



REPUBLIC OF KENYA



**Anyange & another v Lubengi & 2 others (Civil Appeal  
E015 of 2024) [2026] KEHC 4581 (KLR) (6 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4581 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E015 OF 2024  
PJO OTIENO, J  
MARCH 6, 2026**

**BETWEEN**

**CLEOPHAS ANYANGE ..... 1<sup>ST</sup> APPELLANT**

**JAMES NJUGUNA KAMAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BELINDER ACHIENG LUBENGI ..... 1<sup>ST</sup> RESPONDENT**

**NICKY KUNDU OKUTOYI ..... 2<sup>ND</sup> RESPONDENT**

**JOHN KINYANJUI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. J.Ndeng'eri (SRM)  
in Naivasha MCCC No. 287 of 2016 delivered on 10th September, 2024)*

**JUDGMENT**

**Background of the Appeal**

1. By a Plaint dated 29<sup>th</sup> May 2017, the Respondent instituted a suit against the Appellants, together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, seeking general damages for pain, suffering, and loss of amenities of life, future medical expenses amounting to Kshs. 180,000/-, special damages of Kshs. 390,676/-, costs of the suit, and interest thereon.
2. The Respondent's case was that on or about 4<sup>th</sup> October 2015, she was a passenger in motor vehicle registration number KCD XXXN, traveling from her rural home to Nairobi, when the Appellants, together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acting as driver, servant, and/or agent, negligently drove their respective vehicles, resulting in a collision at Ihindu along the Nairobi-Naivasha Road. As a result of the collision, the Respondent sustained serious injuries.



3. In the Plaint, the 1<sup>st</sup> Appellant was described as the driver of motor vehicle registration number KCD XXXN, while the 2<sup>nd</sup> Appellant was identified as the registered owner of the said vehicle. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were described as the driver and/or owner of motor vehicle registration number KAQ XXXY.
4. In a Statement of Defence dated 23<sup>rd</sup> February 2018, the Appellants denied ownership of motor vehicle registration number KCD XXXN and disputed that the alleged accident occurred as a result of the 1<sup>st</sup> Appellant's negligence. Without prejudice, they further averred that if the accident had occurred as alleged, it was caused or substantially contributed to by the negligence of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to enter appearance. Consequently, on 7<sup>th</sup> February 2019, the Respondent applied for interlocutory judgment against them in the sum of Kshs. 390,676/-, together with costs and interest.
6. On 30<sup>th</sup> August 2022, the trial court granted interlocutory judgment as prayed, directing that the issue of costs be reserved until the suit was set down for full trial and formal proof.
7. In a judgment delivered on 12<sup>th</sup> September 2023, the learned Trial Magistrate apportioned liability equally among the Appellants and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, jointly and severally. The Court awarded the Respondent general damages for pain and suffering of Kshs. 1,500,000/-, special damages of Kshs. 390,676/-, costs of the suit, and directed that interest on the general damages accrue from the date of delivery of judgment until full payment at the prescribed court rates.
8. Aggrieved by the decision, the Appellants filed the present appeal by a Memorandum of Appeal dated 19<sup>th</sup> March 2024, seeking orders that the Judgment and Decree of the trial court be set aside with a finding that the Appellants were not liable for the accident, or alternatively, that the general damages awarded be reduced, leaving only the special damages proved. The Appellants further pray that the costs of this appeal be borne by the Respondent.
9. The appeal is premised on the following grounds:
  - a. That the honorable principal magistrate erred in law and fact in holding that the Appellants were liable for the accident equally with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent whereas the 1<sup>st</sup> Respondent did not prove any liability or negligence against the 1<sup>st</sup> and 2<sup>nd</sup> Appellant's evidence.
  - b. That the honorable principal magistrate erred in law and fact in failing to hold that the 1<sup>st</sup> Appellant had proved that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent were solely liable for negligence that caused the accident whereby he completely disregarded the weight of the 1<sup>st</sup> Appellant's evidence.
  - c. That the honorable principal magistrate erred in law and fact in holding that the 1<sup>st</sup> Appellant's evidence required to be corroborated by an independent witness other than the 1<sup>st</sup> Appellant which holding has no basis in law and was not supported by any statute or legal authority.
  - d. That the honorable principal magistrate erred in law and fact in finding the Appellants equally to blame with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whereas there was no evidence to support or infer such a finding but instead the evidence adduced exonerated the Appellants from any blame for the accident.
  - e. That the honorable principal magistrate erred in law and fact in awarding an excessive award on general damages which was not supported by the medical evidence produced in court and this



amounted to an erroneous estimate of damages vis a vis the authorities cited by the Appellants for awards for comparable injuries in their written submissions.

- f. That the honorable principal magistrate erred and misdirected himself in law and fact by relying on legal authorities where the injuries were more severe than those sustained by the 1<sup>st</sup> Respondent and thereby arrived at an erroneous estimate of the award of damages which was three times the amount awarded for similar injuries comparable to those sustained by the 1<sup>st</sup> Respondent.
  - g. That the honorable principal magistrate erred and misdirected himself in law in failing to adequately consider the written submissions and authorities filed and cited by the Appellants on the issue of liability and quantum.
  - h. That the honorable principal magistrate erred and misdirected himself in law and fact by awarding the 1<sup>st</sup> Respondent the special damages that was not strictly proved by evidence of receipts to prove payment thereof by the 1<sup>st</sup> Respondent.
10. Parties have canvassed the appeal by way of written submissions. Their respective submissions may be summarized as hereinunder;

### **Appellants' Submissions**

11. On the issue of liability, the Appellants refer the Court to the decision in *Treadsetters Tyres Ltd v John Wekesa Wepukhulu* [2010] eKLR, for the proposition that in an action for negligence, the burden of proof rests squarely on the plaintiff, who must establish each element of the tort.
12. The Appellants contend that the trial magistrate erred in shifting the burden of proof onto them to disprove negligence once he found that the 1<sup>st</sup> Respondent had failed to adduce any evidence to substantiate the particulars of negligence contained in the Plaintiff. The Appellants note that the Respondent herself admitted she did not know who was at fault for the accident, and that the testimony of the police officer was of little probative value as he was not the investigating officer.
13. The Appellants further challenge the 1<sup>st</sup> Respondent's submission that they were required to issue notice to the co-defendants, namely the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, pursuant to the provisions of Order 1 Rule 24 of the Civil Procedure Rules. They contend that no such notice was necessary where a co-defendant had failed to enter appearance or file a defence, and where interlocutory judgment had already been entered in default. They submit that they were also not joint tortfeasors, as the 1<sup>st</sup> Appellant's testimony demonstrated that the accident was caused solely by the negligence of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
14. In this regard, the Appellants argue that it would have been unnecessary and redundant to serve notice on a co-defendant when paragraph 5 of the defence had already pleaded contributory negligence against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That pleading, they submit, was sufficient notice that the Appellants were alleging that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were wholly or substantially responsible for causing the accident.
15. The Appellants further challenge the trial court's finding that the Defendants were jointly and severally liable for the accident. They rely on *Nzioka (suing on her own behalf and as administrator of the Estate of Gideon Mwanthi Nguyo-Deceased) v Mwangangi & another* [2022] KEHC 15711 (KLR), for the proposition that where a collision occurs and the evidence does not reasonably allow determination of fault, liability should be apportioned equally, 50:50, between the vehicles involved. They also cite *Mbugua Elizabeth & another v Colleta Imbosa Mukanzi* [2017] eKLR, where the court held that two



tortfeasors operating independent motor vehicles, who were neither agents nor servants of one another and had no contractual or other relationship, should not be held jointly and severally liable.

16. With regard to the quantum of damages, the Appellants contend that the award of general damages was excessive and not supported by any medical evidence adduced at trial.
17. As for special damages, the Appellants submit that the sum properly proved at trial amounted to Kshs. 13,250/-, and not the amount awarded by the trial court.

### **1<sup>st</sup> Respondent's Submissions**

18. The 1<sup>st</sup> Respondent confined her submissions to the issue of liability. She submits that she was a passenger in a vehicle which collided with the Appellants' motor vehicle. She notes that in their joint defence, the Appellants sought to attribute blame to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. However, the Appellants did not serve a notice on the co-defendants pursuant to Order 1 Rule 24 of the Civil Procedure Rules. The 1<sup>st</sup> Respondent contends that such a notice constitutes a substantive pleading and is the mechanism by which a court acquires jurisdiction to apportion blame between joint or concurrent tortfeasors. She further argues that, in the absence of such notice, all defendants are liable, even where a court might find that one party was more at fault, or that liability should be apportioned equally. In support, she refers the Court to *Stephen Kagoivoo v Joseph Waithaka Kabai & Hopper Ltd and 2 others v Rose Karimi* [2022] eKLR, which underscores the necessity of a formal notice to enable the court to properly consider apportionment.
19. The 1<sup>st</sup> Respondent further submits that the Appellants have not explained why the 1<sup>st</sup> Appellant faced charges for causing death by dangerous driving, nor have they produced a sketch plan of the accident or a vehicle inspection report to corroborate their allegations regarding the location and nature of the damage. She argues that the presumption of equal negligence (50:50) arises where two vehicles traveling in opposite directions collide, at which point the burden shifts to the drivers to negate or rebut negligence. In support of this principle, she cites *Welch v Standard Bank Ltd* [1970] EA 115, which establishes that, in head-on collisions, the evidentiary burden rests on the drivers to disprove contributory fault.

### **2<sup>nd</sup> Respondent's Submissions**

20. The 2<sup>nd</sup> Respondent contends that, based on the evidence on record, the driver of motor vehicle registration number KCD XXXN was solely responsible for the accident. He further relies on the testimony of PW2, the investigating police officer, who stated that following the conclusion of investigations, the 1<sup>st</sup> Appellant was charged with causing death by dangerous driving. The 2<sup>nd</sup> Respondent notes that the driver of motor vehicle registration number KAQ XXXY succumbed to injuries sustained in the accident. He further submits that the 1<sup>st</sup> Respondent did not provide evidence to show that she was lawfully traveling as a passenger aboard motor vehicle registration number KCD XXXN.
21. Regarding the award of general damages, the 2<sup>nd</sup> Respondent submits that the trial court relied on the decision in *Imbugwa v [unspecified]* [2016] eKLR, where the court awarded Kshs. 700,000/- for a fractured voice box. He contends that in the present case, the trial court erred in awarding Kshs. 500,000/- in general damages in the absence of evidence showing that the 1<sup>st</sup> Respondent's injuries adversely affected her professional work or earning capacity.
22. With regard to special damages, the 2<sup>nd</sup> Respondent submits that invoices lacking proof of payment cannot constitute admissible evidence of expenditure. He notes that some invoices showed that NHIF had contributed payments totaling Kshs. 93,500/- towards the medical bills. Accordingly, he argues



that the only amounts properly proved by the 1<sup>st</sup> Respondent totaled Kshs. 26,895/-. He therefore prays that he be absolved of any liability for the unproven amounts.

### **Issues, Analysis and Determination**

23. Having carefully considered the pleadings, the proceedings at the trial court, the Memorandum of Appeal, and the submissions of the parties, the issues that fall for determination are:
  - a. Who was liable for the accident and to what extent?
  - b. Whether the award of damages made by the trial court ought to be interfered with.

### **Who Was Liable for the Accident and to What Extent?**

24. It is settled that liability in road traffic accidents is not determined by a scientific formula but by applying reason and common sense to the facts as presented. In *Michael Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR, the court emphasized that the task of the court is to assess which faults were sufficiently proximate to have caused the accident and whether more than one party contributed to its occurrence.
25. Further, in civil cases, the standard of proof is on a balance of probabilities. As held in *James Muniu Mucheru v National Bank of Kenya Ltd*, Civil Appeal No. 365 of 2017 [2019] eKLR, the court determines the dispute by assessing which version of events is more believable as more probable. The meaning of proof on a balance of probabilities was elaborated in *Re H and Others (Minors)* [1996] AC 563, which states that the court must be satisfied that the occurrence of an event was more likely than not.
26. In the present case, the trial court apportioned liability equally among the Appellants and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, holding that they shall bear liability jointly and severally. The trial court reasoned that, following the collision, the drivers of the two motor vehicles must share culpability in the absence of evidence exonerating either party.
27. The Appellants contend that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should bear liability for the accident.
28. From the testimonies at trial, the 1<sup>st</sup> Respondent (PW3) stated that she was a passenger aboard motor vehicle registration number KCD XXXN, traveling up a hilly road, when she heard a loud bang and lost consciousness. She was seated at the back and had no knowledge of how the accident occurred, nor did she know who was to blame.
29. It is settled that a passenger, having no control over a vehicle, cannot be held liable unless they contributed to the accident. See *West Kenya Sugar Co. Ltd v Lilian Auma Saya* [2020] eKLR and *Highland Creamers & Food Ltd v Ronald Ngetich*, Civil Appeal No. 40 of 2023 [2023] KEHC 11128. In this case, no contributory negligence was demonstrated on the part of the 1<sup>st</sup> Respondent. Accordingly, the 1<sup>st</sup> Respondent had established negligence on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.
30. The 1<sup>st</sup> Appellant (DW1) testified that on the day of the accident he was driving motor vehicle KCD XXXN, stopped at Nakuru for thirty minutes, and while negotiating a bend at Kinungi, his vehicle was hit by an oncoming motor vehicle KAQ XXXY. Although he did not identify fault definitively, he stated that the other vehicle struck his car on the shocks after he turned the steering wheel.
31. The Respondents contend that the Appellants failed to comply with Order 1 Rule 24 of the Civil Procedure Rules, which provides that where a defendant seeks contribution or indemnity from another party to the suit, the defendant must serve notice to that co-defendant.



32. While the Appellants contend that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were already parties to the suit, cited for negligence, and that no additional notice was necessary, the court appreciates the primary purpose of the notice is to inform the court and co-defendant of a claim for contribution. Failure to file notice typically precludes a defendant from seeking to reduce liability by pointing to a co-defendant's negligence.

### **Whether the Award of Damages Should Be Interfered With**

33. The principles guiding appellate interference with awards of damages are well established. In *Butt v Khan* [1981] KLR 349 and *Kemfro Africa Ltd t/a Meru Express Services & Another v A.M. Lubia & Another* [1982–88] 1 KAR 727, the Court of Appeal held that an appellate court will only interfere where the trial court acted on wrong principles, misapprehended the evidence, or made an award so inordinately high or low as to represent an erroneous estimate.
34. Further guidance is found in *William J Butler v Maura Kathleen Butler* [1984] KECA 34 and *Ugenya Bus Service v Gachuki* [1981–1986] KLR 567, which emphasize that awards must reflect the circumstances of each case while maintaining reasonable uniformity with comparable decisions.
35. The Appellants challenge the trial court's award of Kshs. 1,500,000/- for general damages as excessive.
36. According to the medical reports and treatment notes, the 1<sup>st</sup> Respondent sustained a fracture of the voice box, requiring removal of a tracheostomy, and abdominal injuries necessitating surgery.
37. The trial court, guided by *Kenya Power & Lighting Company v Kenneth Lugalua Imbugua* [2016] eKLR, noted that while the plaintiff in that case did not suffer a fracture of the voice box, he sustained similar intra-abdominal injuries and was awarded Kshs. 700,000/-. The court further observed that, in the present case, the 1<sup>st</sup> Respondent suffered the additional injury of a fractured voice box, and taking into account the passage of time and inflation since 2016, the award of Kshs. 1,500,000/- for general damages was reasonable.
38. The court finds no basis to interfere with this award.

### **On Special Damages**

39. It is trite law that special damages must be specifically pleaded and strictly proved. See *Hahn v Singh*, Civ App No. 42 of 1983 (1985) KLR 216.
40. The 1<sup>st</sup> Respondent pleaded special damages of Kshs. 390,676/-. The trial court awarded the full amount. Upon reviewing the receipts, the court notes: a final invoice from AIC Kijabe Hospital shows total charges of Kshs. 291,724/-, of which NHIF paid Kshs. 93,600/-, leaving Kshs. 198,124/- payable by the 1<sup>st</sup> Respondent. Additional receipts include Kshs. 16,920/- from the hospital and Kshs. 10,500/- from Jamu Imaging Centre Ltd.
41. Accordingly, the total special damages proven by the 1<sup>st</sup> Respondent amount to Kshs. 225,544/-, and the award of special damages by the trial court is therefore adjusted to reflect this amount.
42. In conclusion, the appeal partially succeeds, to the limited extent that the award for special damages in the sum of Kshs 390,676/- is set aside and substituted with a sum of Kshs. 225,544/-.
43. Because there is only partial and limited success by the appellant, the court directs that each party shall bear own costs of the costs of this appeal.
44. It is so ordered.



DATED, SIGNED AND DELIVERED AT LODWAR THIS 6<sup>TH</sup> DAY OF MARCH 2026

PATRICK J O OTIENO

JUDGE

