

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NO. E197 OF 2023**

**LENAH KEMUNTO O MONDI.....APPELLANT**

**VERSUS**

**JACKSON KABUTHI..... 1<sup>ST</sup> RESPONDENT**

**NESPETE ENTERPRISES LIMITED.....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal from the Judgment and decision of Hon. M.W Kamau dated  
24<sup>th</sup> July, 2023 arising out of Molo CMCC No. E005 of 2022)***

**JUDGMENT**

1. The background of this matter is that the Appellant herein sued the Respondents before the trial court vide a Plaint dated 10<sup>th</sup> January, 2022, where she sought judgment against the Respondent for:

- a) Special damages of Kshs. 8,250/=.***
- b) General damages to be assessed by this Honourable Court.***
- c) Costs and incidental to the suit.***
- d) Interest on (a),(b), (c) above at Court rates.***
- e) Any other further relief that this Honourable Court may deem fit and just to grant.***

2. The Appellant's claim as set out in the trial court is that on or about the 19<sup>th</sup> November, 2021, she was a lawful pillion passenger aboard motorcycle registration number KMDU 006H navigating the Nakuru-Eldoret Highway. It is alleged that upon reaching the Sobe area, motor vehicle registration number KDB 1763C/ZG 215Q, then under control of the 1<sup>st</sup> Respondent, was driven so negligently and recklessly that it veered from its proper lane and collided with the said motorcycle. As a direct consequence of the impact, the Appellant sustained serious personal injuries, notably multiple facial abrasions, blunt

trauma to the lower back and gluteal region, scalp lacerations, and chest contusions.

3. The Appellant attributed the cause of the accident solely to the Respondents' driver, particularising the negligence as, *inter alia*: driving at a speed excessive in the circumstances; failing to keep any or any proper lookout; and failing to manage or control the vehicle to avoid the collision. The Appellant maintained that the 2<sup>nd</sup> Respondent is vicariously liable for the tortious acts of their driver, and sought both general and special damages for the loss and suffering occasioned thereby.
4. In a Joint Statement of Defence dated 11<sup>th</sup> March, 2022, the Respondents denied the claim. While they admitted, on a *without prejudice* basis, that an accident did indeed occur involving the subject vehicle and motorcycle, they disputed the Appellant's account of the incident.
5. The Respondents' version of events is that their vehicle was being driven lawfully and at a reasonable speed when the motorcycle rider suddenly and without warning emerged from the pavement into the main carriageway. The Respondents contended that the collision was caused, or substantially contributed to, by the negligence of the motorcycle rider, whom they blame for entering the path of the truck so abruptly that the accident became inevitable.
6. Upon hearing the rival testimony and submissions, the learned trial magistrate dismissed the Plaintiff's suit *in toto*. This determination was primarily predicated upon a perceived failure of identity. The trial court found that the variations in the Appellant's name across the Hospital treatment notes, the P3 Form, and the Police Abstract were irreconcilable with the names set out in the pleadings.
7. The learned magistrate concluded that this material discrepancy in the name was fatal to the Appellant's case, holding that the documentary evidence failed to sufficiently corroborate that the person treated was indeed the claimant before the court. Consequently, the trial court held that the Appellant had failed

to discharge the legal and evidential burden of proof, leading to the dismissal of the suit, a finding that forms the primary substratum of this Appeal.

8. Dissatisfied with that judgement, the Appellant herein lodged the current Appeal vide a Memorandum of Appeal dated 7<sup>th</sup> August, 2023, based on Five(5) grounds of Appeal as follows;-

- 1) *The Learned Trial Magistrate erred in law and in fact by taking into account irrelevant consideration and proceeded to dismiss the Appellant's case when the issues the learned magistrate found weight were curable under section 1A and 100 of the Civil Procedure Act and under Article 159 of the Constitution.***
- 2) *The Learned Trial Magistrate erred in law and in fact in failing to properly analyze the evidence as had been tendered by the Appellant, which evidence established that the Appellant was indeed involved in a Road Traffic accident on 19<sup>th</sup> November, 2021.***
- 3) *The learned Magistrate misdirected herself both in law and in fact by failing to appreciate that the evidence by the Appellant was not rebutted and therefore stood unchallenged and uncontroverted, particularly bearing in mind that the Respondent did not call any witnesses.***
- 4) *The decision and the Judgement of the learned Magistrate is against the weight of evidence tendered.***
- 5) *The Learned Magistrate erred in law and in fact in not considering the Appellant's submissions.***

9. The Respondent herein was served with this Appeal, and notices for various Court dates, as evidenced by the various Affidavits of service filed, but they did not oppose the Appeal, nor did they participate in its hearing. The Appeal was thus canvassed by written submissions.

### **Appellant's Submissions**

10. The Appellant seeks to set aside the trial Court judgment, arguing that the trial magistrate erred by dismissing the case based on curable technicalities under Section 1A and 100 of the Civil Procedure Act as read with Article 159 of the Constitution, failing to properly analyse evidence of a road traffic accident and ignoring that the Appellant's evidence was unrebutted. The Appellant requests that this Court substitute the trial court's decision with a finding that the suit is merited and proceed to assess damages.
11. It was submitted that the mandate of a first appellate court is to re-evaluate evidence and reach its own independent judgment, as established in the cases of *Selle & another v Associated Motor Boat Co. Ltd. & others and Peters v Sunday Post Limited [1958] EA 424.*
12. Citing *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR)*, the Appellant argues that a litigant is entitled to a full and independent consideration of both facts and law at this stage. Furthermore, in *Peters v Sunday Post Ltd [1958] EA 424*, the court asserted that an appellate court must intervene if a trial judge fails to appreciate the weight of circumstances or has plainly gone wrong.
13. The Appellant argues that the trial magistrate erred in finding the case unproven, asserting that the burden of proof was met on a balance of probabilities. She relies on *Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR*, on the legal and evidential burden of proof under Sections 107(1), 108, 109, and 112 of the Evidence Act. On the standard of proof, she cites *William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLR 526*, which defines a balance of probabilities as proving that allegations are more likely than not to have occurred in the ratio of 51% vs 49%.
14. The Appellant challenges the trial magistrate's dismissal based on minor name variations, for example, "*Lenah Moindi*" in the police abstract versus "*Lenah Muindi*" in treatment documents. In support of this, the Appellant cites *Njiinu*

*v Kiarie & another (Civil Appeal E006 of 2021) [2024] KEHC 3732 (KLR)*, where the Court reinstated a suit despite a name missing from police abstract because the evidence of injury and treatment remained uncontroverted by the defence.

15. Regarding the assessment of damages, the Appellant cites *Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini v A. M. M. Lubia & Another (1998) eKLR* as cited in *Mutungu v David Muasya Ndeleva [2015] eKLR* to establish that an appellate court should only interfere with an award if the trial judge considered irrelevant factors, ignored relevant ones, or reached a wholly erroneous estimate.
16. While acknowledging the trial court's discretion as per the *Kemfro Africa Limited case(Supra)*, the Appellant emphasises that interference is justified if wrong principles were applied or evidence was misapprehended.
17. The Appellant states that the trial magistrate awarded zero damages and therefore proposes an award of Kshs. 1,200,000 as general damages for multiple facial bruises, blunt back trauma, scalp wounds, and chest contusions.
18. In support of that proposal, she cites the cases of *Vincent Cheruiyot Rono v Mombasa Maize Millers Ltd [2006] eKLR* and *Pan Paper Mills (EA) Ltd & Another v Asha Hassan [2007] eKLR*, where awards were made for alleged comparable injuries.
19. Lastly, and while citing the decision in *Peter Nyangacha v Nyagaka Bisera Peter [2018] eKLR*, the Appellant urges the Court to allow the appeal and set aside the trial magistrate's decision with costs.

#### *Analysis and Determination*

20. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced before the trial court to arrive at its own independent conclusion, taking into account that it did not have the advantage of seeing and hearing the witnesses as they testified, as elaborated in the case of *Selle vs. Associated Motor Boat Company Ltd [1968] EA 123*.

21. From the Memorandum of Appeal and the submissions filed, it is apparent that the broad issues for determination are on both liability and quantum.
22. Regarding liability, two witnesses testified. Leah Kemunto O. Mondri, the Appellant herein, testified as PW1 and stated that on 19<sup>th</sup> November, 2021, she was a pillion passenger on motorcycle registration number KMDU 006H on their proper lane, when a large truck, motor vehicle KDB 1763C/ZG 215Q, which was speeding, staggered into their lane, and hit them.
23. During cross-examination, she clarified that she did not know the motorcycle rider personally, as she had merely stopped him for transport from a farm. She asserted that both she and the rider were wearing helmets and reflector jackets and were obeying traffic rules.
24. Regarding the identity of the truck driver, she maintained that Jackson Kabuthi was the driver, despite a discrepancy in the police abstract, which named Festus Mwanzi. She explained that she lost consciousness at the scene and only met the vehicle owner and transport manager later.
25. The second witness, CPL Dominic Mageto, from Salgaa Police Station, Traffic Department, was the Investigating Officer in this matter. He told the court that the accident occurred on 19<sup>th</sup> November, 2021, at approximately 1730 hours at Sobea along the Nakuru-Eldoret highway, involving motor vehicle KDB 1763C/ZG 215Q, and motorcycle KMDU 006H.
26. He produced the police abstract as Exhibit P4, which identified the vehicle owner as Jackson Kabuthi, insured by Metropolitan Canon General Insurance Ltd. He further testified that the driver of the motor vehicle was to blame for the accident and, therefore, was charged with careless driving following the incident. He confirmed that Lenah Mondri (the Appellant) was the pillion passenger on the motorcycle at the time of the collision.
27. The Respondents elected not to call any witnesses or offer any evidence to rebut the version of events presented by the Appellant. Consequently, the evidence adduced by the Appellant and the Investigating Officer remains

uncontroverted and unrebutted. In the circumstances, this Court is satisfied that the Appellant's account of the accident is the true version of events.

28. In light of the foregoing, this Court is satisfied that the Appellant proved the allegations of negligence on a balance of probabilities. In the circumstances, the driver of the said motor vehicle KDB 1763C/ZG 215Q is liable for the accident at 100%, and the 2<sup>nd</sup> Respondent, Nespete Enterprises Limited, is vicariously liable for the negligent acts and omissions of its driver and agent, the 1<sup>st</sup> Respondent.
29. In respect to the issue of identity, the learned trial magistrate dismissed the suit primarily based on a perceived discrepancy in the name of the Appellant. It was the trial court's finding that the variations in the Appellant's name across the pleadings, the treatment notes, the P3 Form, and the Police Abstract were so material as to render the evidence incapable of supporting the claim.
30. A perusal of the record and the original exhibits, reveals that the Appellant is described in the pleadings as **Lenah Kemunto O Mondi**, a name that corresponds with her National Identity Card. While it is true that the P3 Form refers to her as '**Lenah Kemunto Mondi**,' the Police Abstract as '**Lenah Mondi**,' and the Hospital Discharge Summary as '**Leah Muindi Kemunto**,' these are clearly minor variations rather than a failure of identity.
31. It is apparent that the trial court laboured under a misapprehension of the facts and erroneously referred to the Appellant as '**Omondi**' when her correct surname is **Mondi**. Had the court exercised due diligence in examining the National Identity Card, it would have observed that 'O' is a middle initial or prefix, and the surname is indeed '**Mondi**.'
32. The Investigating Officer confirmed to the court that the pillion passenger involved in this accident was indeed the Appellant. Further, it is noted that the issue of identity was never raised by the parties as a point of contention during the trial.

33. This is an issue that was taken *suo motu* by the trial magistrate. In the interests of substantive justice, as anchored under Article 159 of the Constitution, such technicalities should not be used to defeat the Appellant's suit.
34. On the issue of quantum, the trial court held, at the time of dismissal, that had the Appellant successfully established liability, an award of Kshs 250,000/- would have been appropriate as general damages for the injuries sustained alongside Kshs. 8,250/- proved as special damages.
35. On General damages, the Appellant sustained Multiple bruises to the face, lower back, knees, left forearm and gluteal region, cut wounds to the scalp and chest contusion. While arriving at the award of Kshs. 250,000/- above, the trial court noted in its judgment that the Appellant had proposed a sum of Kshs. 600,000/- while relying on the case of ***Vincent Cheruiyot Rono vs Momasa Maize Millers Ltd (2006) eKLR***, where an award of Kshs. 400,000/- was made for soft tissue injuries.
36. It is settled law that an award of general damages is discretionary and that the Appellate court should be slow to interfere with such discretion. Indeed, the Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)*** held:-

***“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held***

*as per Law, J.A that: ‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’ This is the principle enunciated in Rook Rairrie [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that: “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”*

37. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] KEHC 2358 (KLR), the Respondent sustained; Multiple cut wounds on the right lower limb, Bruises on the right lower limb, Bruises on both elbows, Bruises on the right iliac region, Bruises on the frontal region, Bruises on the temporal region, Lacerations on the frontal region, Cut wounds on the left iliac region, Cut wounds on the frontal region, Cut wounds on the temporal region and Blunt trauma to the abdomen. The award of Kshs. 230,000/= was set aside and substituted with one for Kshs. 180,000/= for the injuries sustained.

38. Similarly, in Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others [2019] KEHC 8395 (KLR), the Respondent (William Ojwang Jabes), who suffered a cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back, which were considered soft tissue injuries, and was awarded Kshs. 100,000.

39. On that basis, and noting the inflation of the Kenyan currency, this Court is satisfied that the award of Kshs. 230,000 proposed by the trial Court was reasonable and within the acceptable limits for the injuries suffered. That award is upheld.

40. In conclusion, therefore, the Appeal is disposed of in the following terms: -

- 1. The trial court's judgment dismissing the Appellant's suit with costs be and is hereby set aside and substituted with a judgment holding the Respondents 100% liable.**
- 2. The Appellant is awarded general damages of Kshs. 230,000.**
- 3. Special damages of Kshs. 8250.**
- 4. The Appellant is awarded costs of the suit before the trial court and this Appeal, together with interest at the Court rate.**

**Dated, signed and delivered at Nakuru this 18<sup>th</sup> Day of March, 2026.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

**Ms Chepkorir for the Appellant**

**N/A by Respondents**

**Erickson , Court Assistant**