



REPUBLIC OF KENYA



**Mutai & another v Mburugu (Civil Appeal E442 of 2023)
[2025] KEHC 3750 (KLR) (Civ) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E442 OF 2023

LP KASSAN, J

MARCH 26, 2025

BETWEEN

STEPHEN KIPKEMBOI MUTAI 1ST APPELLANT

FESTUS AYABEI 2ND APPELLANT

AND

NICHOLAS MUTUMA MBURUGU RESPONDENT

(Being an appeal from the judgment of the Honourable Magistrate Becky Cheloti Mulemia (PM) delivered on 12.05.2023 from Nairobi CMCC No E7682 of 2020)

JUDGMENT

1. The trial magistrate, following the plaint filed by the Respondent and the subsequent defence and a full hearing, entered the following judgment in favour of the Respondent:
 - a. Liability is entered 100% against the Defendants.
 - b. General damages at Kshs 1,000,000/=.
 - c. Special damages at Kshs 3,550/=.
 - d. Cost of this suit be borne by the Defendant.
 - e. Interest on (a), (b) and (c) above at court's rate from the date of delivery of this judgment until payment in full.
2. A brief background of this matter is that on 31.12.2019 the Respondent was a rider on motor cycle registration number KMEB 297P being ridden along Kingara road when motor vehicle registration number KCU 446B knocked the Respondent causing him to sustain injuries. The Respondent



sustained a fracture of the right acetabulum, right hip central dislocation, pain on the right hip, difficulty in walking, right hip joint movements are tender and restricted, walks with a limp and uses crutches, hip joint may develop osteoarthritis in future, and permanent incapacity of 40%.

3. The Appellant has now appealed against the decision of the subordinate court on liability and quantum on the following grounds summarized as:
 1. The trial court erred in finding them wholly liable without sufficient evidence.
 2. The decision was based on hearsay and not tested evidence.
 3. The trial court improperly shifted the burden of proof.
4. The damages awarded were inordinately high and not based on judicial precedent.
4. The appellant seeks that the judgment of the trial magistrate be dismissed with costs or in the alternative liability be varied, the general damages be varied and for costs of the appeal.
5. The following issues arise for determination:
 - a. Whether the trial court properly analyzed the evidence on liability.
 - b. Whether the respondent proved negligence on a balance of probabilities.
 - c. Whether the award on quantum of damages was excessive.
 - d. Whether the trial court erred in law or fact.

Analysis and Determination

6. This appeal being solely against the decision on damages, I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

“An appellate Court will not disturb an award of 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”
7. As a first appellate court, I am bound by the principle in *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 to re-evaluate and re-analyze the evidence afresh while bearing in mind that I did not have the opportunity to see or hear the witnesses testify.
8. On liability, the Respondent testified as PW1 that on the material date he was lawfully riding his motorcycle along Kingara road heading to Lavington. That motor vehicle registration number KCU 442B was overtaking and although he tried to evade to his far left side, he was knocked and sustained injuries as a result. He was rushed to hospital and got admitted for six weeks. The accident was reported at Muthangari Police Station. PW2, a police officer testified that on 31.12.2019 there was an accident which occurred involving motor vehicle registration KCU 446B make Toyota Axio and motorcycle KMEB 297B make Boxer. The 2nd Appellant was the driver of the said motor vehicle and the Respondent was the rider of the motorcycle. The police abstract was produced as P.Ex.7 and it blamed the driver of the said motor vehicle for the accident.
9. After the Respondent closed his case, the defence also closed without calling any witnesses. The trial magistrate found the appellants 100% liable on the basis that they did not challenge the respondent's evidence and failed to rebut the same. However, the law is clear that the burden of proof rests on the



- plaintiff. Section 107 and 108 of the *Evidence Act*, Cap. 80 Laws of Kenya, provides that he who alleges must prove.
10. As held in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991], there is no liability without fault. Mere occurrence of an accident does not impute negligence unless supported by cogent evidence. Further, in *Bwire v Wayo & Sailoki* [2022] KEHC 7 (KLR), Mativo J. stated that when the plaintiff fails to discharge the burden of proof, the defendant is under no obligation to rebut that which is not established.
 11. While the Appellants filed a defence blaming the Respondent, they called no witnesses to rebut the Respondent's direct testimony, nor did they cross-examine him on key points. This amounts to uncontroverted evidence, which courts are entitled to rely on. As held in *Shaneebal Ltd v County Government of Machakos* [2018] eKLR and *North End Trading Co. Ltd v City Council of Nairobi* [2019] eKLR, pleadings are not evidence unless supported at trial.
 12. The appellants argue that the trial court improperly shifted the burden of proof to them. This is incorrect. Section 107 of the *Evidence Act* provides that the burden rests on the party who alleges. The Respondent, as Plaintiff, discharged that burden through his sworn testimony and corroborating documents. Once this was done, the evidentiary burden shifted to the Appellants to rebut that evidence. They failed to do so. The trial court did not err in this regard.
 13. Therefore, the trial magistrate rightly held the Appellants liable, as the Respondent's evidence on liability was credible, direct, and unshaken.
 14. The award of Kshs. 1,000,000 in general damages was not supported by detailed comparison with precedents. Trial magistrates should consider comparable cases when awarding damages to ensure consistency and fairness. This approach prevents the perception that awards are arbitrary or "plucked from the air."
 15. In the case of *Chepnyanjoi & another v Mwangi (Civil Appeal E067 of 2023)* [2024] KEHC 11020 (KLR) (20 September 2024) (Judgment), the Appellant contended that the trial magistrate erred by not considering conventional awards for general damages in similar injury cases, resulting in an excessively high award. The High Court reiterated that comparable injuries should attract comparable awards, aligning with the principle that awards should be consistent with established precedents.
 16. Similarly, in *Anthony Mathenge Waraga & Another v. AW* [2018] eKLR, the appellants argued that the general damages awarded were inordinately high and that the trial magistrate failed to consider comparable cases. The High Court emphasized that for it to interfere with the quantum of damages awarded by the trial magistrate, it must observe well-settled principles, including ensuring that the award aligns with comparable cases to avoid arbitrary figures.
 17. The evidence adduced by the Respondent is that he sustained a fracture of the right acetabulum, right hip central dislocation, pain on the right hip, difficulty in walking, right hip joint movements are tender and restricted, walks with a limp and uses crutches, hip joint may develop osteoarthritis in future, and permanent incapacity of 40%. He was examined by Dr. Okere who prepared the medical report.
 18. The court in *Geoffrey Maraka Kimchong v Frechiah Hugiru* [2020] KEHC 7558 (KLR) set aside the trial court's award of Kshs 80,000/= as general damages for a sustained a cut wound on the cheek which was tender, blunt trauma to the pelvis which was tender and a fracture of the right acetabulum. The award was substituted with Kshs 1,000,000/=.
 19. The court in *Ihuthia v Gatura (Civil Appeal 67 of 2019)* [2022] KEHC 14342 (KLR) affirmed the trial court's award of Kshs 400,000/= as general damages for a sustained a fracture of the neck of the



left femur, resulted in hip replacement surgery (hemiarthroplasty). The award was substituted with Kshs 1,200,000/=.

20. The court in *Shiro v Mini Bakeries (NBI) Limited* (Civil Appeal E072 of 2023) [2024] KEHC 16642 (KLR) awarded of Kshs 600,000/= as general damages where the Plaintiff sustained comminuted fracture mid shaft right femur, fracture of posterior wall and column of right acetabulum, was using crutches and disability assessed at 30%. The award was substituted with Kshs 1,300,000/=.
21. I have considered the injuries sustained by the Respondent and the after effects thereto. The course of treatment was long with an extended admission period at the hospital. Also considered is the Respondent was left with a permanent disability assessed at 40%. I find the award of Kshs 1,200,000/= in general damages was reasonable.
22. On the Special damages award, a party must produce receipts in order to meet the requirement of specifically proving special damages. The medical report receipt for Kshs 3,000/= dated 08.06.2020 was produced. There is no receipt for Kshs 550/=. As such, the proved amount is only Kshs 3,000/= which I award.
23. The upshot of the above is that:
 - i. The appeal partly succeeds on general and special damages.
 - ii. The trial court award on liability is upheld.
 - iii. General damages award of Kshs 1,200,000/=.
 - iv. Special damages at Kshs 3,000/=.
24. Costs of the Appeal to the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MARCH 2025.

HON. L. KASSAN

JUDGE

In the presence of;

Ogutu for the Appellant

Kakumi for the Respondent

Carol – Court Assistant

