Walter alias Walter Ngugi Kimani v Nyabuto (Civil Appeal 424 of 2021) [2025] KECA 604 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 604 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 424 OF 2021

A ALI-ARONI, AO MUCHELULE & GV ODUNGA, JJA

MARCH 28, 2025

BETWEEN

KIMANI WALTER ALIAS WALTER NGUGI KIMANI ..... APPELLANT

AND

FRED ONYONI NYABUTO ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Thuranira, J.) delivered on 26th June 2019 in H.C.C.C No. 358 of 2014)

JUDGMENT

1. The appellant herein was sued by the respondent in a plaint dated 29th October 2014 for general and special damages for injuries sustained in a road traffic accident, together with interest and costs of the suit. It was the respondent's case that on 26th October 2012, as he was lawfully walking along the pedestrian lane along Mombasa Road in the Kyangombe area, the appellant's motor vehicle registration number KAA 889C veered off the road, hitting and causing him to sustain grievous bodily injuries.

2. In his testimony before the trial court, the respondent testified that he was on his way home when he came across a lorry being loaded with building stones and where he was engaged as a casual labourer. Once loading was completed, the truck failed to move, and the driver then requested that he go under the lorry to check why it was stuck. While underneath, he discovered that stones were blocking the rear tyre, which he removed, when the truck rolled and pressed him down on his back, severely injuring him. He fell unconscious, and when he gained consciousness, he found himself at Kenyatta National Hospital with severe injuries, which included injuries to the spinal cord, hip joint, and leg injuries. Skin grafting was performed, and he could no longer control his stool or urine. Additionally, he lost all function from his waist down.

3. Dr. Theophilus Wangaya presented a medical report dated 9th September 2014 detailing the injuries, which included a spinal injury fracture leading to paralysis of the lower limbs. The doctor's opinion was that the appellant had sustained injuries that were serious, and there was no hope of recovery. He classified permanent incapacity of the spine at 100%.

4. The appellant opposed the suit by filing a statement of defence dated 30th January 2015. He denied that the respondent was lawfully walking on the road when the incident occurred or that he sustained injuries, damages, or losses. The appellant contested the allegations of negligence, arguing that the respondent failed to adhere to pedestrian regulations. He claimed that the respondent abruptly dashed into the road without regard for oncoming traffic, did not navigate through the traffic as expected of an adult, showed insufficient concern for his safety, and caused the accident. Furthermore, the appellant alleged that the respondent was on the road in a state of intoxication and acted recklessly, leading to the incident.

5. The appellant testified that his motor vehicle was not involved in the accident because it had been grounded and was in the garage on 26th October 2012 rather than on the road. He explained that this motor vehicle had previously been involved in a fatal accident in Kariobangi, which was reported to the Buruburu Police Station. Additionally, in September 2012, his vehicle was involved in a self-inflicted accident in Machakos, which was reported to the Machakos Police Station.

6. In a judgment delivered on 26th June 2019, the Court was satisfied that the respondent had proved his case on a balance of probabilities and apportioned 30% liability on the respondent for embarking on a dangerous mission without protection. Holding that the appellant bore greater responsibility for the accident, she apportioned 70% liability on the appellant's driver. The trial court made the following award:

    i. General Damages Kshs. 5,000,000

    ii. Special damages awarded Kshs. 13,548,715 Subject to a 30% contribution Total award Kshs. 12,983,101.

7. Aggrieved by the judgment, the appellant preferred this appeal and raised 8 grounds summarized as follows: the learned Judge erred in law and in fact, in finding that the respondent had proved his case on a balance of probabilities; by failing to appreciate difference between the plaint and the evidence of how the alleged accident occurred; by miscalculating the cost of the wheelchair; by apportioning liability yet the case was not proved; by relying on an accident report made one and half years later after the alleged incident, without calling the maker to testify; by a finding that the applicant's evidence was insufficient, and awarding exorbitant sums for both General and Special damages.

8. In a Notice of Cross Appeal dated 27th August 2021, the respondent sought to have the judgment on General Damages varied, reviewed and enhanced to a sum commensurate with the injuries and pain suffering; judgment on liability be set aside and/or be varied to 100% in favour of the respondent, and for the Court to make an award for erectile dysfunction, loss of consortium and psychological trauma on grounds that the learned Judge erred in law and fact by disregarding the evidence on record while assessing and/or awarding General Damages and thus ended up awarding a sum; by failing to award damages on erectile dysfunction, loss of consortium and mental trauma despite the respondent's evidence on record; and by entering judgment on liability at a ratio of 30:70 in favour of the respondent as against the appellant without considering that the respondent was blameless in the circumstances.

9. The appellant's counsel filed submissions and a list of authorities dated 8 March 2022. He collapsed his submissions into three limbs: whether the respondent met the standard of proof, whether the trial court was apportioning liability at 70:30, and whether the quantum awarded was reasonable.

10. He submitted that the appellant did not prove his case to the required standard. In support of his contention, he relied on the case of Re H (Minors) [1996] AC 563, 586C. He further submitted that in a case where the award runs to a sum of over Kshs.10 million, and where the occurrence of the accident is hotly contested with varied versions of evidence, the evidence required to discharge such proof should be stronger and be keenly evaluated for gaps and disconnects.

11. He argued that paragraph 4 of the plaint and the respondent's evidence differed. He urged that introducing a new version of events at the hearing constituted a trial by ambush and prejudiced the defence. It could be interpreted as either a dishonest act by the respondent or an afterthought that led him to fabricate evidence against the appellant. The result was detrimental to the appellant's ability to effectively examine and present evidence for his defence. Further, he submitted that parties are bound by their pleadings. Learned counsel cited several cases; David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR, Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR citing the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3, & Joseph Mbuta Nziu vs. Kenya Orient Insurance Company Limited [2015] eKLR, where the court referred to a decision of Nigerian Supreme Court the Court of Appeal stated in Adetoun Oladeji (Nig) Limited vs. Nigeria Breweries Plc S.C. 91/2002, where the courts noted that a party cannot raise a different case from what has been pleaded without making the necessary amendments.

12. Learned counsel contended further that the respondent's evidence had gaps. PW2, the officer who produced the police abstract, was not qualified to testify about the investigation and circumstances surrounding the incident. Consequently, this resulted in significant prejudice against the appellant, as the court relied solely on the evidence from the Occurrence Book (OB) entry, as the witness was not the one who investigated the incident.

13. Regarding the court's decision to apportion liability at 70:30, the learned counsel contended that the learned judge should have disregarded the apportionment of liability due to the numerous discrepancies and overall weaknesses in the respondent's case. Further, at the time of the accident, the appellant's vehicle was at a garage in Kariobangi, Nairobi, undergoing repairs after a road traffic accident. Although the trial court found that the receipts provided could not confirm the vehicle's location at the time of the accident, the appellant contends that the evidence of payments to a mechanic and for spare parts logically suggests that the vehicle was under repair and could not have been involved in other activities, such as transporting stones.

14. On the quantum awarded, learned counsel argued that the trial court did not provide a basis for its decision to award Kshs. 5,000,000 for general damages. He references the case of Butt vs. Khan [1981] KLR 349, which established that the appellate court can interfere with the decision of the trial court where it is shown that the judge proceeded on the wrong principle of law and arrived at a wrong decision.

15. The appellant's counsel further claimed that the trial judge disregarded recent case law presented by both parties, leading to an inordinately high and punitive award, which should be set aside and replaced with a more reasonable amount. Further learned counsel contended that the respondent claimed future medical expenses based on a report and the opinion of Dr. Theophilus Wanganya, which were unfounded and unsupported. While adopting a multiplier of 12 years, the trial court miscalculated expenses for a wheelchair as follows: Kshs. 60,000 x 12 x 12 = Kshs. 8,640,000. This calculation was erroneous since the doctor's opinion indicated that the cost of Kshs. 60,000 was an annual expense.

16. Further, during the trial, the appellant objected to the production of receipts for payment of medical bills as the dates did not seem right and they did not appear authentic.

However, the trial court ruled against this objection and allowed the respondent to present the receipts. The appellant urges this Court to examine and scrutinize all the receipts related to special damages.

17. On the part of the respondent, learned counsel's submissions and a list of authorities are dated 30th May 2022. On whether the respondent proved his case on a balance of probabilities, learned counsel relied on the case of Nickson Muthoka Mutari vs. Kenya Agricultural Research Institute [2016] eKLR, where the court held that the burden of proof in an action for damages due to negligence lies with the plaintiff, who must demonstrate that he was injured by the negligent act or omission for which the defendant is legally responsible. This requires proof of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury sustained by the plaintiff. The lorry driver in question owed a duty of care to the respondent. He should have ensured that the respondent was not under the vehicle and that it was safe to reverse or move before doing so. Counsel contended that minor discrepancies in the evidence do not negate the fact that the respondent was injured in an accident caused by the negligence of the appellant's driver, for which the appellant is liable. Learned counsel further cited the case of Mwangi vs. Wambugu [1984] eKLR 453, where the court held that an appellate court will not typically interfere with a trial court's factual findings unless those findings are based on insufficient evidence or a misapprehension of the evidence.

18. Regarding the quantum awarded, learned counsel submitted that the learned Judge erred by failing to award damages on erectile dysfunction, loss of consortium and mental trauma as established in the doctor's report and misapprehended the evidence adduced by the respondent about loss of consortium. In support he relied on the case of Salvatore De Luca vs. Abdullah Hemed Khalil & Another [1994] KECA 80 (KLR) where the court held that the trial judge erred by failing to award for loss of consortium where there was an impairment in the social life of a party who lost his wife, and awarded Kshs. 40,000 for the loss.

19. This being a first appeal, it is our duty, in addition to considering submissions by the appellant and the respondent, to analyze and re-assess the evidence on record and reach an independent conclusion. This approach was adopted in Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR, where the court cited the case of Selle vs Associated Motor Boat Co. [1968] EA 123 and held as follows;

> " 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 demeanor of a witness is inconsistent with the evidence in the case generally."

20. We are also minded that this court will not ordinarily interfere with the finding of fact by the trial court unless it is based on no evidence or a misapprehension of the evidence, or the court acted on the wrong principle in arriving at the finding, as was stated by this Court in Jabane vs Olenja [1986] KLR 661, where the court stated

> "More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown

demonstrably to have acted on wrong principles in reaching the findings he did –see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1KAR 870."

21. We have carefully considered the pleadings, submissions, and authorities cited by the rival parties and the law. We believe the case turns on three issues: whether the respondent was involved in an accident involving the appellant's vehicle, whether the appellant was negligent, and if the answer to the first issue is affirmative, what quantum of damages is payable?

22. The respondent, in his plaint, claimed to have been hit by the appellant's vehicle while walking as a pedestrian, and in his testimony in court it transpired that the respondent on the material day had been engaged as a casual labourer to fill stones in the appellant's vehicle by the appellant's driver when he met the unfortunate accident, upon being instructed to check on what hindered the lorry from moving and he removed stones under the lorry when it moved and rolled over his back. The aftermath was serious injuries that maimed the respondent for life.

23. The appellant's defence was that his vehicle was in the garage at the time of the alleged accident. He produced receipts for spare parts and Mpesa payments to a person he claimed was the mechanic.

24. The appellant also cast doubt on whether the accident occurred at the time stated by the respondent, as the abstract and P3 forms were obtained after 1½ years of the alleged date. In his testimony, the respondent stated that he stayed in the hospital for 1½ years. He informed the court that he obtained both the abstract and the P3 form after discharge from the hospital. This explanation is reasonable against the severe injuries sustained that kept the respondent in the hospital. The testimony of PW3, a police officer, confirmed a record at the police station made by those who took the appellant to the hospital.

25. There is no dispute that there is a difference between the plaint and the respondent's testimony on what caused the accident. In the plaint the respondent stated in Paragraph *4* as follows;

> "On or about the 26th day of October 2012, the plaintiff was lawfully walking along the pedestrian land along Mombasa Road at Kyangombe area when the defendant, his/her driver, servant. employee and or agent so carelessly, negligently and or recklessly drove, managed and or controlled motor vehicle registration Number KAA 889C that the defendant caused the same to veer off the road, hitting and causing the plaintiff to sustain grievous bodily injuries to his body."

26. In his evidence, the respondent informed the court as follows;

> "I was working at home. The time was 11 a.m. I was walking along the old Mombasa road. I came across a lorry that was being loaded with building stones. I got work to load the said lorry with stones. The lorry was parked at a place where some houses had been demolished. When the lorry was full, the driver started it, but the lorry could not move. The driver told me to go under the lorry and check why it was not moving. There were stones under the lorry. I picked a spade and removed the stones from the rear tyre. I removed the stones that were blocking the rear tyre. After I removed the stones, the lorry moved from on top of the stones and pressed my back down I screamed twice and then fell unconscious. The next thing I know is that I found myself at Kenyatta National Hospital (KNH) where I was admitted. I do not know how I was taken to KNH."

27. In his evidence before the trial court, the respondent was clear about the accident. In cross-examination, he stated that he was a pedestrian at first but then got the job. He knew the vehicle's registration number

as he had worked with the lorry 3 times before. The appellant's evidence that the accident occurred in the manner it did was not controverted. The denial by the appellant that his vehicle was involved in the accident was not accepted by the trial court. Indeed, the appellant admitted that without the driver's evidence, he could not tell where the vehicle was at the material time. The trial court went further to state that in the absence of the driver's evidence or any other witness in support of the statement by the respondent, it remained uncontroverted

28. The accident herein took place on the 26th of October 2012. The time the appellant claimed his vehicle was being repaired and receipts produced included Mpesa statements from 1st September to 30th November 2012. Relevant would have been a receipt specifically for that date. It is possible for a truck to visit a garage now and then. Further the spare part receipt of Kshs.80,000 was dated 14th November 2012. All we are saying is that the receipts do not support his allegation that the accident did not occur. We agree with the trial court and equally reject this evidence. Having stated as above, we have considered whether the unpleaded issues raised in evidence should be a reason to dismiss the case.

29. In the case of Odd Jobs vs. Mubia (1970), E.A. Duffus P observed as follows

> "There has been an irregularity in the pleadings, but this court will not usually interfere with a judgement if it is satisfied that there has been no failure of justice or lack of jurisdiction. I am satisfied that the issue was before the court and that the parties were heard on the issue, and the main question here is whether or not the appellant suffered any prejudice or injustice by the course that the proceedings took."

Further, in Shire vs. Thabiti Finance Co. Ltd EALR (2002)1 EA 279 (CAK), the court stated:

> "With respect to the learned Judge, that issue does not flow from the pleadings. However, that notwithstanding, a court may base its decision on an unpleaded issue where, as here, it appears from the course followed at the trial, that the issue has been left to the court for decision – see Odd Jobs vs. Mubia (1974) EA 476."

Similarly, in the case of Herman P. Steyn vs. Charles Thys [1997] KACA 395 (KLR), agreeing with the case of Odd Jobs vs. Mubia (supra), this Court had stated:

> " We respectfully agree. The unpleaded issue was properly left to the determination of the court by the conduct of the course of the trial and the learned trial judge was justified on the evidence in arriving at the decision that he did. This is a case on which we are satisfied that there has been no miscarriage of justice and that, on the contrary, it will be unjust now to allow the appellant to succeed on this issue."

30. There is no doubt that an accident occurred involving the appellant's motor vehicle, and the respondent received severe injuries as a result. At the trial, the respondent was extensively cross-examined on how the accident occurred, and he maintained that it occurred when he was asked to go under the vehicle and remove the stones. His evidence was not shaken in cross-examination. We are satisfied by the extensive cross-examination regarding the respondent's version of how the accident occurred was conducted, that the issue of whether the accident occurred when the respondent was asked to go under the vehicle was an issue that the parties had placed before the court for determination. There was ample opportunity after that cross-examination for the appellant to call evidence to challenge the respondent's case. In these circumstances, it cannot be said that the appellant was taken by surprise which is the main reason for requiring that parties plead their cases in full. The trial court believed the respondent despite the discrepancy in the plaint. We find that the unpleaded issue flowed from the evidence before the court and was left for the court to determine, as was held in

the case of Herman P. Steyn vs. Charles Thys (supra). The trial court, therefore, cannot be faulted for having arrived at its decision. We, too, are satisfied that the unpleaded issues flowed from the evidence placed before the court. There was no miscarriage of justice occasioned as negligence on the part of the driver of the vehicle was generally pleaded, and it would be unjust to allow the appellant to succeed on this ground.

31. On apportionment of liability attributed to each of the parties, we are of the view that in as much as the driver in control of the lorry owed a duty of care to the respondent, the consequences of going under a vehicle that had been turned on ought to have been obvious to the respondent, but he chose to take a risk. Therefore, we shall not interfere with the apportionment as we find it reasonable.

32. In his complaint, the respondent provided particulars of injuries, including erectile dysfunction. The trial court considered all the injuries globally and awarded a sum of Kshs. 5,000,000. The respondent faults the judge for failing to consider erectile dysfunction, loss of consortium, and psychological trauma. On his part, the appellant considers the sum awarded to be exorbitant.

33. Regarding loss of consortium, this Court in Kimotho & Others vs. Vesters & Another [1988] KLR 48 cited the definition of "consortium" in Best vs. Samuel Fox & Co. Ltd [1951] 2 KB 639 as:

> " companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state."

34. In determining whether an award ought to have been made in favour of the respondent for loss of consortium, we are persuaded by the decision of Emukule, J. in Mwaura Muiruri vs. Suera Flowers Limited & Another [2014] eKLR that:

> "This claim can only be granted to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. A plaintiff who has himself suffered any injuries and as a result is unable to perform his marital duties would be properly compensated under the claim for loss of amenities and not as a claim for loss of consortium."

Therefore, the claim for loss of consortium was not available to the respondent.

35. We have looked at comparable cases cited by the trial court and the parties where similar injuries were sustained. We have also looked at the case of Simon Taveta vs Mercy Mutitu Njeru Civil Appeal No. 26 of 2013, where this court gave a global figure of Kshs. 3,500,5000, where this Court stated;

> " In the instant case, the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past. There no dispute as to the critical nature and extent of injuries suffered by the respondent. There is complete paralysis of the limbs and a 100% disability. Bowel and bladder movement have been affected and there is incontinence. This Court needs to strike a chord of fairness in the quantum of damages awarded."

36. Guided by the case where the respondent suffered complete paralysis from the waist downwards and where the injury to the spinal cord disturbed her bladder and bowel function, and she had to wear diapers, and where her disability was assessed at 100%, the court awarded 3,500,000. We note the number of years that have passed and the inflationary trend. We believe that the global sum of Kshs. 5,000,000 awarded by the trial court for all the injuries, including erectile dysfunction and psychological trauma, was fair and just to both parties.

37. On special damages, the appellant complained of erroneous calculations, especially on the sum attributed to the purchase of wheelchairs arriving at an exorbitant amount and relying on 'unreasonable' receipts to arrive at the sum of Kshs. 13,548,715. We have indeed noted discrepancies in the court's calculations and instances of exaggerated sums. In his evidence, Dr Wangaya stated that the respondent would require a change of wheelchairs for 1 to 1½ years and estimated the cost at Kshs.60,000. The court took a year for the replacement. The sum with a multiplier of 12 ought to have been 720,000. The doctor gave replacement at 1 to 1½ years; we think the period of 2 years for a change of wheelchair is reasonable given that the respondent's movement is curtailed.

38. In evidence, the doctor indicated that the respondent would have to visit the doctor for a checkup every month and, in the same breath, suggested quarterly hospital visits, which sounds more reasonable. In his evidence, the doctor ruled out the need for a hip replacement as the same would complicate the respondent's condition, yet the court awarded the same. We also find that the transport of Kshs.3000 to the hospital was not properly explained. How was it arrived at? It is not enough to throw figures at the court an explanation of the figure is necessary. We shall, therefore, disregard the same.

39. As regards the hospital receipts, the same are not part of the record. The appellant complained about the discrepancy in the dates of the receipts and the exorbitant amounts charged by a public hospital. At trial, the appellant admitted that he did not pay for the same initially. The allegations that Kshs. 1,500,155 was paid to a public hospital, which was not explained. Neither did the trial court address the issue. We shall, therefore, allow the appeal on these figure.

40. For reasons explained above, we substitute the award on Special Damages and its place award:

    i. Cost of wheelchair Kshs. 60,000 x 6=Kshs. 360,000

    ii. Helper's salary Kshs. 10,000 x 12 = Kshs1,440,000

    iii. Cost of catheter, diapers,

    2400 x 12x12 Kshs. 345,600

    iv. Quarterly medical checkups

    4000 x3x12 Kshs. 144,000

    v. Special bed and mattress Kshs. 500,000 Total Kshs.2,294,000

        1. Both the appeal and the cross-appeal succeed to the extent that we set aside the sum of Kshs. 12,984,101 awarded by the trial court, and in its place, using the apportionment of liability at 70:30, award the total sum of Kshs. 5,105,800.

        2. In the circumstances of the case, each party will bear his own costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

ALI - ARONI

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR