Chepkeitany v Kiboit (Sued as Legal Representative of the Estate of Erick Kiboit Tomno) (Civil Appeal E005 of 2024) [2025] KEHC 11423 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11423 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E005 OF 2024

RB NGETICH, J

JULY 31, 2025

BETWEEN

PAUL KIPKORIR CHEPKEITANY ..... APPELLANT

AND

SALINAH JEPKEMEI KIBOIT (SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF ERICK KIBOIT TOMNO) ..... RESPONDENT

((Being an appeal from the judgment and decree of Honourable E. Mulochi (SRM) delivered on 30 th April 2024 in Kabarnet CMCC NO. E004 of 2))

JUDGMENT

1. The Appellant, who was the plaintiff in the trial court, filed suit against the Respondent seeking general and special damages for injuries sustained while travelling as a fare-paying passenger in motor vehicle registration number KBJ 828L Toyota Matatu, which collided with motor vehicle GKA 791C Isuzu FSR Lorry.

2. By judgment delivered on 30th April 2024, the trial magistrate apportioned liability at 70:30% in favour of the Plaintiff and awarded Kshs. 800,000/= as general damages and Kshs. 550/= as special damages.

3. The Appellants being aggrieved and dissatisfied by the said judgment appealed against both liability and quantum on the following grounds: -

    i. That the Learned Magistrate erred in law and in fact in awarding liability in the ratio of 70: 30 in favour of the appellant.

    ii. That the Learned Magistrate erred in law and in fact in awarding the sum of Kshs. 827,000.00 as general damages an amount that was low and unjust in the circumstances considering the evidence before court and principles in law.

iii. That the Learned Magistrate erred in law and in fact in over relying on the respondent's evidence and submissions.

4. In respect to liability, the appellant submit that the trial court failed to appreciate that the appellant was a passenger in the motor vehicle and apportioned liability at 70:30 in favor of the plaintiff. The appellant submits that the plaintiff PWI testified that he was a passenger in the subject motor vehicle KBJ 828L which fact was supported by the abstract he produced. He stated that the defendant negligently drove the vehicle occasioning the accident which resulted to death of the driver on the spot. The fact that he was a passenger was not disputed by the defense.

5. That in the case of Civil Appeal No. 100 of 2017 Rosemary Mwasya v Steve Tito Mwasya & 2 Others [2018] eKLR the Court of Appeal held:

> " Our reasons for affirming the judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident."

6. Further in the case of Civil Appeal No.25 of 2019 Gerald Odera Omollo v Rose Anyango Rayola [2022] eKLR Lady justice R. Wendoh disagreed with the argument of the appellant [who was the defendant in the lower court file] that liability ought to have been apportioned instead of finding him 100% liable. She stated

> " The argument of the appellant is that the weather was clear and the rider of the suit motorcycle was able to see; that he swerved to avoid hitting another motorcyclist, hence liability should be apportioned as the motorcyclist of the suit motorcycle also had a duty to avoid being hit. This argument would only stand against the motorcyclist and not a passenger who had no control over how the motorcycle was being ridden."

7. The appellant's argument is that the appellant had no control over the motor vehicle therefore liability should have been awarded at 100% in favor of the plaintiff against the defendant.

8. In respect to quantum, the appellant submit that based on the injuries sustained, the award was inordinately low in view of the following injuries sustained by the plaintiff:-

   i. Blunt injuries to the anterior abdominal wall

   ii. Fracture to the right humerus

   iii. Fracture of the right femur

   iv. Fracture of the right tibia

9. The appellant submitted that he had an implant put on his leg which was produced as PEX2. The P3 form was also produced as PEX4 and was subjected to a 2nd medical examination produced by consent as DEX1 permanent disability of the appellant was assessed at 50% and on that basis, the general damages awarded were inordinately low and failed to consider the 2nd medical report.

10. The appellant proposed general damages of Ksh 2,000,000/= based on the injuries sustained and relied on Paul Guyo Waquoh v Hussein Abdi Huka & Another [2019] and they still rely on that case and also ask the court to be guided by Civil Appeal no 25 of 2018 Amazon Energy Limited v MagdaIine Nthenya Mathias & another [2019] eKLR where Justice Nyakundi reduced the amount awarded to Ksh 2,500,0001- for a 50 % disability. That based on their circumstances Ksh 2,000,000/= will suffice.

11. That Special damages were already awarded for 550/= which can be maintained and costs of appeal to be awarded.

Respodent's Submissions

12. The Respondents submits that the issues for determination:

    a. Whether the court erred in apportioning liability at 70:30 in favour of the plaintiff/Appellant as against the Defendant/Respondent.

    b. Whether the award of Kshs. 800,000 is inordinately high and not founded on any legal principle; and

    c. Who bears the costs of this Appeal and the lower court.

13. That the duty of the first Appellate Court was defined in the case of Abok James Odera T/a A.j.odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR and further in the case of Peter Kanithi Kimunya v Aden Guyo Haro [20141 eKLR. It is their submission that the Honorable Court herein has a duty to reconsider the evidence on record.

14. On whether the court erred in apportion liability, they submit that it is trite law that he who alleges must prove; and since the burden of proof was on the Plaintiff/ Appellant to prove the allegations of negligence, they humbly submit that this Honourable Court do find that the Appellant did not discharge the required burden of proof in accordance to Section 107 and 108 of the *Evidence Act*, Cap 80 of the Laws of Kenya.

15. That the Appellant is required to prove negligence as against the Respondent and also establish a causal link between the Respondents' negligence and his injury if it is first established that the alleged accident did occur. They are guided by the decision of Hon. Lady Justice Janet Mulwa in the case of Evans Mogire Omwansa v Benard Otieno Omolo & another [2016] eKLR. They are further guided by the holding of the court In Khambi and Another v Mahithi and Another [1968] EA 70.

16. That their submissions are further emphasized by the reasoning of the trial court who stated that PW1 [The appellant herein] failed to convince the court on a balance of liability to have the burden shifting to the Respondent, that further, neither PW1 nor PW2[Police] witnessed how the accident occurred as such their evidence amount to mere hearsay which the court should not rely to it as the same is not adducible evidence.

17. It is their humble submission that should this honourable court decide to disturb the liability apportioned to the Appellants herein, then it should find that the Appellant has failed to proof beyond the balance of liability as to how the Respondent was negligent and resulted into the accident in question and proceed and have this Appeal and the primary suit dismissed with costs to the Respondent.

18. On whether the award of Kshs. 800,000 is inordinately high, that as per the medical report by Dr. Rahhul, the Appellant, suffered fracture of the right femur, tibia and right humerus and had also sustained blunt abdominal injury.

19. They submit that the principles to be observed by an appellate court when deciding whether to interfere on quantum of damages awarded by a trial court were stated by Mativo. J in the case Joseph Njogu Kamunge v Charles Muriuki Gachari Civil Appeal 42 of 2014 and Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini v A M Lubia and Olive Lubia [1982-881 1 KAR 727.

20. That in the same vein, the Court of Appeal in Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1982-881 1 KAR 982 stated that unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award, it should be left alone.

21. That as was stated in the Kemfro Africa Limited and Mohamed Mahmoud Jabane cases mentioned above, an appellate court can interfere with an award of damages where the amount is inordinately high. That Kneller JA in the Mohamed Mahmoud case laid out the correct approach to be adopted by a trial court to an award of damages. He, at page 987, stated as follows: -

> " The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by this court to an award of damages by a trial judge: -
>
> i. each case depends on its own facts;
>
> ii. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes [the body politics];
>
> iii. comparable injuries should attract comparable awards;
>
> iv. Inflation should be taken into account; and...."

22. They submit that the court decisions relied on by the Appellant did not match the injuries sustained by the Appellant herein. That the injuries sustained by the Plaintiff's in those cases were more severe and the decisions were contrary to the parameter of 'comparable injuries to attract comparable awards.

23. That the court decisions relied on by the Appellants, the Plaintiffs therein had sustained very similar injuries to the Respondent's. They argue that the court has discretion to award damages but the discretion should be exercised according to the guiding principles in Mohamed Mahmoud case [Supra]. That the court decisions relied on by the Respondent were of a more probable guiding case to the Learned Magistrate while determining the general damages awardable to the Appellant.

24. It is their submission that the Learned Magistrate gave a manifestly excessive and inordinately high award and that being the case, it ought to be re-assessed. They submit that the trial court proceeded on wrong principles and misapprehended the evidence thereby arriving at an amount that was inordinately high. They urge this Honourable Court to be inclined in setting aside entirely the said award.

25. It is their submission that the award of General damages was not founded on any legal principle and was inordinately high and in the premises, they submit that the same ought to be set aside forthwith. That should this Honourable Court decide not to entirely set aside the award made by the Learned Magistrate which they urge it not to, they pray that this court does reassess the same and proceed to vary the award of general damages of Kshs. 800,000/= with a lower sum of Kshs. 450,000/=. In so submitting, they rely on their submissions filed in the Magistrates Court as detailed at pages 45-56 of the record of appeal and reiterate the cited case laws where an award for similar injuries was made between Kshs. 300,000/= to 450,000/= as general damages.

26. That in light of the foregoing, they rely on their submissions on quantum as filed in the lower court proceedings [contained at page 45-56 of the Record of Appeal].

27. On who bears the costs of this Appeal and the lower court, they rely in Section 27 of the *Civil Procedure Act*, Cap.21 Laws of Kenya which implies that costs are discretion of the court and not a matter of

right. It is their submission that the costs of this appeal be awarded to the Respondent and in view of the foregoing, they hereby pray that the appeal be dismissed with costs to the Respondent.

Analysis and Determination

28. This being a first appeal, the Court is enjoined to re-evaluate and reassess the evidence and draw its own conclusions. However, it must bear in mind that the trial court had the singular advantage of observing the demeanour of the witnesses first-hand.

29. The duty of a first appellate court was succinctly set out in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, where it was held:

> " ...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 Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

30. Similarly, in Peters v Sunday Post Ltd [1958] EA 424, it was emphasized that:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses... But the jurisdiction to review the evidence should be exercised with caution..."

31. Therefore, while the Court will independently analyze the record, it remains cautious not to interfere lightly with findings of fact unless there is good cause.

32. Having carefully considered the Record of Appeal, the Memorandum of Appeal, and the rival submissions, the following two issues arise for determination:

    i. Whether the trial court erred in apportioning liability in the ratio of 70:30 between the Respondent and the Appellant.

    ii. Whether the trial court erred in the assessment of general damages.

[i] Apportionment of Liability

[a] Legal principles on liabilty

33. The legal principles on apportionment of liablity were set out in the case of Khambi & Another v Mahithi & Another [1968] EA 70, where the Court held that apportionment of liability is a matter of discretion by the trial court, which should not be disturbed on appeal unless it is based on a wrong principle or is manifestly erroneous.

34. Similarly, in Isabella Wanjiru Karangu v Washington Malele [1983] KLR 142 and Mahendra M. Malde v George M. Angira Civil Appeal No. 12 of 1981, the appellate courts reiterated that interference with a trial court's apportionment is only justified when it is plainly wrong.

[b] Burden of Proof and Evidence on Record

35. The law is clear: he who alleges must prove. The issue, therefore, is whether the Appellant discharged the burden of proving negligence on the part of the Respondent.

36. The Appellant testified that he was a fare-paying passenger in motor vehicle registration number KBJ 828L and had no control over the vehicle. He blamed the accident on the Respondent's driver, alleging over speeding and failure to heed passenger warnings about donkeys on the road. The accident resulted in the driver's death on the spot.

37. A police officer testified and produced a police abstract confirming the accident and injuries but noted that no one was blamed in the abstract and investigations were still pending.

38. The Respondents did not call any witnesses. They submitted that the police could not clearly determine the cause of the accident and that no sketch maps or mechanical inspection reports were produced. They argued that without such evidence, liability could not be established.

[c] Evaluation of Evidence and Finding on Liability

39. Where accounts of an accident differ, the court must weigh the two sides and determine where the balance of probabilities lies.

40. It is not disputed that the Appellant was a lawful passenger. He had no control over the manner in which the vehicle was being driven. The failure of the driver to heed warnings and slow down upon seeing donkeys ahead points to negligence.

41. The Respondent's failure to lead any evidence in rebuttal weakens their defence. The suggestion that lack of sketch maps or mechanical reports absolves them of liability cannot stand where direct evidence exists regarding negligence.

42. In the circumstances, there was no basis for finding the Appellant contributorily negligent. The liability lay squarely with the Respondent through the actions of its agent, the driver.

43. I therefore set aside the trial court's apportionment of liability at 70:30 and substitute it with a finding that the Respondent is 100% liable for the accident.

[ii] Assessment of Damages

[a] Nature of Injuries

44. The Appellant sustained the following injuries as pleaded and proved:-Blunt injuries to the anterior abdominal wall;Fracture of the right humerus;Fracture of the right femur;Fracture of the right tibia.

45. These injuries were confirmed through medical evidence. The Appellant underwent surgery and had metal implants inserted. A P3 Form and implant image were produced as exhibits.

46. A second medical examination was conducted by consent. The medical report [produced as DEX1] assessed the Appellant's permanent disability at 50%.

[b] Principles on Interference with Quantum

47. The trial court awarded Kshs. 800,000/= in general damages and Kshs. 27,000/= in special damages. The Appellant submits that the general damages were inordinately low given the injuries and the extent of permanent disability.

48. In Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] eKLR, the Court set out the guiding principles on appellate interference with damages. Comparable cases should attract comparable awards, and interference is only warranted where:-The trial court acted on wrong

principles;The award was manifestly high or low; orA relevant factor was ignored or an irrelevant one considered.

49. These principles were reaffirmed in Hellen Waruguru Waweru v Kiarie Shoe Stores Ltd [2015] eKLR and Stanley Maore v Geoffrey Mwenda [2004] eKLR, emphasizing restraint in interfering with discretion unless a clear misdirection is shown.

50. Additionally, in Mutinda Matheka v Gulam Yusuf HCCC No. 752 of 1993, the court considered not only the extent of injuries but also residual disabilities, age, expected lifespan, and inflation trends when assessing general damages.

[c] Finding on Quantum

51. I have compared the Appellant's injuries with those in cited authorities. The injuries, while serious, were not as grave as in some of the precedents relied on. Taking into account inflationary trends, the nature of injuries, and degree of permanent disability, I find that the trial court's award was not inordinately low or based on wrong principles.

52. In line with the holding in Mariga v Musila [1982–88] KAR 507, no two motor accident cases are identical. Each must be determined on its own facts. I find no reason to interfere with the general damages awarded.

53. Final Orders

1. The appeal succeeds in part.

2. The apportionment of liability by the trial court is set aside and substituted with a finding that the Respondent is 100% liable for the accident.

3. The award of general damages at Kshs. 800,000/= and special damages at Kshs. 27,000/= is upheld.

4. Each party shall bear their own costs of this appeal.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 31ST DAY OF JULY 2025.

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Ms. Adongo for Appellant.

Ms. Kagira for Respondent.