



Munene v Ashur Ahmed Transporters Limited & another (Civil Appeal E104 of 2024) [2025] KEHC 11309 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 11309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E104 OF 2024
GL NZIOKA, J
JUNE 26, 2025**

BETWEEN

SAMUEL KIHU MUNENE APPELLANT

AND

ASHUR AHMED TRANSPORTERS LIMITED 1ST RESPONDENT

AA TRANSPORTERS LIMITED 2ND RESPONDENT

(Being an appeal from the decision of Hon. W. Rading (PM) delivered on 29th August, 2024 vide Naivasha Chief Magistrate’s civil case No. E18 of 2021)

JUDGMENT

1. By a plaint dated 13th January 2021, the plaintiff (herein “the appellant”) sued the defendants (herein “the respondents”) seeking for judgments against the respondents for: -
 - a. General damages.
 - b. Special damages.
 - c. Costs of the suit and interest at court rates.
2. The appellant’s case is that, on 12th October 2020, he was lawfully riding a motorcycle registration No. KMDW xxxH along the Gilgil – Naivasha road when motor vehicle registration No. KBQ xxxS/ZE 8242, beneficially owned by the respondents, while overtook the motorcycle negligently thus causing the rear part of the vehicle to knock him down.
3. That as a result of the accident he suffered the following injuries:
 - a. Supracondylar fracture of the right humerus;
 - b. Fracture of the proximal head of the right radius;



- c. Dislocation of the right elbow joint;
 - d. Dislocation of the proximal radio ulna joint;
 - e. Multiple lacerations and severe soft tissue injuries of the right ankle joint;
 - f. Lacerations on the right leg;
 - g. Bruises on the right wrist and hand.
4. The appellant blames the respondents' driver and/or authorized agent for negligently causing the accident. The particulars of negligence attributed to that driver are tabulated at paragraph 5 of the plaint. In a nutshell, it is averred that the respondents' driver and/or agent drove the subject motor at an excessive speed, failed to brake, swerve, stop or control the vehicle to avoid the accident and/or failed to have a proper look out for other road users. The appellant also relied on the principle of *res ipsa loquitur*.
 5. However, the 1st respondent opposed appellant's case by filing a statement of defence dated 18th February 2021. The 1st respondent being the lawful and/or beneficial owner of the subject vehicle. Similarly the occurrence of the accident, the injuries the appellant allegedly suffered, and the particulars of negligence attributed to its agents, servants and/or driver, were denied.
 6. However, in the alternative and without prejudice basis, the 1st respondent pleaded that if the accident ever occurred then it was caused solely or substantially contributed to by the appellant. The particulars of negligence attributed to the appellant are tabulated paragraph 6 of the statement of defence to wit that, he was riding the motorcycle at an excessive speed, in a zigzag manner, without due and attention, failed to maintain a proper look out, abruptly and without warning swerved into the lane of the subject vehicle, failed to slow down, swerve, brake stop or control the motorcycle so as to avoid a collision, and caused the accident.
 7. The 2nd respondent did not enter appearance nor filed a statement of defence. Consequently, by an application dated 28th September 2021, the appellant sought for judgment against the 2nd respondent in default of appearance and/or filing of a defence. The subject judgment was entered on 26th October, 2021.
 8. Be that as it may, the case proceeded to full hearing and by a judgment dated 29th August 2024, the trial court stated that, the content of the police abstract blamed the appellant for causing the accident and held that the appellant had not discharged the burden of proof required to establish his claim and dismissed the case. The court further held that the interlocutory judgment against the 2nd respondent was inconsequential.
 9. However, the trial court indicated that, had the appellant succeeded in his claim he would have assessed the general damages in the sum of Kshs. 700,000.
 10. However, the appellant is aggrieved by the decision of the trial court and appealed against it on the following grounds:
 - a. That the learned trial Magistrate erred in law and fact by not holding the defendants 100% liable for the accident despite overwhelming evidence to the contrary.
 - b. That the learned trial Magistrate erred in law and fact in applying wrong principles while assessing liability.



- c. That the learned trial Magistrate erred in law and fact in failing to accord due regard to the appellant's submissions on liability and quantum.
 - d. That the learned trial Magistrate erred in law and fact in failing to consider authorities relied on by the appellant in his submissions.
11. The appeal was disposed of by filing written submissions. The appellant in submissions dated 9th April 2025, argued that he had discharged the burden of proof of his case and showed that the respondents were liable for causing the accident. That he gave evidence to the effect that he was riding his motorcycle near the middle of the road when the respondents' vehicle overtook him and brushed him off. That his evidence was corroborated by the evidence of (PW2) P.C. Ngugi who testified that, the lorry must have been speeding and brushed against the motorcycle.
 12. The appellant further submitted that the respondents did not take any steps to prevent brushing him. He relied on the case of, Kennedy Muteti Musyoka vs Abedinego Moble (2021) eKLR where the High Court cited in the case of; Masembe vs. Sugar Corporation and Another [2002] 2 EA 434 where the court stated that, a reasonable person driving a motor vehicle does not hit every object on his way because the object is wrongfully there but has to take reasonable steps to avoid hitting or colliding with such objects.
 13. The appellant submitted that the respondents did not call any witnesses to support their case and therefore his evidence remained uncontroverted. That it is trite that, where a defendant has failed to call any witnesses to counter the plaintiff's evidence, then any defence remains unsubstantiated and the court will find that the plaintiff has proved his case on a balance of probabilities and the defendant is 100% liable. He relied on the case(s) of; Mbasu & another vs Onyapindi & Cheseny (suing as the legal representatives of Bernard Simiyu Wamalwa (deceased) [2024] KEHC 11716 (KLR), Autar Singh Bahra & another vs Raju Govind J. L HCC No. 548 of 1998 (unreported), Kenya Bus Services Ltd vs Humphrey (2003) KLR 665, and Lake Flowers vs Cila Francklyn Onyango Ngonga & another [2008] eKLR.
 14. The appellant further relied on the doctrine of res ipsa loquitor which presupposes that the plaintiff has discharged his/her burden of proof and shifts the burden to the defendant to either disprove negligence on his part or show contributory negligence on the part of the plaintiff.
 15. The appellant relied on the case of Susan Kanini Mwangagi & another vs Patrick Mbithi Kavita (2019) eKLR where the High Court stated that the doctrine of res ipsa loquitor allows the plaintiff to discharge the burden of showing negligence by proving that an accident occurred in circumstances in which it should not have occurred, and he does not need to prove specific negligence.
 16. On general damages, the appellant submitted that the medical report by Dr. Kiamba, the discharge summary from Gilgil Sub-County Hospital, the P3 form and the general outpatient records from Gilgil Sub-County Hospital and Nakuku Level 5 Hospital produced by consent, established that he sustained the injuries enumerated in the plaint, and that the same were classified as grievous harm.
 17. Furthermore, that he gave evidence that, due to his injuries he is unable to lift heavy objects, stand and walk for long distances thus affecting his ability to provide for his family. That in addition, the medical evidence was unchallenged and uncontroverted by the respondents.
 18. The appellant argued that an award of Kshs. 3,000,000 as general damages will be sufficient taking into account inflation and age of the authorities he has relied on. The appellant further relied on the case of Peace Kemuma Nyangera vs Micahel Thuo & Another (2014) eKLR where the plaintiff sustained a fracture of sacrum bone, fracture of the right superior pubic ramus of the pubic bone, fracture of the



- right ischium/inferior pubic ramus of the pelvic bone, haematoma on both thighs and lumbo-sacral haematoma and left with a permanent limping gait and cosmetic scars, developed arthritis and had difficulties in pregnancy with permanent incapacity assessed at 45%; and the High Court awarding her Kshs. 2,500,000 as general damages.
19. The appellant further relied on the case of, Florence Hare Mikaha vs Pwani Tawakal Mini Coach & another (2012) eKLR where the High Court awarded the plaintiff Kshs. 2,400,000, after she suffered, fractures of right superior and inferior ramus of pubis, fracture of ischium, fracture left acetabulum, fracture lateral condyl of femur, dislocation left knee with torn collateral ligament; skin grafting surgery on left leg, and left leg shortened by 4 cm; was permanently disabled and on two crutches, but the disability level was not indicated.
 20. The appellant submitted that special damages must be pleaded and strictly proved. That he had produced receipts in support of the sum of Kshs. 9,250 as pleaded in the plaint.
 21. Lastly, on the issue of costs, the appellant submitted that costs follow the event and are meant to compensate a successful party for the trouble he has undergone in prosecuting the suit. That, he is entitled to enforce his legal right and there is no misconduct or vexatious or oppressive conduct on his part, as such he is entitled to costs.
 22. He relied on the case of; Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another [2016] eKLR where the High Court in considering whether to award costs to the 2nd defendant where the suit was compromised by way of a consent between the plaintiff and the 1st defendant, it stated the factors to consider in awarding costs were inter alia; the conduct of the parties, the subject of litigation; the circumstances that led to the institution of the proceedings; the events that led to its termination, stage proceedings were terminated, the manner of termination, relationship between the parties; and the need to promote reconciliation between the parties.
 23. However, in response submissions dated 16th April 2025, the 1st respondent argued that the appellant had the onus of proving his case on a balance of probabilities and cited section 109 of the Evidence Act (Cap 80) Laws of Kenya which provides that the burden of proof lies with the person wishing the court to believe the existence of a fact
 24. The respondent relied on the case of; Wycliffe Nyongesa vs Etyang Imonyaro & AG (2004) eKLR where the High Court outlined three ways a party can prove liability and negligence in a tort case being; where interlocutory judgment has been entered against a defendant; under section 34 of the Evidence Act, the use of proceedings of a trial of the same parties based on same facts and issue i.e. a traffic case in a subsequent civil case; and through direct evidence of an eye witness.
 25. The respondent submitted that, the appellant had failed to prove his case on a balance of probability and relied on a police abstract that blame the occurrence of the accident on him, a fact which he admitted in both his examination in chief and cross-examination.
 26. That, the mere fact that the respondent did not call any witnesses did not automatically mean that it was responsible but the onus lay with the appellant to prove his case. The respondent relied on the case of; Jamal Ramadhan Yusuf and another vs Ruth Achieng and another [2010] KEHC 381 (KLR) where the High Court stated that, the mere fact that an accident occurred does not mean that a particular person has driven negligently or negligence ipso facto must be inferred but a claimant must prove such negligence with cogent and credible evidence. The respondent further placed reliance on the case of; Martin vs Shamash Brothers Limited [1995 – 1998] 1 EA 179



27. On the issue of quantum, the respondent urged that, the appellant having failed to prove liability against it, that the court uphold the trial court's findings on the issue of quantum, and consequently dismiss the appeal with costs.
28. At the conclusion of the arguments by the parties, I recognize that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as stated by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
29. The Court of Appeal thus observed: -

“I accept counsel for the respondent's proposition that 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 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 demeanour of a witness is inconsistent with the evidence in the case generally.”
30. Be that as it were, the appeal herein is considered in the light of the evidence available and, I find that the appellant at paragraph 5 of the plaint blamed the respondents for the accident. The appellant indicated the particulars of negligence in the said paragraph. In support of the alleged negligence, the plaintiff filed a statement dated 13th January, 2021 in which he stated that, the respondent's agent who was driving motor vehicle registration number KBQ xxxS/ZE 8242, overtook his motor cycle and hit it from the side causing him severe bodily injuries.
31. In his oral evidence in court, the appellant stated that the respondent's driver overtook him in high speed and shoved him on to the left side of the road. That, he has never been charged in any court of law over any offence. In cross-examination, he stated that, he was next to the road, not in the middle of the road and neither was he crossing the road.
32. The appellant also supported his case through the evidence of (PW2) No. 98841 PC David Ngugi who produced the police abstract, confirming that the accident occurred and the scene was visited by Corporal Sicily. That, according to his evidence, the accident was a brush effect and the plaintiff was injured. That, the lorry must have been speeding. There was no cross-examination of this witness.
33. The defence case was closed without the defendant calling or adducing any evidence. At this point, it suffices to note that the 2nd defendant did not enter appearance and an interlocutory judgment was entered against it.
34. Be that as it may, the trial court dismissed the appellant's claim on grounds that the police abstract blamed the appellant and he conceded that he was to blame for the accident and that he was the author of his own misfortune. The trial court also held that the doctrine of *res ipsa loquitur* does not apply herein.
35. However, notably at paragraph 24 of the judgment, the trial court correctly observed that “the appellant's evidence remained largely uncontroverted as the respondents did not call any witness to augment their case.”



36. In analysing the evidence herein, I have considered the contents of the police abstract herein and I am unable to find any evidence to the effect that the appellant was held to blame for the accident or conceded that he was to blame. Looking at the police abstract, the line where information as to the results of investigation or prosecution (if any), is not provided. It is blank. Similarly, on whom the investigating officer was to prefer charges, it is indicated that, the matter was referred to insurance and that the motor cycle KMDN xxxH was to blame. The name of the investigating officer is indicated as Corporal Sicily.
37. But, notably Corporal Sicily did not testify. (PW2) PC David Ngugi who testified conceded that he was not the investigating officer nor was he the scene visiting officer, therefore, his evidence has little or no evidential or probative value as he cannot substantiate the allegation that the appellant was solely liable for the accident as he did not investigate it. Even then, his evidence in chief blames the lorry which then contradicts the content of the police abstract he produced.
38. Again, with outmost due respect to the observation of the trial court, at paragraph 25, 26 and 27 of the judgment, the sentiments therein are the opinion of the trial court and not based on evidence before the court. To hold for example that, the respondent was an innocent party without the respondent testifying to that effect, amounts to the trial court considering matters of evidence not before it. I say no more on sentiments expressed therein.
39. Be that as it were, the trial court did not address the legal effect of the respondent not rebutting the appellant's case. The 1st respondent blamed the appellant for the accident and stated the particulars of negligence attributed to him. At the hearing of the case, the 1st respondent kept quiet. How then was the appellant's case rebutted and how was the 1st respondent's claim substantiated or exonerated from blame.
40. But that is not even it, the trial court dismissed the appellant's case in its entirety, yet the 2nd respondent did not enter appearance and/or file a defence and indeed an interlocutory judgment was entered against the it on 26th October, 2021.
41. The finding by the trial court that, the subject judgment is inconsequential is not explained and amounts to defending the case on behalf of the 2nd respondent. As such, the appellant's case could not be dismissed in its entirety when that defence was still on record and on that ground alone, the finding of the trial court on liability cannot be upheld.
42. Again as already stated that, PW2 produced the police abstract was not the maker thereof and could not explain how the decision to blame the appellant was arrived at but more importantly the column for results of investigation is blank and neither was the appellant charged for causing the accident and finally, the 1st respondent did not adduce any evidence to controvert that of the appellant as to how the accident occurred, a fact acknowledged by the court, then the dismissal of the case was unjustified.
43. Furthermore, the appellant was an eye witness. The evidence of (PW2) PC Ngugi that the lorry brushed his motor cycle corroborated the appellant's case. The evidence that he was to blame was not substantiated as PW2 was not the investigating officer. Furthermore, the court could only rely on the findings indicated in the police abstract in the column of results of investigation, and the same being blank, it follows that the investigation results were unknown and therefore any of the two, that is driver or the appellant could have caused or contributed to the occurrence of the accident and in the given circumstances.
44. Consequently, it is only fair and just to apportion liability against each of them at 50%. I therefore set aside the trial court's finding that, the appellant did not prove his case and dismissing it and substitute



it with the finding that both parties were to blame and enter judgment in favour of the appellant as against the respondents jointly at 50:50%.

45. As regards, quantum, the trial court dealt with the same at paragraphs 36–41 of the judgment. The appellant still maintains that a sum of Ksh 3,000,000 is adequate as general damages and relies on two authorities;
- a. Peace Kemuma Nyang'era Vs Michael Thuo & Another, Civil suit number 209 of 2013 (2014) eKLR where Aburili J. awarded the plaintiff Ksh 2,500,000 where the plaintiff sustained a fracture of acrum bone, fracture of the right superior pubic ramus of the pubic bone, fracture of the right inferior pubic ramus of the pelvic bone, haematoma on both thighs and lumbo-sacral heamatoma.
 - b. Florence Hare Mikaha Vs Pwani Tawakal Mini Coach & Another, Civil Suit number 85 of 2010 (2012) eKLR where Mwangi J. awarded Ksh 2,400,000 in general damages for a plaintiff who had sustained a fracture of the right superior and inferior ramus of pubis fracture of is chium, fracture of right acetabulum, fracture lateral condyl of femur, dislocation of left knee with torn collateral ligament.”
46. However, I note from Dr Kiamba updated medical report dated 6th October 2021 that the appellant sustained two fractures, two dislocations and other soft tissue injuries. He is said to have restrictions of movement of the right elbow joint resulting into reduction of function of the right upper limb. The degree of injuries is classified as grievous harm and the permanent disability assessed at 20%.
47. On the other part, the respondent's medical report dated 13th October, 2021 prepared by Dr. P. M. Wambugu indicates that the appellant sustained a right elbow joint fracture dislocation and laceration wounds right ankle joint. He also confirmed that, the X-rays taken after the accident and availed to him indicated non-displaced supracondylar fracture right humerus, fracture of the right radius and dislocation of the elbow joint. However, the doctor stated that these injuries were not captured in the discharge summary were at variance with X-ray findings.
48. Apparently, the trial court in assessing general damages relied on Dr. Wambugu's medical report and based its finding on the variance in the discharge summary and the X-rays taken. The trial court also upheld the permanent disability assessed at 10% by Dr. Wambugu.
49. Notably, the trial court did not consider the medical reports by Dr. Kiamba at all. Apparently, It suffices to note that, Dr. Kiamba examined the appellant initially after the accident and prepared his first report dated 27th November, 2020. The accident was on 12th October, 2020. As such, the appellant's injuries were still fresh and evident and most likely more reliable.
50. Further, the trial court did not indicate in its judgment why is disregarded the assessment of the appellant's permanent disability indicated as 20% by Dr. Kiamba and opted to rely on the 10% by Dr Wambugu. Furthermore, reliance could not be fully held on the discharge summary as a discharge will not likely give full details of diagnosis of the patient and even more so, the evidence of an X-ray cannot be less reliable than a discharge summary.
51. Pursuant to the aforesaid, it is the finding of this court that the trial court did not evaluate the medical evidence presented by the appellant. Had the court done so, it is likely that its finding on general damage would be different. That said, it is evidence that, the appellant suffered severe injuries, the sum of Ksh 700,000 indicated by the trial court is not tenable for fracture and dislocation. Furthermore,



the decision relied on by the trial court were quite old and the injuries therein are not comparable to those herein. They are lesser in degree.

52. Finally, as rightfully observed by the trial court, inflation factors must be considered. The accident herein occurred in the year 2020, the case has been in court since 2021, for almost four years. If the appellant had been paid the Kshs 700,000 and invested the same, it would not be the same in the year 2025.
53. Taking into account the aforesaid, I enter judgment in favour of the appellant as against the respondent in the following terms;
- a. Judgment on liability 50:50% in favour of the appellant as against the respondents
 - b. Judgment on quantum;
 - i. General damages.....Kshs 1,500,000
 - ii. Special damages.....Kshs 9,250
 - Total amount.....Kshs 1,509,250
 - Less 50% contributing liability
 - Total sum awarded.....Kshs 754,625
 - c. Interest on the above sum will accrue from date of this judgment until payment in full.
 - d. In view of the finding on liability, each party shall bear its own costs of the entire litigation.
54. It is so ordered.

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

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Kairu for the appellant

Mr. Bore H/B for Mr. Itonga for the respondent

Ms. Hannah: court assistant

