

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E138 OF 2024

THUU WATHIKA.....

.....APPELLANT

VERSUS

ARTHUR ODUOR.....

.....RESPONDENT

**(Being an appeal from the Judgment and Decree of Hon.Nathan Lutta (CM)
in Naivasha CMCC No. 623 of 2018 delivered on 30th October, 2024)**

JUDGMENT

The Background

1. By a Complaint dated 5th July 2018, the Appellant instituted suit against the Respondent seeking general damages, special damages in the sum of Kshs. 341,706/-, together with interests and costs of the suit.
2. The Appellant's case was that on or about 1st October 2017, he was lawfully riding motorcycle registration number KMDE 483Q along the Naivasha-Nakuru Road within Nakuru County and that upon reaching a place known as Three Point, motor vehicle registration number KCA 992V, pleaded to be owned and/or driven by the Respondent, was so negligently driven, managed and/or controlled thus hitting the Appellant. As a result of the collision and accident,

the Appellant sustained bodily injuries, suffered loss and damage and thus claimed damages.

3. The Respondent failed to enter appearance, whereupon the Appellant applied for interlocutory judgment and a judgment in default of appearance was subsequently entered on 10th March 2021 in favour of the Appellant. The court thereafter awarded general damages in the sum of Kshs 2,200,000/, special damages of Kshs 341,706/, together with costs and interest.
4. By an application dated 17th April 2023, the Respondent moved the court seeking, inter alia, an order for stay of execution of the decree and leave to enter appearance and defend the suit. That application was allowed by a ruling delivered on 30th August 2023, in that the default judgment of 10th March 2021 and decree dated 12th April 2023 were set aside, and the Respondent was granted leave to file a defence.
5. In his Statement of Defence dated 17th April 2023, the Respondent attributed the occurrence of the accident to the Appellant, alleging that the Appellant negligently made a U-turn on the highway, thereby obstructing the Respondent's motor vehicle, and rode at an excessive speed, among other particulars of negligence.
6. In a judgment delivered on 30th October 2024, the learned trial magistrate apportioned liability equally between the Appellant and the Respondent at the ratio of 50:50. The court awarded general

damages in the sum of Kshs. 800,000/-, special damages of Kshs. 143,126/-, together with costs of the suit and interest.

7. The decision aggrieved the Appellant who then lodged the instat appeal by way of a Memorandum of Appeal dated 18th November 2024, 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 Respondent.
8. The Memorandum of Appeal sets out four grounds but a careful reading of the grounds show that the appeal is essentially challenging the apportioning liability at 50:50 as the appellant contend that the weight of the evidence showed that the respondent was entirely or largely to blame and, that there misdirection by the court in not taking into consideration the nature of the appellant's injuries and the submissions offered and thus arriving at a figure that was too low as to demonstrate an erroneous exercise in assessment of damages.
9. The Respondent, equally dissatisfied with the decision of the trial court, lodged a Cross-Appeal by way of a Memorandum dated 22nd November 2024, seeking that the cross-appeal be allowed, the decision of the trial court be set aside, and the Appellant's suit be dismissed with costs. He further prays for costs of both the appeal and that of the cross-appeal

10. The Cross-Appeal sets out seven grounds of appeal which in the careful consideration of the court challenge only the apportionment of liability without faulting the assessment of damages. However, in the submission the respondent/counter-claimant seems to have addressed the court on the propriety of the award while contending that the award for pains and suffering was too high while agreeing with the trial court that there was no proof of loss of future earnings to merit any award being made.
11. The parties were directed to file submissions in canvassing both appeal and cross-appeal and both duly complied. The court has had the benefit of reading the filed submissions and only sets hereinbelow a brief summary of the same.

The Submissions

12. For the Appellant, the findings of the trial court on both liability and quantum of damages are challenged. On liability, the Appellant submits that the Respondent's driver testified that he saw the Appellant from a distance of approximately 50 meters, that visibility was clear, and that there were no other vehicles on the road. The Appellant himself testified that he was hit from behind. He contends that, from this narration, it is evident that the Respondent failed to keep a proper lookout and to ensure the safety of other road users.
13. The Appellant further submits that the Respondent's admission that he saw the Appellant in good time placed upon him a duty of

care, and that his failure to avoid the collision amounted to negligence. In support of this proposition, he relies on the decision in **Kambi and Anor vs Muhithi (1968) EA 70**, on the latitude for interference by an appellate court on interference with apportionment of liability by the trial court and in **Hasse v Muriuki (Legal Representative of the Estate of David Murimi Muregi - Deceased) [2024] KEHC 4934 (KLR)** where it was held that a distance of about 50 meters is sufficient to take an evasive action and that failure to take preventive measure points to negligence. The appellant thus urges that the finding on equal blame be set aside and the respondent be found 100% to blame.

14. On quantum, the Appellant submits that he sustained injuries in the nature of; a blunt injury to the right brachial plexus leading to forearm paralysis; a compound fracture of the right ankle joint; and a compound fracture of the distal end of the right fibula. He contends that he suffered permanent disability, having lost function of his right arm and sustained disability in his right leg at the ankle, with permanent incapacity assessed at 50%.

15. For that extent of the injuries, it is submitted that under the head of general damages for pain and suffering he ought to have been awarded the sum of Kshs. 3,000,000/- and cites **C M (a minor suing through mother and next friend MN) v Joseph Mwangangi Maina [2018] eKLR**, where the plaintiff was awarded

Kshs. 2,000,000/- for pain and suffering after sustaining severe crush injuries to the knee resulting in 40% permanent incapacity and hospitalization for three weeks.

16. He also relies on **Alphonza Wothaya Warutu & Carlyne Bancy Wawira v Joseph Muema [2017] eKLR**, where the plaintiff was awarded Kshs. 800,000/- for injuries including a deep cut wound on the forehead, a compound fracture of the midshaft of the right humerus, a compound fracture of the right tibia, and a deep cut wound on the right lower leg.

17. With regard to future medical expenses, the Appellant contends that he will require ongoing physiotherapy sessions and corrective surgeries to regain control of his limbs. He submits that, assuming a life expectancy up to the age of 70 years, he is likely to incur medical expenses amounting to Kshs. 1,500,000/-.

18. In support of his claim for diminished earning capacity, the Appellant relies on **Peninah Mboje Mwabili v Kenya Power & Lighting Company Limited [2016] eKLR**, where the Court held that inability to perform work must be taken into account when assessing damages and awarded the plaintiff, who had suffered 30% disability, Kshs. 6,000/- per month based on an assumed life expectancy up to 75 years. The Appellant proposes an award of Kshs. 1,008,000/-, calculated at Kshs. 6,000/- per month for 14

years ($6000 \times 12 \times 14$), given that he was 61 years old at the time of testifying.

19. He further seeks an award for provision of domestic assistance, contending that in light of his incapacity, it is reasonable to provide for a domestic helper. He states that the applicable minimum wage at the time of filing suit for a house help residing outside municipalities was Kshs. 7,240/- per month and proposes a sum of Kshs. 1,216,320/- calculated as $7,240 \times 12 \times 14$ years.
20. On special damages, the Appellant maintains that he specifically pleaded and strictly proved the sum of Kshs. 341,706/- and that the trial court erred in awarding only Kshs. 143,126/-.
21. In conclusion, the Appellant prays that the appeal be allowed in its entirety, the finding on liability be upset and damages be assessed anew.
22. For the Respondent, two issues for determination are isolated. The first is whether the learned trial magistrate erred in law and in fact in finding that the accident occurred as pleaded and, if so, whether it was occasioned by the negligence of the Respondent or his agent. On this issue, the Respondent contends that the Appellant's case is founded on mere allegations unsupported by credible evidence. He submits that the Appellant failed to discharge the burden of proof by demonstrating that the Respondent's actions caused the injuries complained of. In support of this proposition, he

relies on the decision in **Statpack Industries v James Mbithi Munyao [2005] eKLR**, where the court held that the mere occurrence of an injury is not sufficient to impose liability in the absence of proof of negligence. The Respondent maintains that, if an accident occurred at all, the same was solely attributable to the negligence of the Appellant.

23. The second issue identified by the Respondent is whether the Appellant proved his case on a balance of probabilities so as to entitle him to the reliefs sought. The Respondent reiterates his position that the accident was caused by the Appellant's own negligence. With regard to the award of Kshs. 800,000/= as general damages for pains and suffering, he submits that the same was inordinately high in view of what he describes as unverified injuries and the Appellant's age. In support of this contention, he cites **Daniel Gatana Ndung'u & another v Harrison Angore Katana [2020] eKLR**, where the court awarded Kshs. 140,000/= for a cut wound on the head, blunt injury to the right knee, and multiple bruises; and **Justine Nyamweya Ochoki & another v Jumaa Karisa Kippingwa [2020] eKLR**, in which the court awarded Kshs. 150,000/= for blunt injuries to the lower lip, chest, and left wrist.

24. On the claim for loss of future earnings, the Respondent contends that the Appellant failed to establish any actual or ascertainable loss. He relies on **Pietro Canobbio v Joseph Amanu**

Hinzano [2016] KEHC 6161 (KLR) where the court set aside an award under the head of loss of earnings on the basis that it was not grounded in established legal principles, noting that the claimant remained alive and capable of engaging in gainful employment.

25. In light of the foregoing, the Respondent prays that his memorandum of cross-appeal be allowed with costs.

Issues, Analysis and Determination

26. Having carefully considered the record of appeal, the Memorandum of Appeal, the Memorandum of Cross-Appeal, and the rival submissions filed by the parties, the Court discerns only two issues to arise for its determination.

a) Whose negligence occasioned the accident?

b) What heads of and quantum of damages, if any, is appropriate in the circumstances?

Whose negligence occasioned the accident?

27. The Appellant and the Respondent each attribute blame to the other for the occurrence of the accident. The police abstract was produced as PEXH 1 by PW1, a police officer attached to Naivasha Police Station. It is clear that he was called to merely produce the document without more. It was his testimony that the abstract indicated that the accident was pending investigations and that this remained the status as at the time he testified, some seven years

after the accident. He further stated that the officer who prepared the abstract had since retired. To court, the value of that evidence was limited to the fact that an accident occurred and was reported to the police. It did not demonstrate how it occurred as to demonstrate who the wrongdoer was.

28. The Appellant testified as PW3. His evidence was that he was knocked from behind and that he did not notice the Respondent's vehicle prior to the impact.

29. Conversely, DW1, also a police officer stationed at Naivasha Police Station, produced a separate abstract which, according to her, attributed blame to the Appellant. She, however, conceded that she was not the investigating officer.

30. DW2, the Respondent's driver, testified that he was driving the suit motor vehicle when the suit motorcycle suddenly joined the road and collided with the left front wing of his vehicle. He stated that he was driving on the left side of the road, that he observed the motorcyclist from a distance of approximately 50 meters, and that he attempted to swerve in order to avoid the collision before stopping on the right side of the road. He denied any negligence on his part.

31. There is no dispute that an accident occurred. The point of divergence lies in the question of how it occurred and who was to blame for the occurrence. The evidence tendered by the parties is

plainly conflicting. The police officer who testified for the Appellant produced an abstract indicating that the matter was pending investigations, while the officer who testified for the Respondent produced an abstract attributing blame to the Appellant. Neither of the officers was the investigating officer. No sketch map was produced to demonstrate the point of impact, and no photographs of the accident scene were tendered to clarify the positions of the vehicle and motorcycle upon the collision to help establish who had the right of way. It is however common ground that the two were headed the same direction and that the appellant was in front of the respondent of the respondent's motor vehicle because DW2 conceded that he first saw the cyclist while about 50 meters ahead.

32. The evidence by the driver agrees with that of the appellant to the extent that he was driving behind the cyclist and hit him from the rear. To court, the duty of every driver to be on the lookout and to keep safe distance from those ahead of him imposes a duty on the driver to take every evasive act to avoid hitting anything on the road ahead of it merely because its wrongfully on the road. That the respondent's driver saw the appellant in good time, on a clear daylight but did nothing to avoid the collision, is ipso facto negligence. The fact that he knocked the appellant in the disclosed circumstance only reveal that he was either least observant and

failed to keep a proper lookout or he was over-speeding, both of which are proof of negligence.

33. Even in the absence of independent eye witness, the evidence by the two sufficiently showed that the respondent's driver was at fault. That evidence is not the kind which leaves the court with two competing versions of events. In such circumstances, the court must assign liability where it resides without inviting the guiding principle articulated in **Lakhamshi v Attorney General, (1971) E A 118**, where the Court of Appeal held that where it is not possible to determine with precision which of two drivers was to blame for an accident, liability ought to be apportioned equally. The court finds that the respondent's driver was wholly to blame for having knocked the appellant from behind having seen him ahead at a safe distance sufficient to enable him take preventive measures. On that finding, the court determines that the trial court was wrong when it apportioned liability equally between the two parties for being unable to make a determination from the evidence.

34. The consequence is that the decision apportioning liability equally is set aside, and in its place substituted a judgment on liability at 100% in favour of the appellant against the respondent.

What heads of and quantum of damages, if any, is appropriate in the circumstances?

35. The principles governing appellate interference with an award of damages are now for a very long time well settled since **Butt v Khan [1981] KLR 349**, when the Court of Appeal held that an appellate court will not interfere with an award of damages unless it is shown that the trial court took into account an irrelevant factor, failed to take into account a relevant factor, or arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.
36. later in **Kemfro Africa Limited t/a Meru Express Services & Another v A.M. Lubia & Another [1982-88] 1 KAR 727**, the court reiterated that assessment of damages is an exercise of judicial discretion and that interference is warranted only where the award is based on wrong principles or is manifestly excessive or depicts a misery. Court, in general, are reminded that in assessing damages, regard must be had to the totality of the circumstances, the nature and extent of the injuries, and the need to maintain reasonable uniformity with awards made in comparable cases.
37. In **Ugenya Bus Service v Gachuki (1981-1986) KLR 567**, the court underscored that although general damages cannot be assessed with mathematical precision, the awards must be fair, reasonable, and consistent with comparable precedents.
38. In this matter before one poses to determine what heads of damages could be awarded, one must go back to the plaint and

establish what prayers were made. A casual reading of the plaint show that the prayer merely asked for general damages without any specifics.

39. However, on the body of the plaint at paragraph 7, it is pleaded that the appellant sought to be awarded damages for future medical expenses to carter for specialized treatment. That pleading followed the averment at the beginning of the paragraph that the appellant had suffered loss and damage. The court views the plaint to present those situations where parties just throw materials at the court for the court to decide what to do by groping in the darkness created by ambivalence. That is not what the law expects of plaintiff under Order 4 Rules 6 and 7, Civil Procedure Rules. There ought to have been a succinct and candid pleading on what heads of damages the appellant was asking from the court so that from the onset, both the respondent and the court understood what claim was to be dealt with. The court finds that the appellant here failed in its duty to assist court meet its overriding objective by reason of very inelegant pleadings. It should not be taken for granted that every personal injury claim attracts every known head of damages and that it is the duty of the court to identify for the claimant it suitable remedies.

40. That however, by itself, is not fatal provided the trial court was able to craft a remedy that could serve the ends of justice between

the parties. It is evident to court that the trial court after evaluating the pleadings and evidence formed the opinion and was convinced that the appellant was entitled to damages from pains and suffering even without specifying so.

41. That finding was in line with the evidence which showed that there were injuries suffered by the appellant which the doctor assessed to have resulted into permanent disability at 30%. It is noted that there was never a contestation about the fact of injury and the extent. The court is thus satisfied, as the trial court was, that the appellant proved and was entitled to damages for pains and suffering.

42. According to the medical report by Dr. Obed Omuyoma dated 26th June 2018, the Appellant sustained the following injuries:

- a) Compound fracture of the right ankle joint;
- b) Blunt injury to the right brachial plexus leading to right forearm paralysis; and
- c) Compound fracture of the distal end of the right fibula with dislocation of the right ankle joint.

On General Damages for Pain and Suffering

43. In awarding general damages in the sum of Kshs. 800,000/-, the trial court relied on **Mwangi v Siloma & another (Civil Appeal E102 of 2022) [2023] KEHC 26140 (KLR)**. Upon analysis of that decision, it is evident that the claimant therein sustained injuries

comparable, and in some respects more extensive, than those sustained by the Appellant herein, including multiple fractures and soft tissue injuries, and similarly suffered permanent disability assessed at 30%.

44. Notably, in the said case, the appellate court substituted the award of Kshs. 800,000/- made by the trial court with an award of Kshs. 1,200,000/- as general damages.

45. Guided by the need for consistency in comparable awards, and taking into account the nature of the injuries, the degree of permanent disability, the passage of time, and the effect of inflation, this court is persuaded that an award of Kshs. 1,200,000/- for pain and suffering is appropriate in the circumstances.

On Future Medical Expenses

46. With regard to future medical expenses, the Court of Appeal in **Tracom Limited & Another vs Hassan Mohammed Adan [2009] eKLR** stated that a claim for future medical expenses, though falling within general damages, must be specifically pleaded and strictly proved.

47. Likewise, in **Mbaka Nguru & Another v James George Rakwaro NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR**, the Court of Appeal held that a mere reference in a medical report to future medical costs is insufficient; such a claim must be expressly pleaded and properly proved.

48. In the present case, the Appellant did make a vague reference to that head of damages without specifically praying for the same in the plaint. More importantly, there was never even the slightest attempt to prove the need for future medical treatment. There was no mention of the need for future medication in the witness statement nor in the evidence led. Not even the doctor's report alluded to such in his report and evidence. In the absence of evidence on the need and cost of future medical expenses, the court is guided by the settled principle that claims for future medical expenses must be expressly pleaded and strictly proved, and finds that the claim under this head is both untenable as much as it is unsustainable. The appeal by the appellant in that regard fails and is dismissed.

49. All other heads of general damages alluded to in the submissions including damages for diminished earning capacity and provision of a house help must suffer the fate of dismissal for having not been pleaded nor proved.

On Special Damages

50. On special damages, the law is settled that they must be specifically pleaded and strictly proved. The Appellant pleaded special damages in the sum of Kshs. 341,706/-. The receipts produced, marked as PEXH 3 to PEXH 11, total Kshs. 191,206/-, comprising medical report fees and hospital expenses. The trial

court awarded Kshs. 143,126/-, without a basis and left an accounted for a shortfall of Kshs. 48,080/-. Upon scrutiny of the receipts on record, the proved amount is Kshs. 191,206/-, which ought to have been awarded. Accordingly, the award of Kshs 143,126/= is set aside and in its place substituted a sum of Kshs. 191,206/=

51. In the end, the appeal succeeds in that the finding on liability is set aside, the award for general damages is equally set aside and substituted with a sum of Kshs 1,200,000 just as the special damages is and substituted with a sum of Kshs 191,206/
52. On the flip side, the cross-appeal is hereby disallowed for want of merits.
53. In summary the court makes the following orders

The appeal is allowed on terms that: -

- i) Liability is assessed at 100% for the appellant against the respondent**
- ii) The award of general damages for pain and suffering in the sum of Kshs. 800,000/- is set aside and substituted with an award of Kshs. 1,200,000/-.**
- iii) The award of special damages in the sum of Kshs. 143,126/- is set aside and substituted with an award of Kshs. 191,206/-.**

iv)The Cross-Appeal is dismissed

v) The appellant being successful shall have the costs of both appeal and cross-appeal.

54. It is so ordered.

Dated, signed and delivered at Lodwar this 20th day of February
2026

Patrick J O Otieno

Judge

Original