

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E051 OF 2024

**SIGEI.....KIMUTAI.....APP
ELLANT**

VERSUS

OKARI.....FRED MOKUA.....RESPONDENT

(Being an appeal from the judgment of Hon. Y. M. Barasa (PM) delivered on 9th July 2024 in Naivasha CMCC No. E052 of 2021)

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court where he sued the Appellant for damages arising out of a road traffic accident that occurred on 29th August 2020 at Karai area along the Naivasha-Nairobi Highway. The Respondent's case before the trial court was that he was lawfully riding motor cycle registration number **KMDN 968 B** along the said road when the Appellant, driving motor vehicle registration number **KBU 471 B**, negligently attempted to overtake in the face of oncoming traffic, swerved back into the lane and hit the Respondent from the rear, causing him grievous injuries.
2. The Appellant denied liability and contended that the accident was caused solely by the Respondent's

negligence. He testified that he heard a bang on the right side of his motor vehicle and only later realised that the motor cycle had collided with his vehicle.

3. After hearing both parties and their witnesses, the trial court entered judgment against the Appellant on liability at 100% and awarded the Respondent Kshs. 1,200,000/= as general damages together with costs and interest.
4. The Appellant was dissatisfied with the decision of the trial court and instituted this appeal wherein he listed the following broad grounds of appeal: -

a. Failing to properly evaluate evidence and wrongly attributing 100% liability to the Appellant.

b. Holding that negligence had been proved despite the Respondent failing to discharge the burden of proof.

c. Awarding excessive general damages not supported by comparable authorities.

d. Awarding loss of earnings, future medical expenses and special damages without strict proof.

5. The Appellant challenges the trial court's findings on both liability and quantum, contending that the learned trial magistrate misdirected himself on the evidence and applicable law.

Duty of the First Appellate Court

6. As a first appellate court, this Court is obligated to reconsider and re-evaluate the evidence tendered before the trial court and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses testify. In ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others*** [1968] EA 123, the Court of Appeal stated: -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

The Appellant’s Submissions

7. The Appellant submitted that the learned trial magistrate erred in law and in fact in finding him 100% liable for the accident while there was sufficient evidence pointing to negligence on the part of the Respondent.
8. It was argued that the Respondent failed to discharge the burden of proof required in negligence claims, particularly since the police officer who testified was neither the investigating officer nor present at the scene, and the police abstract produced indicated that investigations were pending.

9. The Appellant further submitted that the trial court improperly relied on submissions rather than evidence, contrary to established principles that submissions do not constitute evidence. Reliance was placed on the decision in ***Erastus Wade Opande vs. Kenya Revenue Authority & Another*** (Kisumu HCCA No. 46 of 2007), as cited with approval in ***Lapana Limited vs. County Government of Trans-Nzoia*** [2024] KEELC 881 (KLR), where the court stated: -

“Submissions are not evidence on which a case is decided.”

10. On quantum, the Appellant contended that the award of Kshs. 1,200,000/= as general damages was manifestly excessive and not supported by comparable authorities. He urged the Court to substitute the award with Kshs. 600,000/=.
11. The Appellant also challenged the awards for loss of earnings, future medical expenses and special damages, submitting that these heads were either not proved or were exaggerated, and urged the Court to reassess them in accordance with the law.

The Respondent's Submissions

12. The Respondent opposed the appeal and raised a preliminary objection that the Record of Appeal was incomplete and incompetent for failure to comply with Order 42 Rules 2 and 13 of the Civil Procedure Rules.

Reliance was placed on the Supreme Court decision in ***Bwana Mohamed Bwana vs. Silvano Buko Bonaya & 2 Others*** [2015] eKLR, where it was held:

“Without a record of appeal, a court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective...”

13. On the merits of the appeal, the Respondent submitted that the evidence on record clearly established negligence on the part of the Appellant, who attempted to overtake in the face of oncoming traffic and rammed into the Respondent from the rear.
14. It was argued that the damage to the Appellant’s motor vehicle corroborated the Respondent’s version of events and that the trial court properly evaluated the evidence before it.
15. On quantum, the Respondent submitted that the injuries sustained were serious and amounted to grievous harm, justifying the award made by the trial court. Reliance was placed on ***Kenya Power & Lighting Co. Ltd vs. Mathew Kabage Wanyiri*** [2016] eKLR. The Respondent urged the Court not to interfere with the award.
16. The Respondent further maintained that loss of earnings and future medical expenses were sufficiently proved and that the appeal ought to be dismissed with costs.

Issues for Determination

17. From the record and submissions, I find that the issues that arise for determination are: -

i. Whether the appeal is incompetent for want of a proper Record of Appeal.

ii. Whether the trial court erred in finding the Appellant 100% liable.

iii. Whether negligence was proved on a balance of probabilities.

iv. Whether the award of general damages was excessive.

v. Whether future medical expenses, loss of earnings and special damages were proved.

Analysis and Determination

(i) Competence of the Appeal

18. A perusal of the record reveals that the Appellant filed a record of Appeal dated 15th October 2024 and a Supplementary Record of Appeal on 16th December 2024. I am not satisfied that the preliminary objection on the validity of the appeal is merited and I therefore dismiss it.

(ii) Liability and Proof of Negligence

19. It was not disputed that an accident occurred involving motor vehicle KBU 471 B and motor cycle KMDN 968 B.

20. The Respondent's evidence was that the Appellant attempted to overtake another vehicle and collided with him from the rear. The Appellant admitted that his vehicle sustained damage on the front right side, including the

mirror and windscreen, a fact that materially corroborates the Respondent's version that he was knocked from behind.

21. Courts have taken the position that if the proved facts raise a prima facie inference that the accident was caused by the defendant's negligence, the case will be decided for the plaintiff unless the defendant provides an adequate explanation to displace that inference. This is the position that was reaffirmed in ***Nandwa vs. Kenya Kazi Ltd*** [1988] KLR 275 where the Court of Appeal held that: -

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if, in the cause of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence provides some answer adequate to displace that inference.”

22. In the present case, the trial court rendered itself as follows on the issue of liability: -

“On the issue of liability, the plaintiff stated that he was hit by the m/v as it tried to swerve back to its lane while overtaking.

PW2 the police officer did not state the circumstances of the accident.

DW1 on the other hand stated that he was driving on the same direction as the motorcycle when he suddenly heard a loud bhang and later noticed that he had knocked the motorcycle.

I take note that the driver of the m/v has actually confirmed the plaintiff's evidence when he stated that he was driving on the same direction with the motorcycle and he suddenly heard a loud bhang.

It is therefore true that he must have knocked down the motorcycle while getting back to his lane.

In view of the foregoing I do find the defendant 100% liable for the accident."

23. In ***Lakhamshi vs. Attorney General [1971] EA 118***, the Court held:

"A judge is under a duty when confronted with conflicting evidence to reach a decision on it, and in most traffic accidents it is possible, on a balance of probability, to conclude that one or other party was guilty, or that both parties were guilty, of negligence. In many cases, as

for example where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, but where it is not possible, it is proper to divide the blame equally between them.”

24. In the instant case, I find that the Respondent discharged the burden of proving negligence as he clearly explained how he was hit from the rear. The Appellant, on the other hand, did not present any credible explanation to show that the collision was not due to his negligence besides stating that he suddenly heard a loud bhang and later noticed that he had knocked the motorcycle. In other words, the Appellant did not explain how his vehicle knocked the motor cyclist.
- 25.** In the circumstances of this case, I find that the trial court was justified in finding the Appellant wholly liable for the accident as he conceded that he knocked the cyclist which,

to my mind, was prima facie evidence of negligence that was not satisfactorily explained.

(iii) General Damages

26. The guiding principle was stated in ***Boniface Waiti & Another vs. Michael Kariuki Kamau [2007] eKLR***, where the court held that the purpose of damages in respect of personal injuries is to compensate the plaintiff and not to punish the defendant.
27. The duty of the appellate court is therefore to evaluate whether the trial court's award was so inordinately high or low as to represent an erroneous estimate warranting interference, bearing in mind the need for comparable awards for similar injuries and prevailing inflationary trends.
28. In reassessing the damages awarded by the trial court, I am reminded of the well-settled principles as expressed in ***Boniface Waiti*** case (supra) where the court emphasized that awards ought not to enrich the claimant, must be commensurate with the injuries sustained, and comparable awards in similar cases serve only as a guide.
29. Recent authorities demonstrate prevailing trends for a single femur fracture accompanied by soft tissue injuries. In ***Kimani vs. Mwangi & 2 others (Civil Appeal E071 of 2023) [2024] KEHC 6744 (KLR)*** the High Court upheld an award of Kshs 550,000 for a fracture of the femur and a cut wound, while in ***Reamic Investment Ltd vs. Joaz Amenity Samuel [2021] eKLR***, the court sustained an

award of Kshs 600,000 for a fractured femur coupled with soft tissue injuries.

30. Similarly, in ***DPL Festive Ltd vs. Rose Akinyi Ochola, HCCA No. 28 of 2018*** (as cited in ***County Government of Tharaka Nithi vs. JSM (Civil Appeal E022 of 2023) [2024] KEHC 13850 (KLR)***), an award of Kshs 750,000 was found to be reasonable for a distal femur fracture alongside further injuries.
31. In ***Ndavi vs. Mwangangi (Civil Appeal 764 of 2019) [2024] KEHC 8106 (KLR)***, the High Court confirmed that Kshs 700,000 was not excessive for a fractured femur and soft tissue injuries.
32. Taken together, the above cited authorities reveal an emerging range between Kshs 550,000 and 750,000, with more severe presentations attracting higher figures. The present matter involves a compound comminuted fracture of the distal femur and further soft tissue injuries. Considering the seriousness of the fracture, the residual pain noted in the medical reports, and the need to maintain consistency with comparable awards while avoiding inordinacy, I find that comparable authorities demonstrate that the award of Kshs. 1,200,000/= was excessive. I therefore set aside the said award and substitute it with Kshs. 700,000 in general damages for pain and suffering.

(iv) Future Medical Expenses

33. The trial court awarded the Respondent Kshs. 200,000 for future medical expenses. Two medical reports presented by the parties estimated future medical expenses at Kshs. 200,000/= and Kshs. 80,000/= respectively.
34. In ***Forwarding Company Limited & Another vs. Kisilu; Gladwel (Third Party) (Civil Appeal No. 344 of 2018) [2022] KECA 96 (KLR)***, the Court of Appeal held: -

“Whereas none of the doctors herein gave reasons for their specific estimates, and noting that the medical reports were produced with consent of all the parties, we are of the view that an average of both estimates would be fair on all the parties.”

35. The award herein is therefore substituted with Kshs. 140,000/=.

(v) Loss of Earnings and Special Damages

36. Loss of earnings is a special damage claim which must be strictly proved.
37. In ***Karani vs. Nchedu (1995-1998) 1 EA 87***, the Court held that the claim for loss of earnings is a special damage which must be pleaded and proved.
38. In the present case, no documentary proof was tendered and I therefore set aside the award for loss of earnings.

39. Special damages amounting to Kshs. 7,550/= were strictly proved and are upheld in accordance with ***Hahn vs. Singh [1985] KLR 716***, where the Court of Appeal held:

“Special damages must not only be specifically claimed but also strictly proved.”

Disposition

40. Having regard to the findings that I have made in this judgment, I find that the instant appeal is merited and therefore succeeds, albeit **partially**, and the judgment of the trial court is set aside and substituted as follows:

- a) ***Liability: 100% in favour of the Respondent.***
- b) ***General damages: Kshs. 700,000/=***
- c) ***Future medical expenses: Kshs. 140,000/=***
- d) ***Special damages: Kshs. 7,550/=***

Total award: Kshs. 847,550/=

41. Interest on the total award is awarded to the Respondent and shall accrue from the date of the trial court judgment until payment in full.

42. Each party shall bear his own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 19TH DAY OF MARCH, 2026.

**HON. W. A. OKWANY
JUDGE**

19/03/2026

FOR APPELLANT Ngagi

FOR RESPONDENT Ms Keberenge

COURT ASSISTANT Karani

30 days stay of execution granted

File closed

ORIGINAL