



**Wasulu v County Government of Kakamega (Civil Appeal
E133 of 2024) [2026] KEHC 3510 (KLR) (17 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E133 OF 2024
S MBUNGI, J
MARCH 17, 2026**

BETWEEN

PATRICK MATSESHE WASULU APPELLANT

AND

COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

*(Being an appeal arising from the judgment and Decree of the Honourable
T.A Obutu, Chief Magistrate, delivered on the 27th June, 2024, in Mumias
Senior Principal Magistrate's court, Civil Case Number 88 of 2023)*

JUDGMENT

1. The appellant herein had filed a suit against the Respondent vide a plaint dated 6th July 2023. In his claim, the Appellant sought general and special damages, including costs and interest, for an accident he attributed to the Respondent's driver.
2. He claimed that on 4th April 2023, the plaintiff was a lawful and diligent rider of motorcycle registration number KMFR 539L TVS Star HLX 125 at Mwitoti Area along Mumias road when the Respondent's driver, agent and or servant so negligently carelessly drove Motor vehicle registration number 37CG 222A Toyota Prado TX, causing it to lose control and hit the Appellant.
3. According to the Appellant, as a result of the accident, he sustained several injuries, which included a head injury with brief loss of consciousness, a fracture of the right humerus, Bruises on the right hand, bruises on both knees and a cut wound on the right foot. He sought general and special damages of Kshs. 18,750/=
4. The Respondent entered an appearance and denied the allegation. The matter proceeded for a hearing with the Appellant calling three witnesses, including himself, while the Respondent had two witnesses, the driver and a police officer.



5. In a judgment delivered on 27th June 2024 by Hon. T.A Obutu, the trial court, upon analysing the evidence and the witness testimony, the trial court apportioned liability at 50:50 and awarded General damages of Kshs. 400,000. The Appellant was awarded general damages of Kshs. 200,000, while the special damages are Kshs. 9,750/=
6. Being dissatisfied with the decision and judgment of the trial court, the Appellant has filed the present appeal based on the following grounds;

That the Learned Trial Magistrate erred in law and in fact in apportioning liability in the ratio of 50:50 against the weight of the evidence on record

That the Learned Trial Magistrate erred in law and in fact in awarding inordinately low damages, given the nature of the injuries sustained by the Appellant and the authorities cited by the Appellant

7. He prays that the appeal be allowed and the court set aside the judgment on liability and quantum and find the respondent wholly liable for the accident.
8. The court directed that the appeal be canvassed by way of written submissions.

Appellant's submission

9. In their submission dated 11th February 2025, the appellant addressed both the issue of quantum and liability. On the claim of liability, they claim that the trial magistrate failed to analyse the evidence contrary to Order 21 Rule 4 of the Civil Procedure Rules 2010 and quoted the case of Bwire vs. Wayo & Sailoki (Civil Appeal) 032 of 2021. He claimed that the trial magistrate misdirected himself in apportioning liability at 50:50 and disregarded the evidence of the two police officers. He faulted the respondent's driver's evidence that he was driving towards Kakamega direction, stating that he was driving from Kakamega towards Mumias.
10. He further submits that failure by the respondent's driver to produce his driving license implied that he was not a licensed driver and quoted the case of AL Kamar Trading Company Limited vs. Harrison Otina (2015) eKLR and Magdalene Yula Mutua vs. Isaack Mwaniki (1993) eKLR.
11. According to the Appellant, the respondent did not prove that the motor vehicle was roadworthy and/or well maintained, an issue they raised during cross-examination and quoted the case of Kenya Bus Service vs Dina Kawira Humphrey, CA 295/2000 and Nairobi CA 179 of 2023 Rahab Micere Murage Estate of Esther Wakiini Murage vs Attorney General & 2 others (2015) Eklr.
12. He claimed that the respondent left his lawful lane and misled the court by claiming that he was driving from the Mumias general direction towards Kakamega general direction, which was not his lane, as he was driving from Kakamega direction towards Mumias general direction and quoted the case of Nester Shikuri vs. Ibrahim Okwiri Matanji (2020) Eklr.
13. According to the Appellant, the trial court was wrong in apportioning equal liability while the evidence on record pointed to the Respondent being at fault.
14. On the issue of quantum, they submit that the trial court awarded them a low sum given the nature of the injuries and quoted the case of Jeremiah & Brothers Contractor & another vs. Francis and several cases to support their case. He highlighted the injuries as follows: head injury with brief loss of consciousness, fracture of the right Humerous, Bruises on the right hand, Bruises on both knees and a cut wound on the right foot.



15. In conclusion, he stated that the award by the trial court was inordinately low and prays that the same be substituted with Kshs. 800,000/=

Respondent's submissions

16. The Respondent filed their submission dated 2nd April 2025 in support of the trial court's judgment and prays that it should not be disturbed. He opposed the Appellant's claim that they were negligent, relying on the Appellant's written statement where he claimed that he was on the left side facing Kakamega and his evidence was not corroborated by his witness, PW2, who produced the police abstract and stated that he never investigated the accident and further could not tell the state of the investigation.
17. They quoted several cases in support of their case, such as Peter Kanithi Kimunya vs. AdenGoyo Haro (2014) and Fredrick Kimenye Musau vs. Explico Insurance Co. Ltd, in support of their case on production of a police abstract.
18. They blamed the Appellant for the accident same as DW2, who blamed the Appellant for failure to stick to his lane. They blamed the rider for not having a license and further that the motorcycle was not insured. They quoted the case of Civil Appeal E048 of 2023, Kevin Asira Osebe vs. Stephen Mwangi Njoroge and Machakos Civil Appeal No E079 of 2022, Moiz Motor Ltd & Anor s. Jacob Kioko Muthoka & 2 others.
19. They pray that the court dismisses the appeal for lack of merit.

Evidence in brief

20. PW1 was Patrick Matseshe Wasullu, the plaintiff. He produced his recorded statement as evidence in chief. At cross-examination, he admitted that he did not have a driving license and claimed that the motorcycle was his and insured, although he did not have a copy of the insurance.
21. He testified that he was from Mumias, heading to Shianda. He testified that he was not sure if the police visited the scene and denied running away from the scene. He stated that the right side of the motorcycle was damaged and he was injured on the right side of the face, right finger, right knees and right foot and he was treated at St. Mary's hospital, Shianda Health centre.
22. He claimed that he did not know how much money was spent on his treatment or how much was paid to Dr. Sokobe.
23. PW2 was PC Moses Ewori attached to Mumias Patrol traffic desk. He produced the police abstract showing the accident that occurred on 4/4/2023 at 9.30 p.m. in Mwitoti along Mumias Kakamega Road between motorcycle KMFR 539 L and Motor vehicle registration number 37CG 222A Toyota TX.
24. On cross-examination, he testified that he did not investigate the accident nor visit the scene and did not know how the accident occurred. He testified that he did not have the OB in court, nor did he know if the rider was licensed to ride and said that the matter was still under investigation.
25. PW3 was Suleiman Lutta, a clinical officer based at Shianda Health Centre. He testified that the plaintiff came to the facility on 4/4/2023 with pain on the ankle, foot, and upper arm and that he had a history of being involved in a road traffic accident. He changed the dressing on the stitched arm, and he was advised to go for x-ray to see whether he had fractures. He produced the treatment notes as exhibit-2.



26. On cross-examination, he produced the treatment notes and claimed that he did not ascertain any fracture since he did not treat the patient.
27. PW4 was Dr. Joseph Sokobe. He produced the report of the plaintiff he made after he examined him on 5/7/2023. He charged Kshs. 6,000/= for the report and filled the P3 form.
28. He produced the medical report as P exhibit-3, receipt- exhibit 4, and P3 exhibit-5. On cross-examination, he stated that he produced the treatment notes from Shianda Health Centre and recalled that the plaintiff had an X-ray on the right hand, which had a fracture of the right humerus and indicated that the patient was seen at St. Mary's Hospital.
29. DW1 was Feslin Khayumbi Likuyani, a driver at the County Government of Kakamega. He adopted his statement dated 6/11/2023.
30. On cross-examination, he confirmed that he drove motor vehicle registration number 37CG 222A Toyota Prado that belonged to the county Government of Kakamega. He claimed that he was coming from Kakamega, headed to Mumias, when the motorcycle came from Mumias' direction, headed to Kakamega and it left its lane and came to his lane.
31. He claimed that both the rider and the passenger were drunk, although he did not prove. He claimed that he was the one who reported the matter to the police.
32. DW2 was PC Erick Otwani attached to Mumias police station. He claimed that he investigated the accident that occurred on 4/4/2023. He claimed that he was called at 2130 hours and informed that there was an accident at Mwitoti. He stated that he visited the scene and found that there was an accident between the county government vehicle registration number 222A Toyota Pardo, and the motorcycle driven by the plaintiff.
33. He claimed that the driver and the rider were headed to Kakamega and that the rider failed to keep to his lane and moved to the other lane and hit the right side mirror of the Land Cruiser, pardon.
34. He stated that the rider was taken to St. Mary's hospital, where he was treated, and he went to the station and booked the accident at the OB. He claimed that he drew the sketch plan although he didn't have the police file with him. he claimed that the rider of the motorcycle failed to keep to his lane and further did not have a driving license. He charged the rider for carelessly driving on the public road. He stated that he found the rider at the scene, who confirmed he was injured from the accident.
35. On cross-examination, he confirmed that he received a call from Bass Commander and visited the scene of the accident. He claimed that the motorcycle left its lane, although he did not have a sketch plan or the police file. He claimed that the people at the scene attempted to hide the motorcycle when he intervened. he stated that the victim was treated at St. Mary mission hospital and issued with a police abstract, which indicates that the accident was pending investigation.
36. He stated that the rider did not have a driver's license, and the motorcycle was not insured.
37. The defence closed its case.
38. In a judgment dated 27th June 2024, Hon. T.A Obutu, upon considering the evidence of both parties, found that since both parties blamed each other and the witnesses did not offer any assistance on who to find liable, apportioned equal liability on the parties, while on the quantum, it was guided by the comparable cases and awarded Kshs. 400,000, which he shared 50: 50 as per the liability and the plaintiff was awarded Kshs. 209,750/=.
39. The appellant, being dissatisfied with both the liability and quantum, filed the current appeal.



Analysis and determination

40. I have perused the record of the lower court, the evidence adduced by the parties, their submissions and the authorities cited. As this is a first appeal, it is my duty to re-evaluate the evidence and come to my own conclusions, bearing in mind that I did not have the benefit of seeing and hearing the witnesses. In *Peters v Sunday Post Ltd* (1958) EA 424 at p. 429, E Sir Kenneth O'Connor P. said as follows-
- “It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.
41. The appellant has raised many grounds in his appeal, which can be summed up into two: whether the learned magistrate erred when he apportioned liability at 50:50, and the second issue is whether the general damages awarded at the trial court were inordinately low to warrant interference by this Appellant court.
42. On the first issue of liability, the appellant averred that the Respondent was to blame for the accident and that the trial magistrate erred in apportioning 50:50 liabilities. He blamed the respondent for misleading the court and claimed that it was the driver who left his lane, a fact that the trial court ought to have considered.
43. He claimed that the vehicle was being driven from Kakamega towards Mumias while he was driving from Mumias towards Kakamega.
44. The appellant claimed that the driver lied to the court that he was driving towards the Kakamega direction, which the trial court ought to consider.
45. Under section 107 of the *Evidence Act*, the burden of proof lies on the party alleging negligence to establish it on a balance of probabilities. In this case, both parties blame each other for the accident. The Appellant's evidence was that he was riding his motorcycle from Mumias towards Shianda when the Respondent vehicle, being driven from Kakamega towards Mumias, left his lane negligently and knocked him. He relied on his testimony and that of PW2, the police officer who produced the abstract, but admitted he did not investigate the accident or visit the scene. PW2 could not shed light on how the accident occurred, and the matter remained under investigation.
46. The Respondent, on the other hand, testified that he was driving from Kakamega to Mumias when the Appellant's motorcycle veered into his lane. DW2, the investigating officer, corroborated this, stating that the Appellant failed to keep to his lane, did not possess a valid driving license, and the motorcycle was uninsured. DW2 further noted that the Appellant was charged with careless driving. DW2 did not produce the police file or sketch plan of the direction made on the traffic case to buttress his evidence.
47. In *Lakhamshi v Attorney General* [1971] EA 118, it was held that where it is impossible to ascertain precisely who is to blame between two drivers, liability should be shared equally.
48. The Appellant faulted the Respondent for not producing the driver's license or proof of vehicle maintenance. However, as held in *AL Kamar Trading Company Limited v Harrison Otina* [2015] eKLR, the failure to produce a license does not automatically imply negligence unless tied to the cause of the accident. Here, no evidence linked any such failure to the occurrence. Similarly, in *Kenya Bus Service v Dina Kawira Humphrey*, CA 295/2000, the court emphasised that vehicle roadworthiness



- must be proven only if raised as a specific issue contributing to the accident, which was not sufficiently established here.
49. The conflicting directions and lane usage were not resolved by independent evidence. The Appellant claimed the Respondent's driver was in the wrong lane, citing *Nester Shikuri v Ibrahim Okwiri Matanji* [2020] eKLR, but that case involved clear evidence of lane violation, unlike here, where testimonies clashed without corroboration.
 50. In *Murunga v Murono* (Civil Appeal 98 of 2017) [2024] KEHC 5544 (KLR), the High Court upheld a 50:50 apportionment where evidence was equivocal, relying on the *Lakhamshi* principle. Similarly, in *Mwangi & another v Oginga* (Civil Appeal 88 of 2023) [2025] KEHC 7976 (KLR), liability was shared equally in the absence of clear fault. I find no error in the trial court's approach; the evidence did not tilt decisively in favour of either party. The apportionment of 50:50 is upheld.
 51. The second issue to be addressed is quantum. It is trite law that an appellate court will not interfere with an award of damages unless it is shown that the trial court proceeded on wrong principles or misapprehended the evidence, resulting in an inordinately high or low award. See *Kemfro Africa Ltd v A.M. Lubia & Another* [1982-88] 1 KAR 727.
 52. The Appellant sustained a head injury with brief loss of consciousness, fracture of the right humerus, bruises on the right hand and both knees, and a cut wound on the right foot. These injuries were confirmed by medical evidence from PW3 and PW4. The trial court awarded Kshs. 400,000/= in general damages, which the Appellant contends is low.
 53. In assessing quantum, courts consider comparable awards for similar injuries, taking into account inflation and the passage of time. In *Logistics Solutions Ltd v Steere Mavu Mwambela* [2021] eKLR, Kshs. 450,000/= was awarded for a fracture of the humerus, a deep cut on the eye, a head abrasion, and blunt injuries to the shoulder and chest.
 54. In *Philip Mwago v Lilian Njeri Thuo* [2019] eKLR, Kshs. 500,000/= was upheld for a humerus fracture with 8% disability.
 55. In *Barnabas v Ombati* (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) (28 July 2022) (Judgment), Doris Nyanduko Ombati (the Respondent), Kshs. 800,000/= was awarded for more severe injuries, including head and chest contusions, fractures of the femur, humerus, and pelvis. However, in *Nguku Joseph & another v Gerald Kihui Maina* [2020] eKLR, an award was reduced to Kshs. 500,000 for a humerus fracture and minor injuries.
 56. Considering the nature of the injuries here, which include a fracture and head injury but without permanent disability noted, and comparing with the above authorities, I find the trial court's award inordinately low. A more appropriate sum for general damages is Kshs. 600,000/=.
 57. On special damages, the trial court awarded Kshs. 9,750/= . No basis has been shown to interfere with this. Save the calculations half of Ksh. 18,750/= is Ksh. 9,375/=.
 58. Accordingly, after apportionment at 50:50, the Appellant is entitled to Kshs. 300,000/= in general damages plus Kshs. 9,375/= in special damages, totalling Kshs. 309,375/=. Interest shall accrue from the date of the lower court judgment.
 59. The appeal succeeds in part on quantum. The appellant shall have ½ (half) of the costs of the appeal and full costs as awarded in the lower court Judgment.
 60. Right of Appeal 30 days explained.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF MARCH,2026.

S.N MBUNGI

JUDGE.

In the presence of:-

CA: Ang'onga/Zilda/Velma

In the absence of the parties and their counsels, though aware of the Judgment date. Court Assistant to upload the Judgment on the CTS forthwith.

