

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. E079 OF 2024

SAMSON NYONGESA WESONGA.....
.....APPELLANT

VERSUS

SOLOMON WAMUKOTA NAMAKHO.....
.....RESPONDENT

**(Being an appeal from the Judgment and Decree of Hon. J. Ndeng'eri (SRM)
in Naivasha CMCC No. E170 of 2023 delivered on 12th June, 2024)**

JUDGMENT

Background facts

1. By a Plaint dated 26th April 2023, the Appellant instituted suit against the Respondent seeking general damages for pain and suffering, special damages of Kshs. 210,550/=, together with costs of the suit and interest thereon.
2. The Appellant's case was that on or about 28th February 2023, he was lawfully riding motorcycle registration number KMEV 593S along the Naivasha-Nakuru Highway, when at the Flowers Garden area, motor vehicle registration number KBA 720A was allegedly driven carelessly and/or negligently, causing it to lose control and collide with the Appellant's motorcycle. As a result of the said accident, the

Appellant sustained serious bodily injuries for which he suffered loss and damage thus claimed damages.

3. The Respondent initially failed to enter appearance and file a defence within the stipulated period as a consequence of which the Appellant moved the trial court for interlocutory judgment, which was entered on 2nd June 2023. However, at the instance of the respondent an application for the setting aside of the interlocutory judgment was lodged, heard and the same was allowed in that the respondent was granted leave to file a defence on condition that it pays thrown away costs.
4. In his Statement of Defence dated 24th June 2023, the Respondent denied ownership of motor vehicle registration number KBA 720A, denied the occurrence of the accident, and refuted all allegations of negligence. In the alternative and without prejudice, he averred that if the accident ever occurred as alleged, then the same was wholly or substantially caused by the negligence of the rider of motorcycle registration number KMEV 593S, who was allegedly riding at an excessive speed and without due care and attention and in disregard of other road users.
5. Because the setting aside was conditional, the default judgment reverted when the defendant failed to pay the thrown away costs and the filed defense then became of no consequence.
6. In a judgment delivered on 28th June 2024, the learned trial court found both the Appellant and the Respondent equally liable for the

accident and apportioned liability at 50:50. The Appellant was awarded general damages of Kshs. 900,000/= and special damages of Kshs. 10,550/=, making a total award of Kshs. 910,550/=. After applying the 50% contribution, the net award payable to the Appellant amounted to Kshs. 455,275/=. The trial court further awarded costs of the suit and interest thereon.

7. Aggrieved by the said decision, the Appellant lodged the present appeal vide a Memorandum of Appeal dated 16th July 2024. He seeks orders that the judgment and decree of the trial court on liability and quantum be set aside and substituted with an appropriate finding holding the Respondent 100% liable for the accident; that special damages be awarded as pleaded and that the costs of the appeal be borne by the Respondent.
8. The appeal faults the learned trial magistrate for having erred in both law and in fact in finding the appellant was 50% liable for the accident contrary to the evidence led, for awarding general damages that was manifestly low and for not awarding special damages despite the fact that the same was specifically pleaded and proved.
9. At the time of preparing this judgment, only the Appellant had filed submissions in support of the appeal despite the fact that the court had directed that the appeal be canvassed by way of written submissions. The however does not lessen the court's duty on a first appeal to reevaluate and reanalyze the record afresh with a view to coming to own independent conclusions

10. In the submissions the Appellant takes issue with the learned trial magistrate's apportionment of liability at 50:50 between himself and the Respondent. He contends that his evidence, to the effect that the accident occurred on his proper lane while the Respondent's motor vehicle was overtaking another vehicle and encroached onto his lane, was not controverted. He further submits that the point of impact was on his right lane and that this evidence remained unchallenged, thereby warranting a finding of full liability against the Respondent.

11. The Appellant further argues that once interlocutory judgment had been entered against the Respondent, the issue of liability stood determined in his favour, leaving the trial court with the sole task of assessing quantum of damages. In support of this proposition, he relies on **Nicholas King'oo Kithuka v Jap Quality Motors & another [2021] eKLR**, **Abdulahi Ibrahim Ahmes v Lemlem Ahmed CA Nairobi No. 278 of 2005**, and **Makala Mailu Mumende v Nyalui Gulf & Country Club Civil Appeal No. 16 of 1989 [1991] KLR 13**.

12. On quantum, the Appellant contends that the award of general damages in the sum of Kshs. 900,000/= was inordinately low in light of the injuries he sustained. He submits that he suffered a fracture of the mid-shaft of the right tibia and fibula; an intertrochanteric fracture of the right femur; posterior dislocation of the right hip joint; fracture of the sacrum; and fracture of the right iliac crest. He

proposes an award of Kshs. 3,000,000/= and relies on **Eugene Reeksting v AG & another [2021] eKLR**, where a plaintiff who sustained multiple fractures was awarded Kshs. 2,500,000/=, and **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another [2015] eKLR**, where the court awarded Kshs. 2,461,324/= to a plaintiff who had suffered multiple fractures and had been hospitalized for a considerable period.

13. The Appellant further submits that the authorities relied upon by the trial court, namely **Kennedy Osando v Dennis Bosire Nyangena [2021] eKLR** and **Intre-Health Interaction International Inc v Charles Musembi Munyao [2019] eKLR**, involved less severe injuries than those he sustained and were therefore not comparable.
14. Additionally, the Appellant invites this Court to award him future medical expenses in the sum of Kshs. 200,000/=.

Issues, Analysis and Determination

15. Having carefully considered the Record of Appeal and the submissions filed by the Appellant, the issues that fall for determination are:

- a) **Who was liable for the accident and to what extent? and**
- b) **Whether the award of damages made by the trial court ought to be interfered with.**

Who was liable for the accident and to what extent?

16. Before I delve into the merits on the issues isolated, the court observes that there was enormous energy spent to press the point that there having been a default judgment, the question of liability stood settled and that the trial court ought not to have dealt with the same as disclosed in the judgment.
17. The position of the law is that the incidence of burden of proof and the standard thereof remains at all times on the plaintiff to prove his cause of action. In a cause like what was before the trial court, a suit based on the tort of negligence, the appellant is never expected to hope that merely because there is a default judgment, liability will rest in his favour. No. The plaintiff must, even in the event of an interlocutory default judgment in his favour, prove his cause to the requisite standards. For that reason, it cannot be legally sound that a default judgment attaches liability on the defendant as of course. consider the 2nd ground of appeal not to be one that merits the courts deliberation.
18. On the merits, it is settled that liability in road traffic accidents is not determined through a scientific formula but by applying common sense to the facts as presented. In **Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR**, the Court emphasized that the task of the court is to assess which faults were sufficiently proximate to have caused the accident and whether more than one party contributed to its occurrence.

19. Further, in civil cases, the standard of proof is on a balance of probabilities. As stated in **James Muniu Mucheru v National Bank of Kenya Ltd C.A Civil Appeal No 365 of 2017 [2019] eKLR**, the court determines the dispute by assessing which version of events is more believable. The meaning of proof on a balance of probabilities was elaborated in **Re H and Others (Minors) [1996] AC 563**, namely that the court must be satisfied that the occurrence of an event was more likely than not.
20. In the present case, the trial court apportioned liability equally at 50:50 between the Appellant and the Respondent. The trial court reasoned that although the Appellant's evidence was largely uncontroverted, he nonetheless bore the burden of proving negligence on the part of the Respondent.
21. The Appellant contends that since the Respondent did not tender evidence, he ought to have been found wholly liable. However, it is trite that even where a defendant does not adduce evidence, the plaintiff must still discharge the burden of proof. In **Mwangi v Mambo (Civil Appeal E1058 of 2023) [2025] KEHC 8438 (KLR)**, the Court reiterated that a claimant must prove his case even where no defence evidence is called. Similarly, in **Peri Formwork Scaffolding v White Lotus Projects Limited [2021] eKLR**, relying on **Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR**, it was held that even at formal proof, the

claimant must still produce sufficient evidence to satisfy the court of the truth of his claim.

22. The evidence on record reveals material inconsistencies. PW2 testified that the accident occurred on the right side of the road and that he was hit while on the pavement. On re-examination, however, he stated that the accident took place on the left side as one faces Nairobi from Nakuru. PW3, on the other hand, testified that the Respondent's vehicle was heading towards Nakuru and left its lane before encroaching onto the Appellant's Lane.
23. These conflicting accounts render it difficult to conclusively attribute sole blame to the Respondent. The inconsistencies relate to the direction of travel, the lane of impact, and the precise manner in which the collision occurred. In such circumstances, it would be unsafe to impose 100% liability on one party.
24. Upon due re-evaluating the evidence as a whole, the Court finds that it was not possible to assign blame squarely on either of the parties. The safer approach was to blame both equally as the trial court did hence there is no basis to interfere with the trial court's apportionment of liability at 50:50. The finding on liability is thus upheld.

Whether the award of damages made by the trial court ought to be interfered with for being too low?

25. The principles guiding appellate interference with awards of damages are well settled. In **Butt v Khan [1981] KLR 349** and

Kemfro Africa Ltd t/a Meru Express Services & Another v A.M. Lubia & Another [1982-88] 1 KAR 727, the Court of Appeal held that an appellate court will only interfere where the trial court acted on wrong principles, misapprehended the evidence, or made an award that is so inordinately high or low as to represent an erroneous estimate.

26. Further guidance was given in **William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)** and **Ugenya Bus Service v Gachuki (1981-1986) KLR 567**, where it was emphasized that awards must reflect the circumstances of each case while maintaining reasonable uniformity with comparable decisions.

27. The Appellant challenges the award under three heads; future medical expenses; pain and suffering and special damages.

Future Medical Expenses

28. The trial court declined to award future medical expenses on the basis that the same had not been specifically pleaded and proved. With respect, this finding is not borne out by the record.

29. At paragraph 8 of the Plaint dated 26th April 2023, the Appellant expressly pleaded future medical expenses in the sum of Kshs. 200,000/-. The medical report by Dr. Obed Omuyoma indicated that the Appellant had metal implants inserted for fracture management and that removal would cost Kshs. 200,000/-. The doctor reiterated this evidence during examination-in-chief.

30. Although the Respondent cross-examined the doctor on the absence of invoices, no contrary medical evidence was tendered. Nor were submissions filed to challenge the claim.
31. In **Tracom Limited & another v Hassan Mohamed Adan [2009] eKLR**, the Court of Appeal clarified that future medical expenses, though awarded under general damages, must be specifically pleaded. The Court further cited **Kenya Bus Services Ltd v Gituma [2004] 1 EA 91**, holding that once pleaded, an approximate figure is sufficient.
32. In the present case, the claim was properly pleaded and supported by medical evidence. Accordingly, the Appellant is entitled to future medical expenses in the sum of Kshs 200,000/- which the court awards to him.

Pain and Suffering

33. According to the medical report of Dr. Obed Omuyoma, the Appellant sustained the following injuries; fracture mid-shaft right tibia and fibula; intertrochanteric fracture of the right femur; posterior dislocation of the right hip joint; fracture of the sacrum and fracture of the right iliac crest.
34. In awarding Kshs. 900,000/- as general damages for pain and suffering, the trial court relied on two authorities. The first was **Kennedy Ogando v Dennis Bosire Nyangena [2021] eKLR**, where the claimant sustained a compound fracture of the left femur,

a displaced fracture of the right radius, and fractures of two upper incisor teeth. In that case, an award of Kshs. 1,000,000/- was made.

35. The second decision relied on was **Intra Health International Inc v Charles Musembi Munyao [2019] eKLR**, in which the plaintiff suffered a compound fracture of the right humerus and a fracture of the right femur. On appeal, the lower court's award of Kshs. 800,000/- was upheld.

36. A careful consideration of the foregoing authorities demonstrates that the injuries sustained therein were comparatively less severe than those suffered by the Appellant in the present matter. Nevertheless, this Court is mindful of the established principle that no two cases will ever present identical injuries. The appropriate approach is therefore to consider comparable injuries and to ensure reasonable consistency in awards, while bearing in mind the peculiar facts of each case.

37. The Appellant, in urging this Court to enhance the award to Kshs. 3,000,000/-, relied on **Eugene Reeksting v Attorney General & another [2021] eKLR**. In that case, the plaintiff sustained injuries disclosed as fracture of the distal end of the left radius; fracture of the head of the left femur with posterior dislocation of the left hip joint; fracture of the posterior wall of the left acetabulum; multiple rib fractures on the left side of the chest; and Lung contusion. There, the plaintiff was assessed to have

suffered 30% permanent disability and was awarded Kshs. 2,500,000/- as general damages for pain and suffering.

38. The Appellant further relied on **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another [2015] eKLR**, where the plaintiff sustained; multiple soft tissue injuries; Blunt injury to the head; Fracture of the left radius/ulna; Compound fracture of the right tibia/fibula; and Compound fracture of the left tibia/fibula and was awarded Kshs 2,000,000/- as damages for pain and suffering.

39. The same authorities were cited and placed before the trial court. In this Court's considered view, the injuries sustained in those decisions are more comparable to those suffered by the Appellant herein than the authorities relied upon by the trial court.

40. Guided by the principle that awards of damages must maintain reasonable consistency while remaining responsive to the specific injuries proved so as to be compensatory, the Court finds that the award of Kshs 900,000/- was inordinately low. The same is hereby set aside and substituted with an award of Kshs 2,000,000/- as the commensurate damages for pain and suffering.

Special Damages

41. It is trite that special damages must be specifically pleaded and strictly proved. **See Hahn v Singh Civil App No 42 of 1983 (1985) KLR 216.**

42. The Appellant pleaded Kshs. 210,550/- as special damages. The trial court awarded Kshs. 10,550/-. The difference of Kshs. 200,000/-

related to future medical expenses, which have now been awarded under the appropriate head. The court finds no error upon the trial court in awarding the sum of Kshs 10,550.

43. In conclusion, the appeal partially succeeds, and the Court makes the following orders:

a) Liability is upheld at 50:50 as between the Appellant and the Respondent.

b) The award of Kshs 900,000 for pain and suffering is set aside and substituted with Kshs 2,000,000/-.

c) The Appellant is awarded Kshs 200,000/- for future medical expenses.

d) The award in the sum of Kshs 10,550 for special damages is upheld

e) The Appellant shall have the costs of this appeal.

44. It is so ordered.

Dated, signed and delivered at Lodwar this 27th day of February 2026.

Patrick J O Otieno

Judge