

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CIVIL APPEAL NO. E052 OF 2022**

**BETTY KANGAI VICTOR.....**  
**APPELLANT**

**VERSUS**

**ANTHONY MUGAMBI GITARI.....1ST**  
**RESPONDENT**

**JOSPEH MAGURA GICHUKI.....2ND**  
**RESPONDENT**

*(Appeal from the judgment of the Senior Resident Magistrate's court at Murang'a delivered by Hon. S.K Nyaga on the 26<sup>th</sup> August 2022 in Civil Suit No. E131 OF 2021)*

**JUDGEMENT**

1. This appeal is against both liability and quantum awarded following a traffic accident claim.
2. By a Plaint dated 14<sup>th</sup> July 2021, the Appellant averred that on or around 24<sup>th</sup> December 2020 along Kenol Murang'a road, the 1<sup>st</sup> Respondent, being the driver of motor vehicle registration number KCW 594B and in which motor vehicle one Betty Kangai Victor, was aboard drove and managed the subject motor vehicle so negligently and carelessly that the motor vehicle veered off its lane and crashed with an oncoming motor vehicle and as a result of which Betty Kangai Victor was seriously injured.
3. It was averred that the 1<sup>st</sup> Respondent's negligence was evident in the manner in which he controlled the subject motor vehicle without due regard to other road users as he was both fast and reckless. Thus, resulting in serious injuries including back pain, excruciating abdominal pain, chest pain and pain in upper limbs.

4. Therefore, the appellant sought special damages of Kshs. 239,076.00 comprising:
  - i. Copy of motor vehicle records Kshs. 550
  - ii. Kshs. 10,000.00 demand notice
  - iii. Kshs. 228,526 medical expenses
5. Additionally, the appellant sought general damages for pain and suffering, loss of amenities and diminished earning capacity.
6. The 1<sup>st</sup> Respondent denied the claim through the statement of defence dated 1<sup>st</sup> April 2021. The 1<sup>st</sup> Respondent specifically denied ownership of the subject motor vehicle and in the alternative pleaded contributory negligence by the driver of motor vehicle registration number KBN 018T for driving at an excessive speed and failing to keep any proper control of the motor vehicle.
7. The matter proceeded to trial where PW1 Betty Kangai Victor testified by adopting her witness statement and bundle of documents. She clarified that her business earns her approximately Kshs. 80,000.00 to 100,000.00 per month but did not file any bank statements to support the claim. Following the accident, she sustained a fracture in the coccyx around the pelvic area, her right eye and one of her left ribs yet these had not been recorded in the Complaint as the x rays were not yet out. She paid for her medical expenses herself. She first attended Murang'a hospital then Nyeri Outspan hospital. She was also taken to Medical and Ruaraka Ruai hospital.
8. PW2 Dr. Nicholus Konge testified that he reviewed the appellant on 16<sup>th</sup> March 2022. She had been diagnosed with multiple soft tissue injuries following a road traffic accident on 24<sup>th</sup> December 2020. She complained of

abdominal tenderness, lower back pains, chest pains, right hip and business on right knee, X rays were done, abdominal scan and blood works. She was given analgesics & tetanus and psychotherapy. She sustained PTSD the back pains might take time to heal. He clarified that there was no fracture as per his report but multiple soft tissue injuries.

9. DW1 Anthony Mugambi Gitari testified that on 24<sup>th</sup> December 2022 he left Nairobi at 5.00pm with PW1 and the deceased. The traffic was heavy along Thika road and it took them around 4 hours to get to the point of impact. The oncoming motor vehicle was unseen and there is nothing he would have done to prevent the accident. He was the driver of Motor vehicle KCW 594B and he has never been charged of any traffic offence arising from the accident. The accident occurred within a month of being issued with a driving license.
10. The trial court found that the 1<sup>st</sup> Respondent could not avoid the accident as the road was busy and traffic was heavy despite trying his best. Therefore, the court dismissed the case against the 1<sup>st</sup> Respondent. However, the trial court found that the 2<sup>nd</sup> Respondent was to blame for the accident and had in fact been charged accordingly.
11. Aggrieved and dissatisfied with the judgment of the trial court, the appellant lodged the instant appeal on grounds that:
  - i. The learned magistrate erred I law and fact in the manner she apportioned no liability on the 1<sup>st</sup> Respondent which was against the weight of evidence.
  - ii. The learned magistrate erred in law and fact in finding no liability on the 1<sup>st</sup> Respondent despite the 1<sup>st</sup> Respondent admitting while testifying on oath that at the time of the accident, his motor vehicle had left

its lawful lane (Kenol- Murang'a) and had encroached on the opposite lane (Murang'a- Kenol)

- iii. The learned magistrate erred in law and fact by dismissing the Plaintiff's suit while blaming the 2<sup>nd</sup> Respondent for causing the accident and failing to enter judgment on liability and quantum against the 2<sup>nd</sup> Respondent despite the 2<sup>nd</sup> Respondent having been enjoined as a party to the suit.
  - iv. The learned magistrate erred in law and fact by arriving at a finding that the 2<sup>nd</sup> Respondent was charged at Kigumo law courts with careless driving without any evidence to the same effect.
  - v. The learned magistrate erred in law and fact in the manner she apportioned all liability on the 2<sup>nd</sup> Respondent despite the Occurrence Book extract stating that the matter is pending under investigation and the investigating officer who visited the scene of accident had indicated that he could not determine the person who caused the accident.
  - vi. The learned magistrate erred in law and fact by relying solely on the evidence of the police abstract to arrive at her finding and which abstract was filled without any investigations as to who caused the accident being carried out.
  - vii. The learned trial magistrate erred in law by awarding the 1<sup>st</sup> Respondent the costs of the suit.
12. Reason wherefore the appellant prayed that the judgment of the trial court be set aside and the court re-evaluate the evidence and make its own finding and judgment in regard to liability and quantum.

13. The court directed that the appeal be canvassed through written submissions.
14. It was also submitted that the mere fact that the 1<sup>st</sup> Respondent admitted to have been in the middle of the road when the accident happened is proof that he was driving without due care and attention. Therefore, the trial court erred in dismissing the appellant's claim.
15. The appellant submitted that she sustained the following injuries following the accident:
  - i. Trismus (restricted mouth opening) 1cm mouth opening
  - ii. Malocclusion open bite on right side
  - iii. Laceration of the right eyebrow
  - iv. Cranial nerve VIII palsy
  - v. Complex right zygomatic bone fracture
  - vi. Communized fracture of lateral, medial wall and floor of right orbit
  - vii. Communize, severally displaced fractures of anterior and posterior walls of right maxillary sinus
  - viii. Head injury-GCS 7/10 at admission
  - ix. Blunt abdominal injury-right hepatic lobe contusion with hemoperitoneum.
16. The medical report and testimony of Dr. Nkonge was that the appellant would need to undergo future removal of implants on her face at a cost of Kshs. 200,000.
17. Reliance was placed on **Thuge Caroline & 2 others vs Kimani Ng'ang'a Kago (2022) eKLR**, where the plaintiff had suffered similar injuries and was awarded general damages of Kshs. 1,612,932 to urge that the appellant was entitled to damages of Kshs. 2,500,000, future medical expenses of Kshs. 200,000.00 and special damages of Kshs. 242,290.00.

18. The appellant maintained that the trial court wrongly exercised discretion in dismissing the claim without a just cause and thus the judgment of the trial court ought to be set aside.
19. I have gone through all the material placed before me and I am of the view that the gravamen of the Appellant's case is whether the trial court properly directed itself in apportioning liability and whether the trial court erred in failing to make an assessment on quantum.
20. ***Selle vs. Associated Motor Boat Company [1968] EA 123*** is probably the most pivotal authority on the review scope of the High Court as the first appellate forum for matters emanating from the sub-ordinate courts.

***"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally."***

21. This court will therefore reevaluate the evidence on record, if necessary, to be able to arrive at an independent decision on liability.
22. I take note that in his testimony given under oath the 1st Respondent expressed that he was the driver of motor vehicle registration number KCW 594B while carrying the appellant and other passengers. At the time of the accident, he had held his license for a period of one (1) month. The trial court in its judgment took note of the same deposition.

23. By his own admission, the 1st Respondent testified that he was not on his lane. Also, he was not in a position to see any oncoming vehicle as he had not anticipated that a vehicle would emerge from anywhere, therefore, he was unable to avoid the accident as whether he swerved to the right or left, an accident would still have occurred as there was heavy traffic on the road.
24. While it is true that the traffic might have been heavy, the 1st Respondent has by his admission demonstrated that he contributed to the accident as he was not on his rightful lane. The mere fact that other motorists had overlapped and left their legitimate lane was not a sufficient excuse for the 1st Respondent to join them in flouting traffic rules. Moreover, the fact that the 1st Respondent had been a licensed driver for only a month placed on him the huge responsibility of utmost compliance with traffic rules. It is unfortunate that his quest to join other motorists resulted in an accident where a minor's life was untimely extinguished and other passengers, including the appellant herein, suffered serious injuries.
25. In *Simba v Langat* (Civil Appeal 84 of 2021) [2024] KEHC 2110 (KLR) the High Court at Nakuru observed that:
- “The basic principle underlying the defense of contributory negligence is that people should take reasonable care for their own safety as well as for that of others.”***
26. I am persuaded that the 1<sup>st</sup> Respondent by his own actions contributed to the accident and therefore the trial court erred in absolving him of any liability.
27. The appellant's case is that the 1<sup>st</sup> Respondent contributed to the accident by failing to keep a proper look out thus was unable to control the vehicle in a proper manner to avoid the accident.

28. Whereas the trial court absolved the 1<sup>st</sup> Respondent of liability on the fact that the 2<sup>nd</sup> Respondent had been charged. There was no evidence on record to demonstrate that indeed a person had been charged with the offence of careless driving. Without such proof, it is difficult to conclusively determine the truth of the allegation that a person, the 2<sup>nd</sup> Respondent, was indeed charged for the accident. a perusal of the police abstract shows that the matter was still marked as PUI, meaning, there was no conclusive determination on liability.
29. In any case, a police abstract in and of itself is not proof of liability, it simply demonstrates that an accident that allegedly occurred was reported to a police station. Therefore, liability has to be proved by both fact and circumstance of the accident. In the instant case, I find that the appellants had proved their case on liability against the 1<sup>st</sup> Respondent on a balance of probability.
30. I realise that there was no representation by the 2<sup>nd</sup> Respondent, therefore, I have no benefit of his testimony regarding the manner in which the accident occurred. As a result, going by the testimony of the 1<sup>st</sup> Respondent and the appellant regarding the circumstance of the road at the time of the accident, it is evident that there was no clarity on how exactly the accident occurred.
31. In such instances, the preferred approach is as per the clear principle that where there is no conclusive proof of who caused or contributed more to the accident, the law often apportions blame between parties. This principle was established in the case of **Barclay-Steward Limited & Another Vs. Waiyaki [1982-88] 1 KAR 1118**, where the Court said: -

***“The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his***

**vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it.”**

**The Court said further:-**

**The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame.**

**In Baker V Market Harborough Industrial Co-operative Society LTD [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:**

**Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them.....**

**See also Welch V Standard Bank LTD [1970] EA 115 at 117 and Simon V Carlo [1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame.....”**

32. In this case, the evidence does not conclusively establish exclusive fault on either side. Although the 2nd Respondent

did not defend its case, the 1st Respondent admitted to have failed to keep to his lane and was unable to clearly anticipate and see any oncoming traffic. This non-compliance with the Highway Code may have affected his control of the motor vehicle at a critical moment. The trial court's decision to place 100% liability on the 2nd Respondent fails to account for these complicating factors.

33. Nevertheless, the law also holds that in the absence of clear proof pinpointing who primarily caused or contributed to the accident, liability ought to be shared. This is because neither side provided conclusive evidence that the other was solely responsible. As a corollary, passengers, who merely boarded the motor vehicle, are to be viewed as innocent parties unless specific evidence shows they contributed to the cause of the accident. In the instant case, no evidence was led to suggest that the appellant was responsible for the accident in any way.
34. On the balance of probabilities and guided by the principle of fairness, I find that the trial court erred in apportioning 100% liability on the 2nd Respondent without any proof that he had indeed been charged with any criminal offence relating to the accident. Also, the trial court erred in absolving the 1st Respondent without conclusive evidence on the manner in which the accident occurred. The safer conclusion, consistent with the facts and the rule that doubtful or unproven causation should lead to shared liability, is to hold both parties equally responsible.
35. On the issue of quantum, I have noted that the trial court, contrary to well established principles of law, failed to make a determination on quantum.
36. The appellant relied on **Thuge Caroline & 2 others vs Kimani Ng'ang'a Kago (2022) eKLR**, to claim an award of Kshs. 2,500,000 as damages for pain and suffering. While the injuries in the Thuge case are similar to the

injuries sustained by the appellant. I note that the court in the Thuge case awarded the Plaintiff Kshs. 1,600,000 as fair compensation for pain and suffering.

37. In the Thuge case, the Plaintiff suffered *fracture ribs, dento alveolar fracture and non- displaced fractures of the right and left zygoma.*
38. Taking into account the injuries sustained by the Appellant as well as inflation, I find that an award of Kshs. 2,500,000 would be excessive in the circumstances. I am therefore inclined to make an award of Kshs. 1,800,000 for pain and suffering.
39. The uncontroverted testimony of the doctor Nkonge is that the appellant would incur future medical expenses of Kshs. 200,000.00. I therefore proceed to award the future medical expenses at Kshs. 200,000.00 as prayed.
40. The appellant is also entitled to special damages of KSh.242,290 as pleaded and proved which I hereby award.
- 41. In the upshot, I find that the 1st Respondent contributed to the accident and I enter judgment as follows:**
  - i. The judgment of the trial court apportioning 100% liability to the 2nd Respondent is hereby set aside and substitute it with liability apportioned on a 50:50 basis between the 1st Respondent and the 2nd Respondent.**
  - ii. Pain and suffering at Kshs. 1,800,000.**
  - iii. Future medical expenses Kshs. 200,000.**
  - iv. Special damages Kshs. 242,290.00.**
  - v. Each party to bear their costs both at the appeal and at the trial court.**

**Dated, Signed and Delivered virtually on 9<sup>th</sup> day of April, 2026.**

**HON. T. W. OUYA  
JUDGE**

**For Appellant - Mr. Muthomi Gitari**

**For Respondent - Ms. Olung'a for 1<sup>st</sup> Respondent**

**Court Assistant - Nyabuto**

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