



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL APPEAL NO. E050 OF 2025**

**MUNENE KANYI Alias SAMSON MUNENE KANYI.....1<sup>ST</sup> APPELLANT**  
**BUNDI BRIAN.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SAMUEL KIMENJU WARUI.....RESPONDENT**

*(Being an appeal from the judgment delivered by Hon. Martha Opanga (PM) on 10/9/2024 at Wang'uru PMCC No. 135 of 2021)*

**JUDGMENT**

1. By an Amended Plaintiff dated 2/8/2022, the Respondent sued the Appellants seeking special damages of Ksh. 449,550, general damages and costs of the suit plus interest. He pleaded that on or about 3/1/2021, he was lawfully riding motor cycle registration No. KMDK 741 Z along Kagio-Sagana road when the 2<sup>nd</sup> Appellant so negligently drove motor vehicle registration No. KBG 606F that it knocked him down, as a result of which he sustained major and severe injuries. He was examined on 14/5/2022, wherein the doctor preferred further medical expenses of Ksh. 136,000 for removal of foreign bodies in the right leg.
2. The Appellants denied the claim by their statement of defence dated 19/1/2022 and prayed for the Respondent's suit to be dismissed.
3. Upon full hearing of the case, the trial court found the Appellants to have been 100% liable for the accident and awarded **general damages of Ksh. 1,000,000, Ksh. 136,000 for future medical expenses and special damages of Ksh.268,050 together with costs and interest.**

**The Appeal**

4. On appeal, the Appellants filed their memorandum of appeal dated 10/4/2025 raising 9 grounds as follows:
1. *The learned Magistrate erred in law and fact in failing to consider and find that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants had shown a prima facie case with a high probability of success.*
  2. *The learned Magistrate erred in law and fact in failing to consider and find that there was no concrete evidence placed before the court to determine who was to blame for the accident between the Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.*
  3. *The learned Magistrate erred in law and fact in failing to consider and find that the contents of a police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made and not that an accident occurred.*
  4. *The learned Magistrate erred in law and fact in failing to consider and find that a police abstract is not conclusive proof of liability.*
  5. *The learned Magistrate erred in law and fact in failing to consider and find that where there is no concrete evidence to determine how the accident occurred and who is to blame for causing an accident, both parties should be held equally liable.*
  6. *The learned Magistrate erred in law and fact in failing to consider and find that in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike.*
  7. *The learned Magistrate erred in law and fact in awarding future medical expenses to the Respondent as the same can only be awarded if strictly pleaded and proven.*
  8. *The learned Magistrate erred in law and fact in failing to consider and find that in assessing compensatory damages, the law seeks to indemnify the victim for the loss suffered and not to mulct the tortfeasor for the injury he has caused.*
  9. *The learned Magistrate erred in law and fact in failing to judiciously analyze the evidence on record thereby arriving at quantum that was erroneous, untenable, unfair and unjust to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.*

### **Duty of the Court**

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**).

### **Evidence**

6. **PW1 Samuel Kimenju Warui**, the Respondent herein, adopted his statement dated 2/9/2021 as his evidence in chief and produced the list of documents evenly dated and a further list of documents dated 8/6/2022 as exhibits. He went on to testify that, *“On 3/1/2021, I was from Kagio heading to Sagana. On reaching wa Kang’ara stage on board my motorcycle, I was carrying my two children. I indicated right. The motor vehicle behind me slowed down. The motor vehicle behind that one over took and knocked them from behind. I pray for compensation for injuries I sustained as prayed in the plaint amended and dated 2/8/2022.”*
7. On cross examination, he stated that, *“When I indicated there was a motor vehicle behind me. It slowed down. The other behind it overtook and hit me. Police told me the registration Number. I did not have reflector jacket. I have healed but metal plates are still inside.”*
8. In re-examination, he stated that, *“If the other motor vehicle did not overtake it would not have hit me. Accident occurred at 4:00 pm in broad day light.”*
9. **PW2 Josphat Muchiri Muriuki**, an eye witness adopted his statement dated 2/9/2021 as his evidence in chief.
10. On cross examination, he stated that, *“I witnessed accident. Salon car caused accident it was registration No. KBG 606F. It tried to overtake fleet of motor vehicle. It was heading to Kagio. Police found me at the scene. I wrote statement with my advocate not with police. They came 20 minutes later. We were shocked at the accident we did not go to the police.”*
11. In re-examination, he stated that, *“Abstract is issued to the victims not me an eye witness. Police came to the scene and interrogated us. The police called me to write witness statement.”*

12. **PW3 CPL Charles Kariu** attached to Sagana traffic base produced the abstract as an exhibit. He testified that, *“I am here on behalf of base commander Sagana who was summoned to Court to come produce police abstract. In respect of a road traffic accident which occurred on 3/1/2021 at 1600 hours along Kagio-Sagana road at kwa Muriithi matatu stage. It involved KBG 606F Salon car driven by Brian Mbuvi Ngare and motorcycle registration No KMDK 741Z Hougan riden by plaintiff from Kagio towards Sagana. It is indicated motorcycle had two pillion passengers son and daughter of plaintiff. He was hit from offside right by motor vehicle when trying to join feeder road. The rider and both pillions passengers sustained injuries and were taken to Mt. Kenya hospital for treatment, P3 forms were issued police abstracts were issued. I was paid 7000/= for Court attendance.”*
13. On cross examination, he stated that, *“I am not the Investigating Officer PCW Halima was the Investigating Officer she was transferred to Naivasha. The evidence is based on what is contained on the OB and Police abstract. I have the OB in Court. All motor vehicles are captured in the OB report was made by driver. Motorcycle had not been known when report was made. Contents of police abstract is informed by many things. The case was null I do not have the police file.”*
14. In re-examination, he stated that, *“The OB shows there was an accident between motor vehicle and motorcycle. Abstract emanates from Sagana police station.”*
15. The Appellants closed their case without calling any witnesses.

### **Submissions**

16. The Appellants urge that the evidence presented in court by the Respondent, whether uncontroverted or not, did not prove their case on a balance of probabilities, and cite **Mashru v Odhiambo (Civil Appeal 21 of 2022) [2023] KEHC 25389 (KLR) (14 November 2023) (Judgment), Florence Mutheu Musembi & Godfrey Mutunga Kimiti v Francis Karengi [2021] eKLR, Kennedy Nyangoya v Bash Hauliers [2016] eKLR, Njoroge v Kimani & 3 others [2025] KEELC 444 (KLR), Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR, Bloomfield Apartments Limited v Rubbycut Company Limited [2025] KEELC 3388 (KLR) and Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR.** They propose equal apportionment of liability between the parties and rely on

**Kamau & another v Kyallo & another [2025] KEHC 2491(KLR)**. They fault the trial court for awarding inordinately high general damages of Ksh. 1,000,000, which mulcted the tortfeasor for the injury he caused as opposed to indemnifying the victim for the loss suffered, and cite **FM (Minor suing through Mother and Next Friend MWM) C JNM & Another [2020] eKLR, Murithi v Mbaya [2025] KEHC 754 (KLR), Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR, Kerandi & another v Okong'o [2024] KEHC 3823 (KLR) and Harun Muyoma Boge v Daniel Otieno Agulo [2015] KEHC 5660 (KLR)**. They urge that an award of Ksh. 80,000, as proposed by Dr. Waithaka Mwaura in his report dated 26/4/2023, would be sufficient for future medical expenses.

17. The Respondent cites **Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123 and Khambi and Another v Mahithi and Another [1968] EA** on the duty of the first appellate court. He urges that apportionment of blame is an exercise of discretion as was held in **Isabella Wanjiru Karangu v Washington Malele Civil Appeal no 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M. Angira Civil Appeal no 12 of 1981**. He urges that he adduced uncontroverted evidence that the Appellants were wholly to blame for the accident, and cites **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR, Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC no 68 of 2007**. He urges that the claim on future medical expenses was pleaded and proved in evidence, and cites **Tracom Limited & Another v Hassan Mohamed Adan [2009] eKLR and Kenya Bus Services Ltd v Gituma (2004) 1 EA 91**. He urges that the general damages awarded are consistent with comparable awards made and there is no justification to interfere with the finding of the lower court especially being alive to the fact that assessment of damages also considered the effluxion of time and inflation.

#### **Analysis and Determination**

18. From the grounds of appeal, the issues for determination are whether the apportionment of liability was proper and whether awards made were inordinately high.

#### **Liability**

19. The Respondent stated on cross examination that, ***“When I indicated there was a motor vehicle behind me. It slowed down. The other behind it overtook and hit me.”*** His evidence was corroborated by PW2, the eye witness who restated on cross examination that, ***“Salon car caused accident it was registration No. KBG 606F. It tried to overtake fleet of motor vehicle.”***
20. In his uncontroverted evidence, the Respondent acknowledged that when he signaled his intention to merge onto a feeder road, the vehicle trailing behind him slowed to give way. However, Appellants’ vehicle carelessly overtook the one behind him thus knocking him from behind.
21. This court thus finds that the trial court’s apportionment of liability at 100% was proper and justified on the evidence.

### **Excessive damages**

22. This court has previously considered the principles for appellate interference with an award of damages by a trial court in **Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA) [2020] eKLR** as follows:

***“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in Nance v. British Columbia Electric Railway Co. Ltd. (1951) A.C. 601, 613 and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in Henry H. Ilanga v. M. Manyoka [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking in some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v***

*Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”

23. The injuries sustained by the Respondent are particularized in the medical report of Dr. Kane Maina dated 14/5/2022 as right leg tibia/fibula fracture, short ankle back slab in situ and painful swollen left lower limb with open fracture of distal tibia/fibula. On examining the Respondent, the doctor noted that, he had tenderness on the lower right leg on palpation and a rod of 4 screws in the right leg.
24. The Respondent testified that, ***“I have healed but metal plates are still inside.”***
25. In ***Kimita v Travel Budget Express & another (Civil Appeal E042 of 2022) [2024] KEHC 6435 (KLR) (4 June 2024) (Judgment)***, the Court (G.L. Nzioka J.) upheld the trial court’s award of general damages of Ksh.800,000 for a claimant who sustained a fracture distal end of the left tibia and fibula, severe soft tissue injury of the left leg, a deep cut wound on the forehead leading to severe soft tissue injuries, a cut wound on the zygomatic area leading to severe soft tissue injuries, a deep cut wound on the left arm leading to soft tissue injuries, a fracture of the right tibia, a compound fracture of the left tibia and a deep cut wound on the chin.
26. This court is persuaded that an award of general damages of **Ksh.800,000** would adequately compensate the Respondent for the pain he suffered, regard being had of his concession that he had since healed.
27. On future medical expenses, the doctor observed that, ***“Permanent disability 10%. Difficulties in using the lower limb due to pain in the right leg. He underwent severe physical and mental agony as a result of the accident. He requires physiotherapy for about one year. He also requires review by orthopaedic surgeon immediately. He will require removal of the foreign bodies in the right leg if/when the fracture is completely healed. Cost of physiotherapy and surgery is estimated below: Daily Charges for 5 days 10000/=, Imaging 15000/=, Surgical materials 20000/=, Surgeons fee 65000/= Total 110000/= . Physiotherapy for 52 weeks at 500/= per session = 26000/-.”***
28. The Respondent was equally examined by the Appellants’ doctor, Dr. Waithaka Mwaura on 26/4/2023 who noted that the metal implants were still in situ, there were permanent scars and pain at the fracture site. In the doctor’s considered opinion the Respondent, ***“suffered compound tibia/fibula fracture and was approximately managed. He still has the metal implants which may require removal at a later date at an estimated cost of***

*shillings eighty thousand (80,000/-) in a modest health facility. Residual permanent disability is assessed at eight percentage (8%) points on the basis of possible development of posttraumatic osteoarthritis of the knee and ankle joints.”*

29. Both doctors further conceded that the metal implants would require surgical removal at an estimated cost of between Ksh.80,000 – Ksh.136,000.
30. This court finds that the Respondent proved on a balance of probabilities that he would require future medical intervention of having the metal implants surgically removed, and award of Ksh.100,000 under that head would suffice.

### **ORDERS**

31. Accordingly, for the reasons set out above, this court finds that the appeal is partly merited and it is allowed in the following terms:
1. The finding of the Court on **liability** is affirmed.
  2. The award of general damages of Ksh.1,000,000 is set aside and substituted with a sum of **Ksh.800,000**.
  3. The award of future medical expenses of Ksh.136,000 is set aside and substituted with an award of **Ksh.100,000**.
  4. **The other awards remain unchanged.**
32. There shall be no orders as to costs as the appeal has only partly succeeded.
- Orders accordingly.*

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**EDWARD M. MURIITHI**

**JUDGE**

### **APPEARANCES:**

Mr. Okoth of ROM Law Advocates for the Appellants.

Ms. Nzuki of Nyaga Gitari & Co. Advocates for Respondent.