

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
MILIMANI LAW COURTS
CIVIL APPEAL NO. E117 OF 2024

MOSES MUSEMBI MUINDE.....1ST

APPELLANT

JUSTINE ONYANGO ONDARI.....2ND

APPELLANT

VERSUS

ESTHER NEKESA

WAWIRE.....RESPONDENT

*(Being an appeal from the Judgment delivered by Hon. D.S.
Aswani (Adjudicator) in Milimani Small Claims Court Claim No.
E3773 of 2023 on 7th March 2024)*

JUDGMENT

Introduction

1. This appeal arises from the Judgment of the Small Claims Court at Milimani delivered on 7th March 2024 in Claim No. E3773 of 2023. The trial court entered judgment in favour of the Respondent and awarded:

- a) General damages - Kshs 350,000/=**
- b) Special damages - Kshs 5,550/=**
- c) Costs and interest at court rates**

2. The Appeal challenges findings on both liability and quantum.

Background

3. The Respondent's case was that she was on 20th February 2023 a lawful passenger in motor vehicle registration number KCU 061X traveling along Eastern Bypass when the 2nd Appellant drove off before she had safely alighted, causing her to fall and sustain injuries.

4. The injuries pleaded and proved were:

i. Deep cut wound at the front of the head

ii. Bruises on the head extending to the neck

iii. Bruises and tenderness on the chest extending to the abdomen

iv. Bruises on the left forearm extending to the palms

v. Bilateral lacerations on both legs

5. Medical evidence was produced including a P3 form, treatment notes from Ropas Clinic dated 20th February 2023 and a medical report by Dr. Okere dated 13th March 2023.

6. The Appellants filed a defence denying liability and pleading contributory negligence but did not call any witness or tender evidence.

(a) Liability

7. The trial court found that the Respondent was a lawful passenger and that her testimony was uncontroverted since no evidence was adduced to support contributory negligence.
8. The trial court further found that the 2nd Appellant breached his duty of care by driving off before ensuring that it was safe for the Respondent to alight. The court also found that vicarious liability attached to the 1st Appellant.
9. The court relied on ***Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR*** for the principle that a police abstract is evidence that an accident was reported, though not conclusive proof.
10. The court also relied on ***Rosemary Wanjiku Kungu vs. Francis Mutua Mbuvi & Another [2014] eKLR*** for the principle that a lawful passenger cannot be held liable absent evidence of fault.
11. Liability was apportioned at 100% jointly and severally against the Appellants.

(b) Quantum

12. In assessing damages, the court relied on several authorities including ***Kigaragari vs. Aya (1982-88) 1 KAR 768, Ugenya Bus Service vs. Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR*** and ***Mbaka Nguru & Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR*** and awarded Kshs 350,000/= as general damages after

considering comparable awards, inflation and the nature of injuries.

13. Aggrieved by the Trial Court's findings, the Appellants instituted the present appeal in which they challenge the findings on quantum. They listed the following grounds of appeal in the Memorandum of Appeal: -

1. The Learned Magistrate erred in law and fact in delivering judgment contrary to the law and facts before the court.

2. The Learned Magistrate erred in awarding general damages of Kshs 350,000/= which were excessive in view of the injuries sustained.

3. The Learned Magistrate failed to properly apply the principle of stare decisis and binding precedent.

4. The evidence and submissions were incapable of sustaining the award of Kshs 350,000/=.

5. Judgment was entered against the 2nd Appellant despite alleged failure by the Respondent to sufficiently establish her case, particularly on quantum.

14. The Appellants seek the setting aside of the entire Judgment, that the appeal be allowed with costs and the stay of proceedings in Milimani SCC No. E3773 of 2023 together with the costs of the appeal.

- 15.** Directions were taken for the hearing of the appeal by way of written submissions.
- 16.** The Appellants did not file written submissions and only the Respondent's submissions are in the court file. This court is still minded to determine this appeal based on the material on record.
- 17.** The Respondent submitted that the trial court properly directed itself in law and fact. It was submitted that the award of Kshs 350,000/= was fair, reasonable, and consistent with prevailing judicial trends. It was the Respondent's case that the Appellants failed to demonstrate misdirection, error of principle, or excessiveness and that liability was correctly assessed at 100%. The Respondent therefore urges dismissal of the appeal with costs.

Issues for Determination

- 18.** From the record and the grounds of appeal, I find that the issues arising for determination include: -
- a) Whether the trial court erred in its finding on liability.***
 - b) Whether the trial court properly evaluated the evidence regarding negligence and vicarious liability.***
 - c) Whether the award of Kshs 350,000/= in general damages was excessive.***

d) ***Whether the trial court properly applied comparable precedents and principles governing assessment of damages.***

19. The duty of a first appellate court was stated in ***Susan Munyi vs. Keshar Shiani (2013) KECA 472 (KLR)*** as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them.”

Burden of Proof

20. It was not disputed that the Respondent was a passenger in the Appellants' motor vehicle and that the Appellants were, in the circumstances of the case rightly found to be 100% liable for the accident. The Respondent relied on ***Kenya Power & Lighting Co Ltd vs. Rassul Nzombe Mwadazaya*** [2020] eKLR, where the Court held:

“It is noteworthy that the Appellant in its amended Statement of Defence filed on 15th October 2012 denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation.”

21. The position was reiterated in ***Edward Muriga through Stanley Muriga vs. Nathaniel D. Schulter***, Civil Appeal No. 23 of 1997, where the Court of Appeal stated:

“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made

therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence. Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted.”

22. Similarly, in ***John Wainaina Kagwe vs. Hussein Dairy Ltd [2013] eKLR***, the Court held:

“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent's defence was a

mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident.”

23. The elements of negligence were set out in **Caparo Industries PLC vs. Dickman (1990)** and **Chun Pui vs. Lee Chuen Tat (1988)** as follows:

“The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused.”

Quantum

24. The appellate court’s discretion to interfere with damages was stated in **Butt vs. Khan [1982-88] 1 KAR 1** and **Maringa vs. Musila [1982-88] 1 KAR 57**, that interference is warranted only where the award is inordinately high or low or based on wrong principles.
25. In **Stanley Maore vs. Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**, the Court emphasized that comparable injuries should attract comparable awards.

26. Further, in ***Mbaka Nguru & Another vs. James George Rakwar [1998] eKLR***, the Court stated:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

Pain and Suffering

27. Halsbury’s Laws of England, 4th Ed., Vol. 12(1) paragraph 883 page 348 provides:

“883. Pain and suffering. Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate.”

Comparable Soft Tissue Authorities

28. The Respondent relied on **Veronica Mkanjala Mnyapara vs. Patrick Nyasinga Amanya [2021] eKLR**, where the Court held:

“This is an appeal against the assessment of quantum by the trial court. The appellant contends that the award made by the trial court was excessive and not based on concrete evidence. The parties had agreed to settle liability in the ratio of 80:20 in favour of the respondent; upon which the trial court assessed general damages at Kshs 300,000/= and special damages at 12,570/= he respondent had multiple soft tissue injuries but did not have a disability. The award made by the trial court was sufficient and commensurate to the respondent’s injuries.”

29. Reference was also made to **Francis Ochieng & Another vs. Alice Kajimba [2015] eKLR** and **Poa Link Services Co Ltd & Another vs. Sindano Boaz Bonzemo, HCCA No. 17 of 2019**.

30. Having reconsidered the record, the grounds of appeal, the submissions of counsel and the authorities cited, this Court finds as follows:

a) On liability, the Respondent’s evidence was uncontroverted. The Appellants tendered no evidence to rebut her account or establish contributory negligence. The trial court correctly

applied the principles governing burden of proof and unchallenged evidence.

- b) On quantum, the award of Kshs 350,000/= for multiple soft tissue injuries classified as harm was consistent with comparable authorities and the prevailing trend of awards.***
- c) The Appellants have not demonstrated that the trial court applied wrong principles or that the award was inordinately high so as to justify appellate interference under the principles in Butt v Khan.***

Disposition

31. Accordingly, I make the following final orders: -

- a) The appeal on liability fails.***
- b) The appeal on quantum fails.***
- c) The Judgment of the Small Claims Court in Claim No. E3773 of 2023 delivered on 7th March 2024 is hereby upheld.***
- d) The appeal is dismissed with costs to the Respondent.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

**HON. W. A. OKWANY
JUDGE
20/02/2026**

FOR APPELLANT No appearance
FOR THE RESPONDENT Kemunto
COURT ASSISTANT Abdirizak
File closed

ORIGINAL