

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL APPEAL NO. E122 OF 2023**

**DAVIES ODWORY MUSIGO.....**  
**.....APPELLANT**

**VERSUS**

**JAMES KARIUKI THANJU.....1<sup>ST</sup>**

**RESPONDENT**

**JOSEPHAT NDERITU CHEGE.....2<sup>ND</sup>**  
**RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon.E.Cherop  
(Adjudicator) in Naivasha SCCC No. E0402 of 2023 delivered on 23<sup>rd</sup>  
November, 2023)**

**JUDGMENT**

**Background of the Appeal**

1. By a Statement of Claim dated 19<sup>th</sup> September 2023, the 1<sup>st</sup> Respondent instituted suit against the Appellant and the 2<sup>nd</sup> Respondent seeking general damages, special damages in the sum of Kshs 8,550/-, together with costs of the suit and interest thereon. The suit was for personal injury and founded on the tort of negligence
2. The 1<sup>st</sup> Respondent's case was pleaded to be that on or about 5<sup>th</sup> August 2023, he was lawfully travelling in motor vehicle registration number KCE 763H along the Nairobi-Nakuru Road and that at

Morendat area, motor vehicle registration number KCA 992V, allegedly owned and/or driven by the Appellant, was carelessly and/or negligently overtaking, lost control, and collided with motor vehicle registration number KCE 763H, thereby causing the accident as a result of which he, the 1st Respondent sustained injuries and thus loss and damages.

3. In the claim, the Appellant was described as the registered owner, insured, driver and/or beneficial owner of motor vehicle registration number KCA 992V and particulars of negligence pleaded against him.
4. In a Statement of Defence and Counterclaim dated 30<sup>th</sup> October 2023, the Appellant admitted ownership of motor vehicle registration number KCA 992V but denied negligence and liability for the accident.
5. he equally mounted a counter-claim in which he contended that on 5<sup>th</sup> August 2023 at about 11.00 p.m., while lawfully driving motor vehicle registration number KCA 992V, the driver of motor vehicle registration number KCE 763 negligently caused the accident. The 2<sup>nd</sup> Respondent, as the alleged owner of the motor vehicle the respondent was aboard was then joined to the proceedings by way of a third-party notice.
6. The record does not disclose whether the 2<sup>nd</sup> Respondent participated in the trial proceedings. However, in a judgment delivered on 23<sup>rd</sup> November 2023, the learned trial magistrate found the Appellant 100% liable for the accident. The 1<sup>st</sup> Respondent was

awarded special damages in the sum of Kshs. 8,550/- and general damages of Kshs. 758,550/-, together with interests and costs of the suit. The interests were was ordered to be payable from the date of judgment.

7. The appellant was aggrieved by the said decision, the Appellant lodged the present appeal by way of a Memorandum of Appeal dated 22<sup>nd</sup> December 2023, seeking to have the judgment and decree of the learned trial magistrate set aside. He further prays that the costs of the appeal be borne by the Respondents.
8. The Memorandum of Appeal sets out ten grounds of appeal faulting the trial court on the basis that: -
  - a) **THAT the learned magistrate erred in law and in fact by holding that the Appellant's driver was wholly to blame for the accident.**
  - b) **THAT the learned magistrate erred in law and in fact by failure to consider that the 2<sup>nd</sup> Respondent/third party entered appearance despite being served.**
  - c) **THAT the learned magistrate erred in law and in fact by not exercising her discretion judicially.**
  - d) **THAT the learned magistrate erred in law and in fact by concluding the quantum of damages as the judgment therein which was excessive in the circumstances.**

- e) **THAT the learned magistrate erred in law and in fact by accepting the medical report from a doctor whose evidence was questionable.**
- f) **THAT the learned magistrate erred in law and in fact by not considering the Appellant's submissions and authorities relied upon by the Appellant.**
- g) **THAT the learned magistrate erred in law and in fact by showing open bias against the Appellant.**
- h) **THAT the learned magistrate erred in law and in fact by failure to consider the evidence of the Appellant's driver.**
- i) **THAT the learned magistrate erred in law and in fact by failure to consider counterclaim by the Appellant.**
- j) **THAT the learned magistrate erred in law and in fact by failure to consider that the Appellant was entitled to the costs of the suit.**

9. The appeal has been canvassed by way of written submissions as directed by the court which the court had had a good chance to peruse and derived useful benefit. There would be no benefit to reproduce or rehash the submissions here but a summation suffices.

10. On liability, the Appellant contends that since the accident involved two motor vehicles, the respective drivers ought to have been found jointly culpable. He relies on the decision in **Mwangi & another v Oginga (Civil Appeal No. 88 of 2023) [2025] KEHC**

**(KLR)** for the proposition that, in the absence of clear evidence pinpointing which party primarily caused or substantially contributed to the accident, liability ought not to be placed wholly on one party. He further cites **Moses Theuri Ndumia v IG Transporters Limited & Gregory Mutuka, Civil Appeal No. 42 of 2018**, in support of the same position.

11. The Appellant therefore faults the trial court for failing to apportion liability to the 2<sup>nd</sup> Respondent, particularly in light of the fact that the 2<sup>nd</sup> Respondent did not enter appearance to the Third-Party Notice or actively participate in the proceedings.

12. On the quantum of damages awarded, the Appellant challenges the assessment of damages, contending that the medical report relied upon by the trial court was not based on an independent examination. He asserts that the doctor was influenced in the preparation of the report and further questions the credibility of the report on the basis that the doctor charged a fee of Kshs. 8,000/-, allegedly above the usual fee of Kshs. 4,000/-.

13. On the foregoing grounds, the Appellant urges this court to interfere with the findings of the trial court on both liability and quantum and to correct what he terms as errors in the impugned judgment.

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14. For the Respondent, the decision finds full support with submissions that since the two motor vehicles were travelling in

opposite directions at the material time, DW1 was under a duty to maintain a safe distance between his vehicle and the trailer ahead of him but failed to do so. DW1 is blamed to have driven too closely behind the trailer and, in attempting to overtake, swerved into the lane of the oncoming vehicle, thereby causing the collision between motor vehicle registration number KCE 763H and motor vehicle registration number KCA 992V. The Respondent further points out that DW1 conceded in his testimony that the accident occurred on the lawful lane of motor vehicle registration number KCE 763H.

15. On quantum, the Respondent maintains that the award made by the trial court was commensurate and justified. He submits that the learned trial magistrate duly considered the evidence presented by both parties and relied on recent decisions of superior courts in assessing damages. The Respondent therefore prays that the appeal be dismissed with costs.

#### **Issues For Determination**

16. Having carefully considered the pleadings, the judgment of the trial court, the Memorandum of Appeal, and the rival submissions filed by the parties, this court identifies the following issues for determination:

- a) Whose wrongdoing caused the accident?**
- b) What quantum of damages, if any, is appropriate in the circumstances?**
- c) What is the appropriate orders on costs?**

### **Analysis And Determination**

17. Before addressing the merits of the appeal based on issues identified above, it is imperative to remember that appeals from the Small Claims Court to the High Court are confined to matters of law only, pursuant to Section 38 of the Small Claims Court Act. The scope of what constitutes matters of law was succinctly articulated by the Court of Appeal in **John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR**, where the Court stated:

**“We have considered the Memorandum of Appeal, the written and oral submissions by the parties and the authorities cited to us. We remind ourselves that by dint of section 85A of the Elections Act, appeals to this Court in election petitions are confined to matters of law only, meaning the interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse**

**that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court. (See Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR).**”

18. It therefore follows that in determining whether the law was properly applied to the evidence tendered, this court must examine the record to ascertain whether the conclusions reached by the trial court were supported by the evidence and consistent with established legal principles.

#### **liability**

19. After its analysis of the evidence, the trial court found the Appellant 100% liable for the accident. In coming to that conclusion, it took into account the fact that the 1<sup>st</sup> Respondent testified as CW2 and stated that he was aboard motor vehicle registration number KCE 763H, which had come to a stop due to traffic congestion. He added that he observed motor vehicle registration number KCA 992L approaching from the opposite direction at high speed while overtaking, and that it rammed into their vehicle.

20. The driver of motor vehicle registration number KCA 992L, who testified as RW1, confirmed that he was driving in the opposite direction and that the accident occurred on the lane designated for motor vehicle registration number KCE 763H. That evidence supports

the trial court's finding that the Appellant, as the registered owner of motor vehicle registration number KCA 992L, bore responsibility for the accident because his vehicle rammed onto the other motor vehicle which was on its correct lane.

21. RW1, Anthony Odhiambo, who admitted to driving the suit motor vehicle at the material time, sealed the finding on liability when he admitted having veered onto the outer lane before colliding with motor vehicle registration number KCE 763H. that he was driving the appellants motor vehicle with ostensible authority invite the application of vicarious liability upon the applicant. It matters not that he was never joined to the proceedings. In the absence of any credible evidence demonstrating wrongdoing by the 2<sup>nd</sup> respondent, it would be capricious to attribute any contributory negligence on his part or on the part of the driver of motor vehicle registration number KCE 763H. the court determines that the contention by the Appellant that he was not solely to blame is unsubstantiated. Accordingly, this court finds no legal basis to interfere with the trial court's finding on liability.

### **What Quantum of Damages Is Appropriate**

22. The principles governing appellate interference with an award of damages have been well settled and never in dispute since **Butt v Khan [1981] KLR 349**, when the Court of Appeal held that an appellate court will not disturb an award of damages unless it is demonstrated that the trial court:

- a) took into account an irrelevant factor;
- b) failed to take into account a relevant factor; or
- c) arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

23. The caution and deference underscore the law that assessment of damages is a matter of judicial discretion, and interference is warranted only where the award is founded on wrong principles or is manifestly excessive.

24. According to the evidence and medical report by Dr. Obed Omuyoma dated 19<sup>th</sup> August 2023, the 1<sup>st</sup> Respondent sustained injuries described as; mild one-third diaphyseal cortical fracture of the left femur, deep cut wound on the left knee joint, blunt injury to the right elbow joint, blunt injury to the right leg, and blunt injury to the right shoulder joint.

25. While the Appellant contends that the award of general damages in the sum of Kshs 750,000 is excessive, it is for the court to look at that award on the prism of the principles applicable and the need to keep awards compensatory and thus comparable to recently decided cases.

26. It is noteworthy that the Appellant and the 1<sup>st</sup> Respondent entered into a consent dated 30<sup>th</sup> July 2025, which was adopted as an order of the Court on 1<sup>st</sup> August 2025. The terms of the consent provided that part of the decretal sum, in the amount of Kshs. 250,000/- would be settled by the Policyholders Compensation Fund

pursuant to the Insurance Act, Cap 487 Laws of Kenya, and that the balance would be the subject of this appeal.

27. In awarding Kshs. 750,000/- as general damages, the learned trial magistrate relied on **Nairobi HC Civil Appeal No. E167 of 2020; Pestony Limited & Another v Samuel Itonye Kagoko [2022] eKLR**, where the Respondent sustained a mid-shaft femur fracture and soft tissue injuries, and the appellate court awarded Kshs. 800,000/- as general damages.

28. This Court has also considered **Kenyatta University v Isaac Karumba Nyuthe [2014] eKLR**, where the plaintiff sustained a fracture of the right femur and soft tissue injuries and was awarded Kshs. 350,000/-, as well as **Jackson Mbaluka Mwangangi v Onesmus Nzioka & Another [2021] eKLR**, where the appellate court enhanced an award from Kshs. 350,000/- to Kshs. 600,000/- for injuries including a femur fracture and soft tissue trauma.

29. In the latter decision, the Court of Appeal held as follows;

**“In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body.”**

30. Guided by the foregoing authorities, the nature and extent of the injuries sustained, the principle of maintaining consistency in

comparable awards, and taking into account the passage of time and the effect of inflation, this Court is persuaded that the award of Kshs. 750,000/- for pain, suffering, and loss of amenities was fair, reasonable, and within acceptable parameters. The same does not warrant appellate interference because no error has been demonstrated against the trial court.

31. With respect to special damages, the Appellant challenges the award of Kshs. 8,000/- for the medical report, contending that the doctor ordinarily charges Kshs. 4,000/-. It is trite law that special damages must be specifically pleaded and strictly proved. In the present case, the 1<sup>st</sup> Respondent pleaded payment of Kshs. 8,000/- and produced a receipt in support thereof. The evidentiary burden having been discharged, the award was properly made.
32. Flowing from the above, it follows that the appeal lacks merit and is thus dismissed with costs.

Dated, signed and delivered at Lodwar this 20<sup>th</sup> day of February

2026

Patrick J O Otieno

Judge