected herself in finding that the driver was acting within the course of employment and that the Appellant was vicariously liable for his negligence. The argument that the Respondent's presence in the vehicle extinguished liability is unsupported by the applicable legal principles and does not displace the factual finding that the accident occurred in the course of the Appellant's business.

General damages:

27. On quantum, the learned trial magistrate awarded a total sum of Kshs.5,280,900/=, comprising Kshs.2,500,000/= as general damages for pain, suffering and loss of amenities, Kshs.2,430,900/= for loss of earning capacity, and Kshs.350,000/= for future medical expenses, while declining the claim for special damages for want of legible proof. The Appellant claims that these awards were excessive.

28. The principles under which an appellate Court can interfere with an award of general damages made by a trial Court were set out by the Court of Appeal in the case of ***Kemfro Africa Limited T/A Meru Express Services [1976] and another v Lubia and another (No.2) [1985] eKLR***, in which the Court (Kneller, Nyarangi, JJA and Chesoni, Ag JA) stated as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be

*satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.”*

29. Equally in the case *Shabani v City Council of Nairobi* [1985] KLR 516 Hancox, JA stated as follows:

*“The test as to when an appellate court may interfere with an award of damages was stated by Law JA in *Butt v Khan*, Civil Appeal No. 40 of 1997 (a case referred to in another context by the learned Judge), as follows: ‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on*

wrong principles, or that, he misapprehended the evidence in some material respect, and so arrived at a figure which was so inordinately high or low.’This discretion has since been followed frequently by this Court.”

30. Looking at the record before me, in addressing the Appellant’s complaint that the trial Court disregarded defence medical evidence, the record does not support such an assertion. The documents attributed to the Defendant/Appellant appearing at pages 28-31 of the Record of Appeal do not disclose any independent medical report challenging the injuries, prognosis, or recommended future treatment.

31. The only medical report properly forming part of the evidentiary record is that of Dr. G. K. Ikonya dated 2nd December, 2015 appearing at page 16 of the Record. It is therefore evident that the learned magistrate’s observation at page 10 of the judgment, that “no contrary medical report was availed by the defence” was firmly grounded on the material placed before the Court.

32. In the absence of a competing expert opinion, the trial Court cannot be faulted for relying on the

uncontroverted medical evidence in assessing both the degree of permanent incapacity and the need for a prosthesis. Accordingly, the suggestion that the magistrate disregarded defence medical evidence is unfounded and unsupported by the record.

33. Regarding the award of general damages, the trial Court considered the nature of the injuries, namely a below-knee amputation of the right leg with permanent incapacity assessed at 50% and guided itself by comparable authorities cited by the parties, including ***Kariuki M'Ngundu v Phillip Miriti & 2 Others (2005) eKLR***, where an award of Kshs.1,500,000/= was made for similar injuries, and ***Akwaba Olubuliera Nicodemus v Dickson Shikuku (2020) eKLR***, where the court awarded Kshs.2,000,000/= for injuries involving a crush injury leading to below-knee amputation with a lower degree of permanent disability.

34. The learned magistrate expressly noted that the Respondent's incapacity was higher and, taking into account the comparable precedents and the severity of

the injuries proved, assessed general damages at Kshs.2,500,000/=.

35. It is trite that no two injuries or their sequelae are ever identical and that awards in comparable cases serve only as a guide rather than a rigid tariff. The task of the appellate Court is therefore not to substitute its own assessment merely because it might have awarded a different figure, but to consider whether the award made falls within the permissible range for similar injuries.

36. In the present case, the Respondent sustained a below-knee amputation with permanent incapacity assessed at 50%. The learned trial magistrate, having considered the authorities placed before him, assessed general damages at Kshs.2,500,000/=. That figure, viewed against comparable jurisprudence, cannot be said to be inordinately high. In ***John Kipkemboi & another v Morris Kedolo [2019] KEHC 8736 (KLR)***, the High Court reiterated that awards for amputation injuries have ranged between about Kshs.1.2 million and Kshs.2.5 million depending on severity and attendant injuries, and upheld an award within that bracket.

37. In *Kipkoskei Tangus Tesot v Julius Kiprono Tanui [2018] eKLR*, where Kshs.2,500,000/= was found to be fair compensation for similar amputation injuries, and *Gilanis Supermarket & Another v Kennedy Swanya Mwayaka [2018] eKLR*, where an award of Kshs.2,500,000/= was upheld as not inordinately high for amputation injury with permanent incapacity. Likewise, in *John Kinyua Murage & 2 Others v Joseph Onyango Obura [2018] eKLR*, the Court declined to interfere with an award of Kshs.2,500,000/= for an amputated leg.

38. Guided by those decisions, and bearing in mind the Respondent's higher degree of incapacity at 50%, this Court finds that the award of Kshs.2,500,000/= made by the learned magistrate falls well within the range of comparable awards for similar injuries. There is therefore no basis to interfere with that finding, and the award on general damages is hereby upheld.

Diminished earnings:

39. Turning to the award on loss of earning capacity, the learned trial magistrate was alive to the respective positions taken by the parties. The Respondent had

proposed that, in the absence of documentary proof of earnings, the Court adopts a minimum wage of Kes 10,107.10 applicable to former municipalities together with a multiplier of 30 years, while the Appellant urged the Court to adopt a lower minimum wage of Kshs.6,752.50/= and a multiplier of 10 years.

40. The magistrate carefully weighed these competing proposals and noted that although the Respondent described himself as a farmer and casual labourer resident in Sultan Hamud, the defence itself had conceded to a higher figure than the basic general labourer wage. In a balanced approach, the Court settled on Kshs.6,752.50/= as the applicable multiplicand, based on the choice of the parties' own submissions.

41. On the multiplier, the magistrate considered that the Respondent was 21 years old at the time of the accident and engaged in informal sector work where retirement age is not rigidly fixed, but nevertheless moderated the award by acknowledging the uncertainties and vicissitudes of life. The adoption of a multiplier of 30 years was therefore an exercise of discretion informed by

age, nature of occupation, and the degree of permanent incapacity proved.

42. It cannot be said that the Court ignored the Appellant's proposal; rather, it struck a middle ground by accepting the Appellant's wage figure while declining to adopt the shorter multiplier suggested by the defence. In those circumstances, the resultant computation of $\text{Kshs.}6,752.50 \times 12 \times 30$ yielding $\text{Kshs.}2,430,900/=$ cannot be faulted as having been arrived at on wrong principles or without regard to the parties' respective submissions.

Disposition:

43. The appeal therefore lacks merit. Consequently, the appeal is hereby dismissed in its entirety, the judgment and decree of the trial Court delivered on 16th December, 2022 are upheld, and the Respondent shall have the costs of the appeal together with interest at Court rates.

44. Orders accordingly.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this **18TH** day of **FEBRUARY, 2026.**

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HON. C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Moranga holding brief for Mutuku, Advocate for Appellant

Mr. Agata, Advocate for Respondent