



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Pkemoi (Civil Appeal E002 of 2023)
[2025] KEHC 3967 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL E002 OF 2023
RPV WENDOH, J
MARCH 27, 2025**

BETWEEN

JULIUS KAMAU MAINA APPELLANT

AND

STEPHEN EWOI PKEMOI RESPONDENT

JUDGMENT

1. This appeal arises from the judgment delivered by the Chief Magistrate in Kapenguria CM.CC.No. E010/2021 Stephen Ewoi Pkemoi -v- Julius Kamau Maina, on 25/4/2020. The appellant was the defendant in the lower court while the Respondent was the plaintiff.
2. The claim arose out of a road traffic accident which occurred on 17/10/2020 along Makutano - Kacheliba Road, between motor vehicle registration No. KCG 025T FAW lorry and motorcycle KMEW 679M.
3. The Respondent was the rider of the motorcycle and as a result of the accident he sustained serious injuries. The Respondent filed a suit in the lower court claiming damages against the appellant, alleging negligence on the appellants driver. The trial court entered judgment in favor of the Respondent as follows;-
 1. Liability 60%: 40%
 2. General damages 3,000,000/=
 3. Special damages 1,503,750/=
 4. Costs and interest at court rates.
4. The appellant is dissatisfied with the said judgment and filed this appeal challenging both liability and quantum based on four (4) grounds of appeal which are as follows;-



1. That the learned magistrate by apportioning liability and finding the appellant 60% liable;
 2. That the trial magistrate erred in awarding general damages that were inordinately high;
 3. That the trial magistrate erred in awarding future medical expenses which were in the nature of a special damages that were not pleaded;
 4. That the trial magistrate erred by not subjecting the special damages to 60% - 40% liability;
 5. That the trial magistrate erred by failing to consider factors that he ought to have considered.
5. The appellant prays that the decision of the trial magistrate be set aside and the suit be dismissed or in the alternative, the award on damages be reviewed and, that the award on special damages be subjected to apportionments at 60%:40%.
 6. This being a first appeal, this court is required to re-examine all the evidence tendered in the lower court, evaluate it and arrive at its own conclusions. The court should however, bear in mind that it neither saw nor heard the witnesses testify. The court is guided by the decision in *Selle & Another - V- Associated Motor Boat Co., Ltd & another* (1986) EA 123 as follows “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 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 into account of particular circumstance 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”.
 7. The Respondent called three witnesses. PW1 Sergeant Wafula of Kapenguria Traffic Section produced in court a police abstract dated 11/2/2021 which she produced in evidence as P.Exh.1. She also produced a Notice of intended prosecution issued to the driver of KCG 025t FAW lorry, David Kirwa and cash bail. She stated that the case was still under investigation but she was not the Investigating Officer.
 8. PW2 Dr. Joseph Sokobe produced a medical report dated 12/2/2021 in respect of the Respondent where he found that the Respondent sustained a crush injury leading to amputation of the left lower limb. He assessed permanent disability at 50% and that the Respondent needed to fit a prosthesis at a cost of one million five hundred thousand (1.5 million).
 9. PW3, is the Respondent, Ewoi Pkemoi, worked as a watchman. He adopted his statement as evidence. He stated that on 17/10/2020, he was riding his motor cycle behind the appellant’s vehicle; that the appellant indicated as if he was joining the left side of the road and suddenly joined the highway without indicating thus hitting the Respondent’s motor cycle as a result of which he was injured. In cross examination, he further explained that there was a Pro-box between him and the lorry. He denied hitting the Probox. He was taken to hospital where he was admitted from 26/10/2020 to 11/11/2020 and has been visiting hospital for review and walks using crutches. He produced the documents he relied upon in evidence. In cross examination he denied that it had rained or that he braked and the motor cycle slid.
 10. DW1 Julius Kamau Maina recalled that on 17/10/2020, he received a call from his employee, a co-driver turnboy Desmond Chumba DW2, informing him that his motor vehicle KCG 025T had been involved in an accident with a motor cycle KMEW 679M. He said that he reported to Kapenguria police station and was informed that the rider was to blame for the accident. Later, he was told that the



police forgave the rider because he was seriously injured; that his vehicle was inspected and found to be in good condition. He was issued with a police abstract on 25/7/2021.

11. DW2 Desmond Chumba testified that on 17/10/2020 about 5.00p.m. he was a co-driver of Tipper KCG 025T coming from Kacheliba to Makutano; that it had rained and they were driving at about 20KPH; that a vehicle overtook them and a motor cycle followed it very fast, that they braked at the bumps and the motor cyclist applied brakes and because the road was slippery, he skidded towards the lorry's front tyre and hit it and was thrown off.
12. They called an ambulance, and reported to police. DW2 said that the rider was blamed for the accident. He said that he was seated in co-driver's seat and saw the accident occur through the side mirror.
13. DW3 PC William Cheboi of Kapenguria police station produced the police abstract in respect of the accident involving KCG 025T which was ferrying sand, and KMEW 679M motorcycle; that both were moving from same direction, Kacheliba towards Makutano. He carried out investigations and found that the motor cycle was trying to overtake the tipper, skidded because the road was slippery and muddy; that the rider was blamed for the accident but because of the injuries he sustained, they did not charge him In cross examination, it transpired that DW3 did not have the police file or sketch plan of the scene. He denied being the author of the police abstract produced by PW1 P.EXH.1.
14. From the evidence tendered by both the Respondent and Appellant, there is no doubt that an accident occurred involving lorry Tipper KCG 025T belonging to the appellant and a motor cycle KMEW 679M belonging to the Respondent who was the rider. The key witnesses to the accident are PW3, the Respondent and DW2 who were present during the occurrence of the accident. The evidence of the Investigating Officer DW3 was not very useful to the court because he did not tell the court whether he visited the scene or not. Apart from producing the police abstract, what he told the court must be what he gathered from witnesses.
15. From PW3's version of events, it had not rained and that it is the lorry which swerved and hit him. According to DW2, it had rained and the Respondent skidded after he braked at the bumps. Curiously DW2 claimed to have witnessed this incident from the co-drivers side mirror. If that is the case, he could not have so vividly witnessed what was happening on the driver's side at the front tyre which allegedly hit the Respondent through the side mirror. In my view, the best person that would have told the court what happened, apart from PW3, was the actual driver of the tipper.
16. The trial court stated as follows in its judgment at paragraph 16... "I find that there is a connection which reveals the fact that there was a sudden accident where the rider braked suddenly and the motorcycle skidded and ended up being hit by the lorry (or is it him hitting the lorry! Which also tried to avoid him."
17. Having expressed itself as above, the court should have found the rider liable or that he bore most of the blame. The trial court found the contrary.
18. This being a civil case the burden rests on the Respondent to prove his case on a balance of probability. Halsbury's Laws of England 4th Edition Paragraph 662 (P476) says as follows on burden of damages for negligence rests primarily on the plaintiff; who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established".
19. I have considered the evidence of PW1 and DW3, police officers who produced police abstracts relating to the same accident. It is clear that investigations were never concluded and it was not clear when DW3 decided that the rider was to blame for the accident. The Investigations Officer (DW3) did not even



have the police file in court for the court to ascertain their findings on the file. There was no sketch map produced. The evidence of DW3 was not helpful to this court. This court is guided by the decision in Michael Hubert Kloss & Another -v- David Seroney & 5 others (2009) eKLR where the Court of Appeal said “The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley -v- Gypsum Mines Ltd (2) (1953) A.C. 663 at Page 681 as follows: - To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a Court of Law, this question must be decided as a properly instructed and reasonable jury would decide it.....”The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally”.

20. Taking into account the Respondents version of the events and the defence evidence, this court is left to wonder what really happened. Accidents do not just occur. It must be caused by either one of those involved or contributed to by both parties. In such circumstances, where the court is not clear who is to blame, the court apportions liability equally between the parties. There is a host of authorities by Kenya Courts on how the court should proceed where it is not clear who caused the accident. In Kibimba Company Ltd -V- Umar Salim, Supreme Court civil appeal No.7 of 1988 (1988) the court said “where there is little to choose between the evidence of two parties, the blame is equally divided between them i.e. 50% liability on each side from the observations made by the Honourable judge in this case, and the evidence and testimony provided in the hearing of the suit, we hold a humble view that the learned magistrate, lawfully and rightly exercised his judicial powers, in applying the proper legal principles, and coming up with the equal apportionment of liability.
21. In Hussein Omar Farah -V- Lento Agencies – CA at Nairobi Civil appeal no. 34 of 2005, the justices of the Court of Appeal stated as follows; -

The trial court as we have said, had two conflicting versions on how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party, we would think that liability for the accident would be equally on both the drivers. We therefore hold each driver equally to blame.
22. In Isaac Onyango Okumu -V- James Ayere & another (2019) eKLR (Musyoka, Judge) stated as follows;-

“It is an established principle of law that where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally liable.
23. In this case, the court is faced with the dilemma of who is to blame for this accident and to what extent. I find that each party is to blame to some extent and I hereby apportion liability at 50:50.

Quantum:-

24. The appellant complains that the award of Kshs.3 million as general damages is excessive.



25. In *Ahmed Butt –V- Uwais Ahmed Khan* (1982-88) KAR, the Court of Appeal said
- “An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....”
26. In *Catholic Diocese of Kisumu –V- Tete* (2004) eKLR the court added that; “It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate”.
27. Some of the principles that courts will take into account when assessing quantum are-
1. That assessment of damages is a matter of exercise of discretion and it depends on the facts and circumstances of each case.
 2. Money as an award cannot review a physical frame that has been battered and shattered or a lost life. The award is only meant to give a party reasonable compensation.
 3. It is desirable that so far as possible, comparable injuries should be compensated by comparable awards.
28. See also *H. West and Son Ltd -V- Sheffield* 1964 AC 326 2017 e KLR and *Charles Orino Odenyo -V- Appollo Justus Amdanbwa -V- Another* (2017) eKLR. In this case, the Respondents leg was amputated above the knee and the permanent disability was assessed at 50%.
29. The appellant relied on the decision of *Cosmos Mutiso Muema -V- Kenya Road Transporters Ltd & Another* (2014) eKLR where an award of Kshs.2,000,000/= was made for the plaintiff who suffered a crushed left leg that led to amputation, below the knee, fracture of cervical spine; fractures to the skull, fractures to the ribs, dislocation of the right knee and vertebrae etc. He urged the court to award Kshs.2,000,000/=.
30. The Respondent on the other hand urged the court not to interfere with the award and relied on the case of *Ngooro Timothy & Another -V- Daniel Mutuga Wangeci* (2020) eKLR where the Respondent sustained a life long injury leading to amputation of left leg below the knee and the court made an award of Kshs.3,000,000/=. Reliance was also made on the case of *Peter Mogaka -V- Ziporah Gersare Omuya* (2022) eKLR where the court upheld an award of Kshs. 3,000,000/- where the Respondent suffered serious injuries leading to amputation of the leg above the knee.
31. I have similarly looked at other comparative decisions in *HCA 11/2019 Crown Bus Services Ltd. -V- Peter Khakali & Ainus Shemsi Hauliers Ltd* where an award of Kshs.2,500,000/= was made for amputation of the leg in 2020. I also considered the case of *Akhwabi Olubuliera Nichodemus -V- Dickson Shikuku HCC 168 /2018* where an award of Kshs.2,000,000/= was made in 2020 for amputation of a leg.
32. The above decisions were made over 5 years ago. After taking into account the issue of inflation and comparable awards, I find that the award of Kshs. 3,000,000/= is not inordinately high as to warrant this courts interference.



33. The special damages of 1,503,750/= were pleaded and proved.
34. In the end, I enter judgment for the Respondent against the appellant as follows;-
1. Liability 50: 50;
 2. General damages Kshs.3,000,000.00
 3. Special damages Kshs. 1,503,750.00
- Total 4,503,750.00
- Less 50% contribution Kshs.-2,251,875.00
- Kshs. 2,251,875.00

The appellant will have ½ the costs of appeal.

DATED, SIGNED AND DELIVERED ON 27TH DAY OF MARCH, 2025

HON. R. WENDOH

JUDGE.

Judgement read in open court in the presence of

Appellant- Mr. Korir

Respondent-Ms. Tallam holding brief for Ms. Jeruto

Juma/Hellen-Court Assistants

