



**Muttai & another v Nalunyu (Civil Appeal 56 of 2023)
[2025] KEHC 3837 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 56 OF 2023**

**RK LIMO, J
MARCH 27, 2025**

BETWEEN

SETH KIPKOECH MUTTAI 1ST APPELLANT

BOARD OF GOVERNORS LEGACY SCHOOLS 2ND APPELLANT

AND

JOHN SIMIYU NALUNYU RESPONDENT

*(Being an appeal from the judgment by Hon K. Akida, Resident Magistrate Kitale
Chief Magistrate's Court Civil Suit No. 203 of 2022 delivered on 10th July, 2023)*

JUDGMENT

1. This is an appeal against the judgment of Hon. K. Akida vide Kitale CM's Court Civil Suit No.203 of 2022 which was delivered on 10th July 2023.
2. In that case, the Respondent had sued the appellants for tort of negligence which arose from a road traffic accident which occurred on 28/1/2022 involving the appellants' motor vehicle KBV 355P and a tractor Reg No.KAJ 188W driven by the respondent. The respondent blamed the appellant for causing the accident alleging that he negligently drove his said motor vehicle and hit the tractor he was driving from behind. He pleaded that he suffered the following injuries:-
 - a. Blunt injury to the scalp.
 - b. Bruises on the face.
 - c. Fracture of the right clavicle.
 - d. Chest injury with multiple rib fractures, hemothoraces and emphysema.
 - e. Blunt injury to the abdomen.



- f. Blunt injury to the shoulder.
3. The appellant on the other hand pleaded that the respondent caused the accident by obstructing him and by driving a defective tractor without reflectors or lights.
 4. The trial court evaluated the evidence and found the 1st appellant 100% liable for trying to overtake the tractor when it was unsafe to do so. The respondent was awarded Kshs.400,000/- in general damages for injuries sustained and special damages of Kshs.6,550/-.
 5. The appellants felt aggrieved and filed this appeal raising the following grounds namely;-
 - i. That the trial magistrate erred by holding them 100% negligent without taking into account the evidence adduced.
 - ii. That the trial court erred by applying wrong principles in assessment of damages.
 - iii. That the trial court erred by awarding damages that were inordinately high.
 - iv. That the trial court failed to consider their written submissions especially on quantum by the appellants.
 6. In their written submissions through counsel, the appellants admit that an accident occurred on 28/1/2022 involving their motor vehicle and a tractor driven by the respondent. They fault the trial court for relying on evidence of PW2, a police officer stating that the witness did not visit the scene. They contended that the accident was still under investigations because if their driver was to blame, he could have been charged for a traffic offence.
 7. They submit that the same investigating officer (PW2) did not avail sketch maps or photographs of the scene to show where the point of impact was.
 8. They also blame the respondent for only concentrating ahead while driving the tractor. They held the view that he should have focused on the entire surroundings. They blame him for endangering his life by driving a tractor without lights.
 9. They fault the trial court for finding that the appellants' driver contradicted himself and contended that their evidence was clear and concise.
 10. They maintain that there was an oncoming vehicle with full lights on which dazed their driver and caused the accident. It is their position that the tractor was being driven without lights on and blame the respondent for being the author of his misfortune.
 11. They submit that the respondent should have at least be found to have caused or contributed to the accident and be held 50% liable and have relied on the a case of *Tipper Hauliers Ltd & Salim Jalala Mwaita v Mercy Chepngeno Towet & Anor* [2021]eKLR where the court held that where it is difficult to determine who was to blame in an accident, liability should be apportioned at the ratio of 50:50. The appellants urge this court to find that the same situation or circumstances obtained in this case.
 12. On quantum, the appellants submit that general damages should reflect the trend of previous, recent and comparable awards.
 13. The appellants submit that the respondent suffered simple fracture of the clavicle. They cite the decision in *General Muhuthia Mwangi v John Mburungu & Another* where the plaintiff suffered distal clavicle fracture with superior displacement and other multiple soft tissue injuries. They submit that the court of appeal upheld an award of Kshs.280,000/- in general damages.



14. They cite the case of *Jospeh Wambura v Joseph Mwangi Obai* [2018]eKLR in urging this court to interfere with the award on quantum by submitting the award of Kshs.400,000/- with an award in the region of Kshs.250,000/- to 300,000/-.
15. The respondent has not only opposed this appeal but cross-appealed on the quantum reached by the trial court stating that it was too low compared to injuries sustained.
16. On liability the respondent supports the finding of the trial court pointing out that the evidence he adduced and the evidence by the investigating officer (PW2) proved that the appellants' driver was to blame for causing the accident.
17. On quantum the respondent contends that he suffered fracture of right clavicle and rib fractures and contended that the award of 400,000/- was too low. He proposes that the award be enhanced to Kshs.1,400,000/- and relies on the following authorities;-
 - i. *George Raini Atungu v Jared Ogwoka Ondari* [2021]eKLR where the plaintiff was awarded Kshs.1 Million for the following injuries;- cut wound on the left parietal region, chest contusion, fractures of the ribs, fractures of right tibia/fibula bones, fracture of the pelvis and soft tissue injuries.
 - ii. *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Naomi Gaima Galgalo* [2019]eKLR where the plaintiff was awarded Kshs.1,400,000/- for the following injures;- pelvis fracture and open back facial bruises.
18. This court has re-evaluated the evidence tendered at the trial court by both the appellants and the respondent with a view to arriving at own conclusions.
19. Both parties in this appeal are in agreement that an accident occurred on 28/1/2022 near a bridge involving the appellants' motor vehicle Reg No.KBV 355P and a tractor Reg No.KAJ 188W driven by the respondent. The only point of divergence is who is to blame for causing the accident.
20. According to the respondent, the 1st appellant was to blame because he hit him from behind. The first appellant on the other hand blames the respondent for driving a tractor without lights at that hour stating that it was around 7.30pm.
21. In his oral evidence in court the respondent stated that the accident occurred at around 6.30pm. Going by the police Abstract tendered (PExhibit 2) it is apparent that the appellants' version that the accident occurred at around 7.30pm is more probable and correct. This is supported by the fact that the 1st appellant stated that his vision on the road ahead was somehow blurred by the headlights of an on-coming vehicle.
22. I am however not persuaded by the appellant's contention that the trial court erred in evaluating the evidence tendered. The appellants' contention that the respondent should not have concentrated ahead only but its surroundings does not make much sense. A diligent driver first and foremost is to concentrate on what is happening ahead. For the appellants to state that he should have seen the appellants' vehicle from behind and do something to avoid the accident is both impractical and diversionary. The driver who ought to have taken more pre-caution before trying to overtake is the 1st appellant. I find that the trial court was correct to find it that had the appellants' motor vehicle kept to its lane and kept his distance he could have avoided the accident.
23. The appellants has put weight and emphasis on their contention that the respondent was driving a tractor without reflectors or lights but they failed to tender any evidence to prove that fact. The police officer (PW2) who testified never supported their view but laid blame on the appellants' driver



notwithstanding the fact that he clarified that investigations were ongoing. This court finds that given the fact that the appellants' vehicle hit the tractor from behind, it was more probable that their driver was to blame.

24. I find that the 1st appellant tried to lay blame on an unidentified on-coming vehicle whom it blames for dazing and blurring his vision but even if that was true, the respondent had nothing to do with that. The appellants cannot escape liability. I find that the trial court reached the correct verdict by holding them 100% liable to blame.
25. On quantum, this court finds that both the appellants and the respondent have faulted the trial court with the respondent citing authorities with injuries that are not comparable to the ones he suffered.
26. To begin with the appellants, they have relied on the case of Gerald Muhuthia Mwangi (Supra) where the injuries suffered were distal clavicle fracture with soft tissue injuries. The award of Kshs.280,000/- in general damages was upheld. In the instant case, apart from fracture of left clavicle, the respondent suffered rib fractures and soft tissue injuries. I find that though the injuries are not far apart in terms of severity, the difference is the rib fractures sustained and when you look at the award of 400,000/- as opposed to the proposed award of 300,000/- by the appellants, you will note that the difference is not big to invite this court to interfere. The trial court exercised its discretion well and I find no basis to interfere.
27. The respondent's cross-appeal on quantum is also not merited because the authorities cited i.e. the cases of Board of Trustees Anglican Church of Kenya (Supra) and Azhar Ali (Supra) certainly reflects much more serious injuries that cannot be compared with what he sustained. His cross-appeal on quantum is unsustainable as such.

In summary this court finds no merit in this appeal and cross-appeal. The same are dismissed and since both sides have failed each will bear own costs.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF MARCH, 2025.

R.K. LIMO

JUDGE

Judgement delivered in open court

In the presence of;

Muresia for the Appellants

No appearance for the Respondent

Court assistants – Duke/Chemosop

