Ndimae & another v Chesebe (Civil Appeal E152 of 2024)
[2026] KEHC 3300 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E152 OF 2024

REA OUGO, J

MARCH 13, 2026

BETWEEN

GEORGE SILALI NDIMAE ..... 1ST APPELLANT

KENYA POWER & LIGHTING COMPANY ..... 2ND APPELLANT

AND

DAVID EMOIT CHESEBE ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. J.O. Manasses RM delivered on the 3/10/2024 in Sirisia PMCC No. E148 of 2023)

JUDGMENT

1. The respondent filed a suit in the trial court via a plaint dated 21/8/2023. He claimed general and special damages, as well as costs of the suit, for injuries sustained in a road traffic accident.
2. The appellants entered appearance and filed a joint statement of defence dated 27/9/2023, in which they denied the respondent's claim while alleging contributory negligence on the respondent's part.
3. The matter proceeded to trial and, by a judgment delivered on 3/10/2024, as follows: -
    a. Liability at 80:20 in favour of the respondent against the appellants.
    b. General damages Kshs. 1,000,000/- 80% contribution = Kshs.800,00/-
    c. Special damages Kshs. 6,000/-
    d. Costs of the suit and interest on damages awarded at court rates.
4. Being dissatisfied with the said judgment, the appellants lodged this appeal via the Memorandum of Appeal dated 25/10/2024 and raised nine (9) grounds of appeal summarized as follows:

a. That the learned trial magistrate erred in law and fact in holding the appellants 80% liable in negligence against the evidence tendered on record and the legal concept of negligence.

b. That the learned trial magistrate erred in law and fact in awarding general damages of Kshs. 1,000,000/- without any basis and which damages were inordinately high as to amount to a gross overstatement of the loss suffered.

c. That the learned trial magistrate erred in law and in fact in failing to consider the provisions of Order 21 Rule 4 of the Civil Procedure Rules and other provisions as required by law.

5. The appeal was disposed off by written submissions; however, at the time of writing this judgment, only the appellants' submissions were on record.

6. The appellants contended that the apportionment of liability at 80:20 against them lacked support from the evidence, as the record indicated that it was the rider of the motorcycle, whom the respondent had boarded, who hit the appellants' vehicle from behind. They argued that the respondent was the author of his own demise as the evidence the record shows that he voluntarily rode on an overloaded motorcycle being driven recklessly and that he did not wear the necessary protective gear.

7. Consequently, the appellants urged the court to dismiss the respondents' claim for lack of proof of liability against the appellants.

8. Regarding general damages, the appellants argued that the trial court's award was based on incorrect principles, as the respondent failed to provide any documentary evidence confirming the diagnosis of a fracture. They contended that the respondent's claim should have been rejected for being disingenuous, speculative, and unsubstantiated. The respondent failed to establish a causal link between the appellants' alleged negligence and/or fault and his injury, the trial court's award of damages was excessive and on the high side and should be set aside.

ANALYSIS AND DETERMINATION.

9. Since this is a first appeal, the Court must re-evaluate the evidence presented at trial and reach its own independent findings and conclusions. However, it must always remember that it did not have the benefit of observing the witnesses testify. See Selle & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.

10. The respondent's case before the trial court was that on 30/06/2023, while lawfully travelling as a pillion passenger on a motorcycle along the Bungoma–Chwele road, he was involved in a road traffic accident near Makutano. The 1st appellant negligently drove and controlled the motor vehicle with registration number KCV 476U, causing it to violently ram into the motorcycle the respondent was riding.

11. The respondent testified as Pw1 and adopted his statement dated 21/08/2023 as his evidence in chief, in which he reiterated the details of the accident contained in the plaint. He stated that he was still healing and had a recurrent injury on his left leg, where he had sustained a fracture. In cross-examination, Pw1 admitted that there were two pillion passengers on the motorcycle—his father and himself. He stated that the appellants' motor vehicle was ahead of the motorcycle that the respondent was riding, and the accident occurred as the motorcycle rider was attempting to overtake the motor vehicle. There was no other motor vehicle between the respondent's motorcycle and the appellants' motor vehicle.

12. Pw2, Elias Adoka, a clinician at Bungoma County Referral Hospital, produced a P3 form dated 3/07/2024 and treatment notes in favour of the respondent. The respondent came to the hospital with

a history of involvement in a road traffic accident and exhibited swelling on the forehead, bruises on the dorsal side of the left hand, and a fracture of the left fibula near the ankle joint. He assessed the injuries as grievous harm. In cross-examination, Mr. Adoka testified that he examined the respondent on 1/07/2023 and 3/07/2023. He stated that the respondent sustained a fracture, as evidenced by an X-ray, although the same had not been produced in court. In re-examination, he reiterated that the respondent had sustained a fracture.

13. Since this matter was part of a series, the trial court adopted the testimony of Pw3 (Police Officer) as outlined in Sirisia PMCC No. 151 of 2023.

14. Pw4, Dr. Joseph Sokobe produced a medical report dated 17/07/2023 in favour of the respondent. He testified that he charged the respondent Kshs. 6,000/- for the report. In cross-examination, Dr. Sokobe stated that he had not produced any X-ray to confirm the respondent's fracture; however, in re-examination, he testified that the respondent had a small fracture of the fibula when he examined him.

15. The trial court accepted Dw1's testimony in Sirisia PMCC E147 of 2023 as evidence from Dw1. In that case, the 1st appellant testified as Dw1, adopting his statement dated 27/11/2023 as his evidence in chief. He explained that on the relevant date at 18:40, while it was raining, he indicated and turned into a corner that goes left. Suddenly, a boda boda rider overtaking hit his motorcycle on Dw1's car. Dw1 blamed the motorcycle rider, who was overtaking on a continuous yellow line. During cross-examination, Dw1 reiterated that he was joining a feeder road on his right but indicated his intention before doing so. He blamed the motorcycle rider for causing the accident.

16. It is based on this evidence that the trial court rendered its decision. From the foregoing, the grounds of appeal can be summarised into two, viz, '

    i. That the learned trial magistrate erred in law and in fact in failing to consider the provisions of Order 21 Rule 4 of the Civil Procedure Rules and other provisions as required by law

    ii. That the trial court misdirected itself in ignoring the evidence, submissions, authorities and principles applicable on liability and quantum and consequently came to a wrong conclusion on the same.

17. The appellants challenged the trial court judgement on the ground that it did not comply with Order 21 Rule 4 of the Civil Procedure Rules.

18. A judgment must adhere to the mandatory provisions of Order 21 rule 4 of the Civil Procedure Rules, which specify that a judgment in a defended suit should include a concise statement of the case, the points for determination, the decision on those points, and the reasons for such decision. In this case, the learned magistrate's judgment did not fully adhere to Order 21 Rule 4. Despite providing what it considered a concise statement of the case and setting out the issues for consideration, the trial court failed to give reasons for the decisions it made.

19. Section 78 of the *Civil Procedure Act* provides:

    1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

        (a) to determine a case finally;

        (b) to remand a case;

        (c) to frame issues and refer them for trial;

        (d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

20. The powers of an appellate court is to re-evaluate the evidence and reach its own conclusion. (see Selle & Another v Associated Motor Boat Co. Ltd & Others 1968 E.A. 123).I will therefore proceed to subject the whole evidence to a fresh and exhaustive scrutiny and make my own conclusions.

21. On liability, the appellants were held 80% liable for causing the accident. In Ndatho v Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment), the court reiterated Lord Reid's statement in Stapley v Gypsum Mines Limited (2) (1953) A.C 663 at P. 681, wherein he stated thus: -

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it ... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally."

22. The general rule of law is that he who alleges must prove. That is the essence of section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya. In Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:-

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

23. Furthermore, it is well established that a party is bound by its pleadings and cannot depart from them. See the Supreme Court of Kenya in its ruling in the case of Raila Amolo Odinga & Another v IEBC & 2 others (2017) eKLR.

24. The respondent pleaded in his plaint that the 1st defendant (appellant) negligently drove, managed and/or controlled motor vehicle registration number KCV 476U that it violently rammed into the motorcycle that the respondent was aboard.

25. Accordingly, it was the respondent's duty to produce evidence that the appellants were responsible for causing the accident that resulted in the injuries complained of. However, the respondent testified that the accident happened when the motorcycle rider he had boarded was attempting to overtake the motor vehicle. There was no motor vehicle between the respondent's motorcycle and the appellants' vehicle. This account of events matched that given by the 1st appellant in his testimony, stating that

the motorcycle rider hit his vehicle while attempting to overtake on a continuous yellow line as he was turning into a feeder road after indicating.

26. Having considered the evidence, I find that the rider of the motorcycle, which the respondent had boarded, was responsible for causing the accident. It remains unrebutted that the 1st appellant was turning into a feeder road and had indicated, whereas the respondent's rider was overtaking from behind the appellant's vehicle. Furthermore, liability also attaches to the respondent, who had not worn any protective gear, and they were two pillion passengers on the motorcycle, contrary to the provisions of section 103B(2) of the *Traffic Act*. It was the respondent's burden to prove the aspects of negligence pleaded against the appellants. The evidence adduced did not do so.

27. Given the circumstances, I am convinced that the trial court made an error in assigning liability to the appellants. I would distribute the liability equally between the respondent and the rider of the motorcycle he boarded, who, unfortunately, was not included as a party to the case. Therefore, I conclude that the respondent's claim against the appellants lacks merit.

28. Regarding quantum, had I allocated liability in favour of the respondent against the appellants, considering the proven injuries sustained by the respondent, such as a fracture of the left foot and soft tissue injuries, I would have set aside the trial court's award for general damages as excessive and replaced it with an award of Kshs. 500,000/-. I am persuaded by the following cases where the plaintiffs sustained comparable injuries to the respondent herein. In Savanna International Ltd v Muka (Civil Appeal 31 of 2018) [2022] KEHC 675 (KLR) (14 June 2022) (Judgment) the claimant sustained fracture medial malleolus of the left ankle joint and soft tissue injuries and was awarded Kshs. 400,000/-. This court in Menengai Oil Refineries Limited v Bundi [2024] KEHC 11122 (KLR) awarded Kshs 500,000/- where the plaintiff sustained a left medial malleolus fracture with disability assessed at 20%.

29. In conclusion, I find that the trial court erred in fact and in law entirely when arriving at its decision and make the following orders;

    a. The judgment of the trial court delivered on 3/10/2024 in Sirisia PMCC No. E148 of 2023 is hereby set aside entirely as the respondent failed to prove his case against the appellant.

30. Costs in both the trial court and this appeal are awarded to the appellants. Following the directions of this court on 2/12/2025, the aforementioned orders similarly apply to Bungoma Civil Appeal No. 154 of 2024. It is so ordered.

DATED, SIGNED AND DELIVERED IN BUNGOMA ON THIS 13TH DAY OF MARCH 2026.

R. OUGO

JUDGE

In the presence of:

Miss Chebet -For the Appellants

Miss Akinyi - For the Respondent

Wilkitser - C/A