

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E063 OF 2021

KOROSEK
LIMITED.....APPELLANT

LOGISTIC

VERSUS

HARUN
KAMAU.....RESPONDENT

NGANGA

(Being an appeal from the decision of Hon. L Sarapai (PM) delivered on 28th September 2021, in Naivasha Chief Magistrate Civil Case No. 1037 of 2017)

JUDGMENT

1. By a plaint dated 4th December 2017, the plaintiff (herein “the respondent”) sued the defendant (herein “the appellant”) seeking for judgment against the appellant for:

(a) General damages for pain and suffering.

(b) Special damages as pleaded in paragraph 5 of the plaint

(c) Costs of this suit and

(d) Interest on (a), (b) and (c) above at court rates.

2. The plaintiff's case is that on or about 22nd November 2016, he was lawfully driving Prime/Mover trailer registration No. KCJ 826A/ZF4814 along Naivasha-Mai Mahiu road from Nakuru heading to Nairobi. That at Chechinia area, the defendant's agent, driver, employee and/or servant negligently managed Prime/Mover trailer registration No. KBR 119V/ZD/2961, travelling in the opposite direction such that, it veered off its designated lane and encroached onto the lane on which the plaintiff was driving.
3. That as a result the two vehicles violently collided and as a result he suffered severe injuries, being a fracture of the right radius, dislocation of the left

wrist joint, fracture of the distal end of the left radius, fracture of the right femur at two places on the upper and the mid shaft.

4. The plaintiff blames the defendant's driver and/or agent for causing their accident based on the particulars of negligence listed at paragraph 4 of the plaint that; he drove his vehicle at a speed which was too fast in the circumstances of this case, failed to exercise or maintain any sufficient or adequate control of the vehicle.
5. Further that, he caused or permitted his vehicle to collide with the plaintiff's vehicle, caused obstruction to other road users, in particular the plaintiff's vehicle and failed to keep proper lookout for other road users or have any sufficient regard for traffic that was or might reasonably be expected on the said road.
6. Further that he failed to slow, stop, swerve in any other way to avoid the accident or manage the said

Prime Mover trailer. Furthermore, he failed to comply with the requirement of the Traffic Act, (cap 403) of the Laws of Kenya and the Highway Code and/or drove while drunk or under influence of intoxicating substance.

7. The plaintiff pleads for special damages in the total sum of Kshs 2,550 being; Kshs 2,000 for medical report, and Kshs 550 for vehicle search and an additional sum of Kshs 130,000 as cost for future medical expenses.
8. That the 2nd defendant is sued as under the doctrine of vicarious liability.
9. However, the plaintiff's claim was opposed vide a statement of defence dated 28th February 2018, wherein the defendant denied that it is the registered owner of the subject Prime Mover trailer as described in the plaint. However, it was conceded that on the material date its vehicle was involved in an accident with the plaintiff's vehicle

but denied that the cause of the accident was negligence on the part of its agent.

10. The particulars of negligence attributed to the defendant's driver were denied, so was the particulars of special damage and the injuries that the plaintiff is alleged to have sustained.

11. However, the defendant pleaded that in the alternative and on without prejudice basis, if the accident allegedly occurred which was denied, then it was solely caused or substantially contributed to by the driver and/or the owner of the prime mover KCJ 826A slash ZF 4814.

12. The particulars of negligence attributed to the plaintiff's driver are that; he drove at an excessive speed in the circumstances of the case and hit the defendant's vehicle. That he failed to give a warning as he approached the road.

13. Further that he failed to see the defendant's vehicle in sufficient time so as to avoid the collision and

drove without any due care and attention. Furthermore, that he drove a defective prime mover, failed to keep any proper lookout or have sufficient regard for traffic that was or might reasonably be expected on the said road.

14. That he also failed to; maintain a safe distance, drive on his designated lane, permitted defective vehicle to be used on the road and finally, that he drove in a zigzag manner and failed to stop, slow down, brake or swerve or in any way to act so as to manage and control his vehicle to avoid the accident.

15. The defendant averred that the suit is fatally defective and it would take the first step, in the first instance under the law and urge the court to dismiss it with costs.

16. At the close of the pleadings, the case proceeded to full hearing. (PW1) adopted his witness statement as evidence in chief and testified that on the day of

the accident he was driving prime mover/trailer KCJ 826A/ZF4814 along the Naivasha - Mai Mahiu road heading toward Nairobi. That at Chechenia area he saw that defendant's vehicle from the opposite direction had come to his lane. That he flashed the lights and hooted but there was no response.

17. That he swerved to his extreme left however, the defendant's vehicle hit his vehicle on the side pushing it to fall on the left lane while the defendant's vehicle fell on the middle of the road.

18. That he was rushed to Naivasha District Hospital where got first aid and was transferred to North Kinangop Hospital where he was diagnosed with several fractures and was admitted from 26th November 2016 to 16th December 2016. That his hand has healed but his leg is still unwell. Further, the metal implanted will require to be removed in future at a cost of Kshs. 130,000.

19. The plaintiff reiterated that he blamed the driver of the defendant's vehicle for causing the accident as he encroached on his lane. He denied that he was attempting to overtake stating that his vehicle was fully loaded and was heading uphill.

20. The plaintiff's case was also supported by the evidence of (PW2) No. 96714 PC Josephat Makau who produced the police abstract as plaintiff exhibit 5 and confirmed the occurrence of the accident. He testified that it was a fatal accident as the driver of the defendant's vehicle died on the spot. Further that the police completed their investigations and blamed the driver of motor defendant's vehicle KBR 119V and recommended an inquest be held and the matter was pending before court.

21. The defendant's case was supported by the evidence of (DW1) Frankline Kibet who adopted his witness statement as his evidence in chief. He testified that he was a turn boy on defendant's

vehicle and that on the date of the accident their vehicle was along Naivasha - Mai Mahiu road heading towards Naivasha.

22. That on reaching Chechinia area he saw plaintiff's motor vehicle registration KCJ 826A/ZF4814, coming from the opposite direction then joined their lane as it was overtaking another vehicle at a high speed. That the driver of the defendant's vehicle hooted, flashed his lights and attempted to swerve but, due to the short distance between the two vehicles and the presence of a third vehicle on their lane the two vehicle collided head on and he lost consciousness.

23. That when he regained consciousness he was in hospital and noted that he was injured on the left arm and leg and also learnt that the driver of their vehicle had died. DW1 blamed the plaintiff's driver for causing the accident due to dangerous overtaking, driving at high speed and encroaching on their lane.

24. At the close of the case, the trial Magistrate recalled (PW2) No. 96714 PC Josephat Makau to in order to avail a copy of the sketch plan of the scene mentioned by both parties in their cross examination, that had not been produced in court.

25. Be that as it were both parties filed their submissions and by a judgment dated 28th September 2021, the trial court entered judgment in favour of the plaintiff in the following terms:

Liability ----- 100% against the defendant

General damages----- Kshs. 2,000,000

Special damages-----Kshs. 12,000

Future medical expenses-----Kshs. 130,000

Costs and interest at court rates from the date of the judgment

26. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds:

- (a) That the judgment by the trial court is devoid of want and/or form as required under Order 21 rule 4 and 5 of the Civil Procedure Rules 2010 to wit the judgment is devoid of concise statement of the case, points of determination and reasons for the decision.*
- (b) That the learned Magistrate erred in law and in fact in finding the appellant 100% liable against the overwhelming evidence on record.*
- (c) That the learned Magistrate erred in law and in fact in apportioning liability against the appellant with no justification and/or reasoning as required.*
- (d) That the learned Magistrate erred in law and in fact in assessing general damages at*

Kshs. 2,000,000 with no justification and/or reasoning as required.

(e) That the learned Magistrate erred in law and fact in making an award on future medical expenses without any supporting evidence and justification.

(f) That the learned Magistrate erred in law and in fact by misapprehending the law and evidence on record and therefore arriving at an erroneous determination on liability.

(g) That the learned Magistrate erred in law and in fact by misapprehending the law and evidence on record and therefore arriving at an erroneous determination on quantum.

(h) That the learned Magistrate erred in law and in fact by shifting the settled burden of proof from the respondent to the appellant.

(i) That the learned Magistrate erred in law and in fact by disregarding crucial

testimonies/evidence by the appellant's witnesses.

(j) That the learned Magistrate erred in law and in fact by totally disregarding the appellant's written submissions dated 20th March 2021.

(k) That the learned Magistrate erred in law and in fact in failing to address sufficiently all the issues for determination as framed by the parties.

(l) That the learned Magistrate failed to exercise her discretion in the matter and therefore fell into error and the said judgment is manifestly unsafe and therefore deserving to be vacated.

(m) That the learned Magistrate erred in law and in fact in arriving at the impugned judgment, abdicated her judicial obligation and/or duty to the detriment of the appellant.

27. As a consequence, the appellant prays for the following orders:

a) That this appeal be allowed.

b) That the judgment of the Honourable Sarapai, Principal Magistrate delivered on 28th September 2021 in Naivasha CMCC 1037 of 2017 be set aside and in place Naivasha CMCC 1037 of 2017 be dismissed in its entirety.

c) That cost of the suit in Naivasha CMCC 1037 of 2017 and costs of this appeal be awarded to the appellant.

28. The appeal was disposed of vide of filing of submissions. The appellant in submissions dated 5th August 2024, argued that the trial court delivered a one-page judgment summarizing the outcome without an analysis of the facts, evidence, submissions and case law, and without framing the issues contrary to Order 21 Rules 4 and 5 of the Civil Procedure Rules, 2010.

29. That the plaintiff did not substantiate the allegations of evidence against him and/or his

authorized agent. That under section 107 and 109 of the Evidence Act (Cap 80) Laws of Kenya, the burden of proof always rests with the plaintiff even where the case is undefended.

30. The appellant relied on the case of, Alexander Mwendwa Mwova & others v Attorney General [2021] eKLR where the High Court held that the silence of the defendant cannot assist the plaintiff where the evidence offered has not made a case against the defendant.

31. Further, that in the case of Alfred Kioko Muteti v Timothy Miheso & Another [2015] eKLR the High Court held that it is trite law that, he who alleges must prove and that burden does not shift to the adverse party even if the case proceeds by way of formal proof and or is undefended.

32. The appellant argued that the plaintiff did not produce an authenticated sketch map with a police stamp to prove on whose lane the accident

occurred. That it was not enough for him to claim that he was hit on his lane.

33. Further, the appellant's witness rebutted the respondent's evidence testifying that he witnessed the respondent lose control of vehicle registration KCJ 826A/ZF 4814 leading to a head on collision. Additionally, the police abstract produced indicated that the accident was pending under investigation. Further the respondent did not call the investigating officer to offer evidence on the circumstances of the accident.

34. The appellant submitted that parties are bound by their pleadings and where the allegations therein are not proved no relief can be given outside its pleadings. That in the case of; Francis Mburu v Moses Omuse & 3 others [2015] eKLR, the High Court held that it is only when a party proves the facts in its cause of action that he is entitled to the remedy sought.

35. That in addition, in Rose Wanjiru Njiga [Suing as the legal representative & administrator of the Estate of the late Edwin Gachoki Njiga [Deceased] v Packson Githongo Njau & another [2019] eKLR the High Court held that where there is no evidence to prove negligence on the part of the 1st defendant, the appellant had failed to discharge the burden of proof and therefore the trial court ought to have dismissed the case.

36. The appellant further submitted that the trial court went outside judicial bounds and engaged in speculation considering material that had not been filed and produced as exhibits thus her decision apportioning 100% liability was erroneous and should be set aside.

37. The appellant faulted the trial court for ignoring its submissions and referred the court to the case of; Municipal Council of Thika v Elizabeth Wambui Kamicha [2013] eKLR where it was held that it was

incumbent on the trial court to consider submissions filed by both parties' failure of which was an error in law.

38. On damages, the appellant submitted that the injuries pleaded in the plaint and the report of Dr. Wokabi were not accurate and exaggerated. That the injuries in the discharge summary from North Kinangop Catholic Hospital being; fractures of the right femur, right radius and left radius were most accurate

39. The appellant proposed general damages of Kshs. 150,000 and relied on the case of Said Abdullahi & Another v Alice Wanjira [2016] eKLR where the claimant suffered of fracture of the right humerus midshaft spiral; swelling, deformity and pain on the midshaft of the right humerus; tenderness of the right arm; and permanent incapacity of 10% and the High Court reduced general damages from Kshs. 600,000 to Kshs. 300,000.

40. The appellant further relied on the case of; Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR where the plaintiff sustained more serious injuries being lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur where the High Court reduced the amount from Kshs. 1,000,000 to Kshs. 450,000.

41. On future medical expenses the appellant argued that the respondent failed to lead evidence on the award and what it was meant for. Lastly, the appellant argued that the trial court erred in awarding special damages beyond what the respondent specifically pleaded and proved.

42. However, the respondent in submissions dated 6th August 2024 argued that liability was proved

through the evidence of PW1 and corroborated by the evidence of the police that vehicle registration KBR 119V encroached and stopped on the lane of motor vehicle registration No. KCJ 826A.

43. Further, the evidence of DW1 was not corroborated and was inconsistent. That he did not explain why the evidence adduced indicated that the accident took place on the lane of vehicle registration KCJ 826A and that he tailored his evidence in an attempt to exonerate the appellant.

44. On damages, the respondent submitted that in awarding general damages the trial court considered the injuries he had sustained as pleaded in the plaint and outlined in the medical report of Dr. Wokabi, and the submissions of the parties.

45. That he had proposed an award of Kshs. 2,500,000 and relied on the cases of; Sabina Nyakenya Mwanga-Vs-Patrick Kigoro &Another (2015) eKLR where the court awarded general damages of Kshs.

3,000,000, and the cases of; Clifford Omondi Otieno-Vs-Geoffrey Muthiani Mutiso & Another (2020) eKLR and Board of Trustees of the Anligcan Church of Kenya Diocese of Marsabit vs N IA(Minor Suing through her next friend IAIS) (2018) eKLR where the Court awarded damages of Kshs. 2,500,000 as general damages.

46. On future medical expenses, the respondent argued that he had pleaded for the same in paragraph 5(c) of the plaint. That the same was proved by the evidence of both doctors that he had a mental implant in situ.

47. However, the appellant's doctor, Dr. Ruga did not render an opinion on whether it was necessary to remove the implant. On the other hand Dr. Wokabi indicated that the metal implant needed to be removed at a cost of Kshs. 130,000 in a medium cost hospital. That Dr. Wokabi's report was not contested and therefore remained uncontroverted.

48. In consideration the appeal this court notes that the role of the 1st appellate court as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion.

49. The court stated as follows: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. In

particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

50. The evidence on the occurrence of the accident was led (PW1) Harun Nganga Kamau and Frankline Bett (DW1). Notably they blame each other for the accident but DW1 was not a driver of the defendant's vehicle.

51. Notably, at the hearing of the case, the plaintiff in cross-examination denied that the accident occurred when he overtaking another vehicle and termed the defendant's witness as false. He further denied the defendant's witness evidence that the driver of their vehicle hooted or flashed lights.

52. In addition, (PW2) No. 96714 PC Josephat Makai testified that the accident occurred when the driver of motor vehicle registration KBR 119V lost control of the vehicle and collided with an oncoming vehicle registration number KCJ 826A driven by the plaintiff driver (PW1). The witness stated that according to the police file, the driver of the motor vehicle KBR was to blame for the accident.

53. In cross-examination, the witness conceded that he was not the investigating officer in the matter but had a police file which had a sketch plan of the scene which showed the point of impact on the left side as one goes towards Mai Mahiu direction. Notably, the sketch plans were presented to court without any objection from the parties.

54. The trial court found the defendant 100% liable for the accident on the basis of the reasons stated at pages 14 - 15 of the judgment and having considered the same in the light of the evidence

adduced in the trial court and the submissions, I find that the trial court arrived at the correct decision on the basis that the evidence of (PW1) was corroborated by the evidence of (PW2), the finding in the police file and the sketch plan whereas (DW1)'s evidence was uncorroborated. I therefore uphold the finding on liability.

55. As regards quantum, I note that the injuries the plaintiff suffered are pleaded at paragraph 5 of the plaint. In support thereof, the plaintiff produced the following documents;

a) Discharge summary from North Kinangop Catholic Hospital which shows he was admitted on 23rd November, 2016 and discharged on 16th December, 2016. He was re-admitted again on 14th August, 2017 and discharged on the 21st August, 2017.

b) X-ray request form dated 15th February, 2017.

- c) A P3 form at page 14 and 15 of Records of Appeal (not clear).
- d) A medical report by Mr. W. M. Wokabi, quite detailed in which he confirms that the fracture of right radius, dislocation of left wrist joint, fracture of right femur at two places on the upper end and mid shaft. Both were operated on and fixed with metal implants. The doctor indicates that the plaintiff suffered lots of pain due to the accident and each surgical procedure. The doctor also observed that the dislocation will dispose the wrist joint to develop possible arthritis in future. He further indicated that the plaintiff would require a sum of Kshs 130,000 for future medical attention in a modest hospital and assessed degree of permanent disability at 18%. This report is dated 19th September, 2017.

56. The defendant also availed a medical report dated 11th July, 2018 in respect to the plaintiff prepared by Dr Maina Ruga. Several observations can be observed therefrom: -

- i) It is prepared approximately a year after Mr. Wokabi's report yet it places permanent disability of the plaintiff at 20%.
- ii) The report of Dr Ruga states that the plaintiff is at the risk of developing osteoarthritis in the right hip joint and left wrist and requires physiotherapy.
- iii) Notably, the defendant's doctor is not a surgeon unlike Mr Wokabi.

57. In assessing the damages, the court relied on the case of Kigaraari Vs Uyu (1982-88) KAR 768, Mbaka Ngoru and another vs James George Rakwar (1998) eKLR and Stanley Maore vs Geoffrey Mwenda (2004) eKLR

58. In the submissions in the lower court, the plaintiff sought for Ksh. 2,500,000 as general damages. On the other part, the defendant submitted Ksh. 200,000 was sufficient and relied on the case decided in the year 2018.

59. First and foremost, the submissions by the defendant that the plaintiff be awarded Ksh. 200,000 as general damages for such serious injuries are not serious and leads to the conclusion that the defendant does not appreciate the seriousness of the injuries the plaintiff suffered. In that regard, the court is left with the plaintiff submissions to consider.

60. Consequently, taking into account the two periods of the respondent's hospitalization and the fact that he had to undergo surgery for implants and removal thereof. Further, one year after the accident he was still unwell and the possible future complications associated with the injuries sustained in the period

this matter has been in court from the date of the accident to the date of filing the suit, the hearing in the trial court to judgment. Furthermore, the period of about ten (10) years the matter has been in court, and the inflation factors, I find that the award of Ksh. 2,000,000 as general damages is not extraordinarily high and decline to interfere with it.

61. Furthermore, Mr. Wokabi indicated that the respondent would require Ksh. 130,000 for future medical treatment. That evidence was not challenged and therefore the award thereof was not incorrect. I find that the appellant cannot contest the same in the submissions at the trial and appellate stage. I decline to interfere with the award. Finally, I find no contestation on the award of special damages. Consequently, I find no merit in the appeal and I dismiss it in its entirety.

62. It is so ordered.

Dated, delivered and signed this 9th day of March
2026.

GRACE L. NZIOKA
JUDGE

In the presence of:

Mr. Omanga the appellant

Mr. Muturi H/B for Mr. Wanjohi for the respondent

Ms. Hannah: Court Assistant