Alfa Gas Limited & another v Ngige (Civil Appeal E1148 of 2023)
[2025] KEHC 9552 (KLR) (Civ) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9552 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1148 OF 2023

JN NJAGI, J

JUNE 26, 2025

BETWEEN

ALFA GAS LIMITED ..... 1ST APPELLANT

LEWIS KIMANI KARANJA ..... 2ND APPELLANT

AND

JOSEPH NGIGE ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon. R. L.Musiega, Senior Resident Magistrate, in Nairobi Chief Magistrate`s Court at Milimani Civil Case No. E4676 of 2020 delivered on 6/10/2023)

JUDGMENT

1. The respondent herein brought suit against the Appellants seeking general and special damages after he was injured in a road traffic accident involving a motor vehicle belonging to the 1st appellant and which at the time of the accident was being driven by the 2nd Appellant. The appellants denied the claim. After a full trial in which parties called evidence, the trial magistrate found the 2nd Appellant wholly liable for causing the accident and awarded the respondent Ksh.1,100,000/= in general damages. The appellant was aggrieved by the finding of the court on liability and on the award on quantum and lodged the instant appeal.

2. The grounds of appeal are, inter alia, that the trial court erred in making a finding of negligence against the appellants without evidence; making findings on liability based on extraneous issues and or hearsay evidence; failing to analyze and weigh evidence against the rules of evidence; shifting the burden of proof of liability to the appellant; failing to hold that the respondent did not prove the alleged injuries

using primary evidence to the required standard and that the assessment of damages was inordinately high as to represent an entirely erroneous estimate.

3. I will first deal with the issue of liability before delving into the issue of quantum.

The evidence before the trial court on liability

4. The Respondent pleaded in his plaint that he was on the 23rd March 2020 riding a motor cycle registration No. KMEG 172N along Dr.Griffin`s Road when the 2nd Appellant drove motor vehicle registration No. KCE 132S so negligently and at high speed that he lost control of the same thereby causing it to collide onto the appellant`s motor cycle thereby causing the respondent serious bodily injuries. The particulars of negligence on the part of the 2nd appellant were stated in the plaint.

5. The respondent relied on his witness statement dated 6th August 2020 in which he basically reiterated the pleadings in the plaint. He testified in court and adopted the contents of his witness statement. He added that the accident occurred near Pangani police station. That he was crossing the road and the motor vehicle did not obey traffic lights. He denied that he disobeyed traffic lights.

6. The respondent called one witness, a police officer, PW1 who produced a police abstract as exhibit in the case. The witness said that he was not the investigating officer in the case and neither did he visit the scene. He said that the police abstract indicated that the matter was pending investigations.

7. The appellants on the other hand denied in their statement of defence that the accident occurred in the manner pleaded by the respondent and if the same occurred at all it was wholly and/or substantially caused by the negligence of the respondent. They set down particulars of negligence committed by the respondent and denied the particulars of negligence stated against them by the respondent. They denied that the respondent was injured and received severe injuries.

8. The 2nd appellant testified in court and relied on his witness statement dated 22nd October 2020 and adduced further evidence in his oral testimony in court. In his witness statement, the 2nd appellant stated that he was on the date of the accident driving his motor vehicle, a canter, along the road. That traffic lights on his road turned green and he proceeded to drive at a speed of about 60 km/h. That suddenly a motor cycle appeared at high speed while crossing Thika road from Juja road towards Pangani. He was unable to break in time due to its abrupt appearance. He swerved to avoid it but it was too late and he hit it on its rear region thereby sending it to the ground. The motor cycle was carrying a rider and 2 passengers all of whom were injured and they were taken to hospital by well-wishers. Policemen arrived at the scene and he explained to them how the accident had occurred.

9. In his evidence in court, the 2nd appellant stated in cross-examination that he was coming from the direction of Thika road heading towards Kariokor while the rider was coming from Juja road and was joining Thika road. That there were traffic lights at the point of impact. That he is the one who had the right of way at the time of the accident as the lights on his side had turned green while those of the rider were red. That the rider had already joined the junction when he hit him.

Submissions on liability

10. The appeal was canvassed by way of written submissions. On the issue of liability, the appellants submitted that the accident occurred at a junction manned by traffic lights. That what was contested was which party had the right of way and which party did not heed to the traffic lights hence occasioning the accident. The appellants faulted the trial court for not addressing the issue but instead focused on which part of the motor cycle was hit by the vehicle.

11. The appellants submitted that the initial burden of proof lay on the respondent to show that he had the right of way and that it is the 2nd appellant who disregarded the traffic lights. That the trial court did not show how the 2nd appellant was negligent.

12. It was submitted that the police officer who testified in the case did not investigate the case and therefore that his evidence was of no assistance.

13. It was submitted that though the 2nd appellant adduced evidence that the respondent was carrying two pillion passengers on the motor cycle and that the respondent ran away from the scene of the accident leaving behind his passengers, the respondent did not counter the evidence and the trial court never addressed itself on the issue despite the acts having been unlawful.

14. The respondent on the other hand submitted that the respondent blamed the driver of the motor vehicle for causing the accident and denied having contributed to the occurrence of the accident. That the driver on the other hand denied having contributed to the occurrence of the accident. That the trial court considered the evidence tendered by both sides and found the evidence of the appellant to be inconsistent and hence found the appellants wholly liable for the accident. The respondent submitted that the finding of the trial court was justified. The respondent relied on the case of Cosmus Mutiso Muema v Kenya Road Transporters Ltd & another (2014) eKLR where the court held that:

> Naturally, it is expected that one driver will blame the other for an accident. Indeed, the drivers of the subject motor vehicles have blamed each other for the accident. The question that this court needs to answer is, whose evidence is more credible in the circumstances.

15. He also cited the case of Ndattho v Chebet (Civil Appeal No.8 of 2020 (2022) KEHC 346 (KLR) where it was held that:

> In a road traffic accident involving a collision between two motor vehicles, the court apportions liability depending on blameworthiness of the drivers.

16. The respondent urged the court to uphold the finding of the trial court on liability.

Determination on the issue of liability

17. This being a first appeal, I am mindful that it is my duty to re-evaluate the evidence adduced before the lower court and, on the basis thereof, come to my own conclusion, bearing in mind however, that I did not have the advantage of seeing or hearing the witnesses. In Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

18. I have considered the grounds of appeal, the record of the trial court and the submissions tendered by the respective advocates for the parties herein. The issues for determination is whether the trial court erred on its finding on liability.

19. The standard of proof in a civil case is on a balance of probabilities. In William Kabogo Gitau v George Thuo & 2 others (2010) eKLR the court held as follows on that subject:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

20. The respondent pleaded in his plaint that the accident was caused by the act of the 2nd respondent driving at high speed thereby losing control and hitting his motor cycle. The respondent reiterated the same in his witness statement. However, the respondent did not in his witness statement nor in his evidence in court adduce evidence as to how the 2nd appellant drove at high speed and lost control of his motor vehicle thereby leading to the accident. He instead stated he was crossing the road when the 2nd appellant failed to obey traffic lights and the accident occurred. While he denied that he failed to obey traffic lights, he did not give details as to what happened at the traffic lights that led to the accident. There was no evidence as to whether he stopped at the traffic lights and whether he had the right of way when he crossed the road. A mere denial that he did not disobey traffic lights without more was not sufficient evidence.

21. The 2nd respondent on the other hand stated in his witness statement that he was driving along the road. That traffic was very light on the road and traffic lights indicated green on his lane and he proceeded driving at a speed of about 60 km/h. The respondent`s motor cycle suddenly appeared while crossing the road from Juja road to join Thika road. He tried to swerve to avoid it but it was too late.

22. It is then not in dispute that the motor cyclist, the respondent, was hit by the motor vehicle of the 2nd appellant at a traffic junction when he was crossing the road. Both parties are agreeable that there were traffic lights at the junction. Each party blames the other for failing to obey traffic lights thereby leading to the accident. It is then clear that the issue that was before the trial court is as to which party failed to obey traffic lights thus occasioning the accident. I agree with the submission for the appellants that the trial court addressed the wrong issue in addressing the issue on which party hit the other instead of addressing the issue as to which party failed to obey traffic lights thus leading to the accident.

23. The 2nd appellant says that he was driving at a speed of 60 km/h when he hit the motor cyclist. A question then arises as to how come that he was driving at such high speed at a traffic intersection. To have hit the respondent at that kind of speed at a traffic intersection can only mean that he did not stop or slow down at the junction when he hit the respondent. This shows that he was not telling the truth on how the accident occurred. There is nothing to show that he is the one who had the right of way at the traffic lights when he hit the motor cyclist. Even if the lights had turned green as he approached the lights, he was obligated to approach the junction at slow speed and not at a speed of 60 km/h.

24. From the evidence which was adduced before the trial court, it is not possible to determine as to who between the respondent and the 2nd appellant failed to obey traffic lights at the junction when the accident occurred. Each part blames the other for failing to do so. There is no independent evidence in proof of the same. It is only word of one party against the word of the other party. In such circumstances it is difficult to know as which one of them was telling the truth. In the case of Farah vs. Lento Agencies [2006] 1 KLR 123 the Court of Appeal held that where it is not possible for the court

to pin down negligence on any particular driver to have been liable for causing the accident, then both drivers should be held equally to blame. The court expressed itself as follows:

> " In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.....The trial court had two conflicting versions of 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 could be equally on both the drivers. We therefore hold each driver equally to blame."

25. In this case, it was not possible to know as who between the motor cyclist and the driver was to blame for causing the accident. In the circumstances, both should be held equally to blame. I find both the motor cyclist and the driver to have been equally to blame for causing the accident. Liability is thereby apportioned equally between both parties at the ratio of 50:50.

Quantum

26. The respondent relied on documents on his list of documents that are on page 13 of the Record of Appeal that include X-ray request form from Kenyatta National Hospital (KNH), ultra sound reports, attendance card from KNH, a police abstract and copy of receipts. His medical report was prepared by Dr. Mwaura PW3. The same is on page 17 of the record of appeal. It was the evidence of the doctor that he examined the respondent on 15/7/2020 and found him to have sustained 8th and 9th rib fractures and dislocation of the right shoulder joint. He said that the said injuries were confirmed in the X-ray Request form.

27. On the issue of quantum, the Appellants faulted the trial court for failing to find that the respondent did not prove the injuries alleged to have been sustained. It was submitted none of the documents produced from Kenyatta National Hospital for the tests done on the date of the accident showed that the respondent had sustained the fractures and dislocation complained of. That a Radiologist Request form dated 30/3/2020 is not accompanied by the attendant report showing the results of the test. It was submitted that the receipts that were attached to the respondent`s claim were in respect to consultation and none was for tests. It was thus submitted that there were no document from the primary treatment centre, KNH, proving that the respondent had sustained injuries.

28. The appellant submitted that the P3 form was filled on 8/6/2020 by the police surgeon which was two-and- a-half months later after the accident. That the injuries noted in the P3 form were 8th and 9th rib fractures and dislocation of the right shoulder.

29. It was submitted that Dr. Mwaura PW3 examined the respondent on 15/7/2020 which was almost 3 months after the accident. That he did not have access to any x-ray film when he examined the respondent. That the gist of his evidence was that there was no document to prove that tests were done except the ultra sound.

30. The Appellants submitted that the primary documents in this case, the treatment notes from KNH, did not show the respondent to have sustained fracture and dislocation complained of. Reliance was placed in the case of Sospeter Kimutai v Isaack Kipleting Boit (2021) eKLR where Mwongo J. held that primary documents such as treatment notes and discharge notes outweigh secondary evidence such as reports of medical experts and that it is the primary factual evidence that is of the greatest importance.

31. It was submitted that in this case Dr. Mwaura confirmed that he did not do any independent scan, X-ray or ultra sound but only relied on the P3 form, X-ray request form, ultra sound reports and an attendance card from KNH. That a Request form was supposed to be followed by a report detailing the result of the test. That the report of Dr. Mwaura and the P3 form were not founded on any primary documents from KNH.

32. Reliance was also placed in the case of Easy Coach Bus Limited v Mary Adhiambo Ohuru (2017) eKLR where the late Majanja J. noted that reports that differ from the initial treatment notes cannot account for critical issue of causation.

33. The appellants urged the court to find that the trial court erred in failing to find that there was no proof that the respondent had sustained the injuries complained of.

34. The respondent on the other hand submitted that Dr. Mwaura confirmed the injuries sustained by the respondent and assessed the permanent incapacity at 5%. The respondent urged the court to find that the injuries were sustained.

35. On the amount of quantum, the trial court awarded Ksh.650,000/= on general damages for multiple rib fractures and Ksh.300,000/= for right shoulder dislocation. On the former award the court relied on the case of Joseph Ndumia Murage v David Kamande Ndungu, HCCC No.101 of 1996 where the plaintiff was awarded Ksh.500,000/= for fractures of 6 ribs. On the latter award the court relied on the case of Mara Tea Factory Ltd v Lilian Bosibori Nyandika (2021) eKLR where Ksh.300,000= was awarded for dislocation on the right hip joint and right knee.

36. The appellant submitted that the approach of the trial court was wrong as it imputes that each injury has its own award of damages yet injuries are always particularized in a compound manner and the damages are a global sum and not for each injury.

37. The appellant submitted that the award of the trial court was an inordinately high and an erroneous estimate of the applicable quantum of damages. They proposed an award of Ksh. 200,000/= and relied on the cases of Mara Tea Factory Ltd v Lilian Bosibori Nyandika (supra) and Blue Horizon Travel Co. Limited v Kenneth Njoroge (2020) KLR. In the latter Ksh.380,000/= was awarded for bruises on the scalp, neck, abdomen, lower back, cut wounds on the left palm and left foot near the ankle joint, sublaxation of the left shoulder joint and fractured 3rd and 9th ribs.

38. The respondent defended the award of the trial court and relied on the case of Simbe v Nyangau (Civil Appeal E0037 of 2012 (20222) KEHC 3275 (KLR) (19July 2022 where the High Court upheld an award of Ksh.2,000,000/=). He also relied on the case of Mehari Tewoldge T/A Mehari Transporters Ltd v Damus Muasya Maingi (2013) eKLR where Ksh1,500,000/= was awarded for blunt injury to the chest; fracture 3 ribs 4, 6, 7 on the right side with puncture of the pleural leading to heamathorax; blunt injury to the abdomen with a tear in the liver and severe internal bleeding leading to heamoperitoneum; a deep cut on the upper right arm with skin and muscle deficit near the axilla; many cuts and bruises on the whole right arm; fracture right scapula; and several fractures on the right tibia and fibula at the ankle joint."

39. The first question is whether the respondent sustained the fractures and dislocation complained of.

40. The respondent produced two Radiology Request forms from KNH. The first one was dated 23/3/2020 which was the day of the accident. The brief clinical summary on request was that the patient was hit by a lorry on the right upper limbs. There was no mention of him having suffered any fractures or dislocation.

41. The second Radiology Request still from KNH was dated 30/3/2020. The brief clinical summary on request was: right anterior humeral dislocation. Reduction performed. Check X-ray 8th and 9th rib fracture right side.

42. Though the second radiology request form indicates that humeral dislocation reduction had been done, no treatment notes were produced to prove so. The report also noted rib fractures. Similarly, no treatment notes were produced to prove so. It beats reason why the injuries were not noted in the first radiological request which was made on the day of the accident and were only noted in the second request which was made a week after the accident. Even after the request was made, no x-ray film was produced confirming the fractures and the dislocation. Dr. Mwaura confirmed that he did not see any x-ray film when he examined the respondent. He relied on the radiology request form of 30/3/2020 to opine that the respondent suffered fractures and dislocation. However, that was only a request form and was not evidence of the fractures and dislocation. The same had to be confirmed by x-ray which was either not done or was not availed to the court.

43. The trial court did not consider whether the injuries were actually sustained. There being no treatment notes from KNH evidencing that the respondent was treated of fractures and shoulder dislocation and there being no x-ray film to confirm the same, I find that the respondent did not prove that he had sustained the injuries complained of. The award for the said injuries is for setting aside.

44. Considering the authorities cited by the parties, I would have awarded the respondent a sum of Ksh. 550,000/= in general damages had he proved that he sustained two rib fractures and shoulder dislocation.

45. The upshot is however that the respondent did not prove the nature of injuries sustained during the accident with the result that this court upholds the appeal on the award of damages. Consequently, the award of the trial court on damages is set aside.

46. Orders accordingly. Each party to bear its own costs to the appeal.

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

J. N. NJAGI

JUDGE

In the presence of:

Mr. Akach for Appellant

Mr. Kiptanui HB for Mr. Waiganjo for Respondent

Court Assistant -