



**Magembe & 2 others v Shisia (Civil Appeal E496 of 2023)
[2025] KEHC 11720 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11720 (KLR)

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

CIVIL

CIVIL APPEAL E496 OF 2023

WM MUSYOKA, J

JULY 31, 2025

BETWEEN

DARIUS MAGEMBE 1ST APPELLANT

JONAH THUO KINUTHIA 2ND APPELLANT

JONAH MWANGI KARUGO 3RD APPELLANT

AND

CALEB NETIA SHISIA RESPONDENT

(Appeal from judgement and decree of Hon. Becky M. Cheloti, Principal Magistrate, of 19th May 2023, in Milimani CMCCC No. E7610 of 2020)

JUDGMENT

1. The suit, at the trial court, had been filed by the respondent against the appellants, for compensation for loss and damage, arising out of a motor traffic accident. The claim was that an accident happened on 21st February 2020, on Outer Ring Road, Nairobi, between the respondent and a motor vehicle, KCM 645V, owned or controlled by the appellants. The respondent attributed negligence on the appellants. The appellants resisted the claim. They denied liability. In the alternative, they attributed negligence on the respondent, either wholly or in part.
2. A trial was conducted. Only the respondent testified. Judgment was delivered, on 19th May 2023, in favour of the respondent. General damages were awarded at Kshs. 900,000.00, specials at Kshs. 291,980.00, with costs and interests.
3. The appellants were aggrieved, hence the appeal. The grounds revolve around the court erring in finding the appellants wholly liable; erring in finding that the respondent had discharged his burden



- of proof on a balance of probabilities; failing to appreciate partial contribution to the accident by the respondent; failing to consider the defence evidence; damages being excessive; among others.
4. The matter was never placed before a Judge, for directions, contrary to Order 43 rule 13(1) of the Civil Procedure Rules. Nevertheless, both sides have filed written submissions.
 5. The appellants argue around liability and damages. On liability, they argue that the evidence tendered by the respondent failed to demonstrate, on balance of probability, that the appellants directly caused the accident. They cite *Kamau vs. Kimani & Another* [2023] KECA 187 (KLR) and *Kanyungu Njogu vs. Daniel Kimani Maingi* [2000] eKLR.
 6. On general damages the appellants submit that the amount of Kshs. 900,000.00 was too high, and an award of Kshs. 400,000.00 would have sufficed. They cite *Daniel Otieno Owino & Another vs. Elizabeth Atieno Owuor* [2020] eKLR and *Sundries Bargains (Nairobi) Limited vs. Richard Karinga Mwangi* [2019] eKLR. On special damages, it is submitted that special damages are only recoverable if specifically pleaded and strictly proved. They cite *Hahn vs. Singh* [1985] KLR 716 (Kneller, Nyarangi, JJA & Chesoni Ag JA). It is submitted that only Kshs. 123,400.00 was strictly proved.
 7. On liability, both sides had filed witness statements. The respondent attended court, adopted his witness statement and was subjected to cross-examination. The appellants' witness did not attend court, but his witness statement was marked as defence exhibit No. 1. The respondent breathed life to his statement, and was confronted on its contents, by being tested on cross-examination. The 1st appellant shied from doing the same, instead his statement was produced as an exhibit, and was not tested on cross-examination. A witness statement produced as an exhibit, without being tested in the cross-examination, cannot be at the same level with one where its maker avails himself for cross examination. Cross-examination adds weight to the evidence for a party.
 8. In his witness statement, which he adopted, and he was cross-examined on, the respondent averred that the accident happened at a zebra crossing. While other motorists stopped at the crossing, the 1st appellant did not, hence he knocked the respondent down. In his untested witness statement, the 1st appellant averred that at some stage area, there were vehicles that had stopped to allow pedestrians cross. The vehicles then started moving, and the respondent suddenly run into the road, and he was hit despite the 1st appellant braking.
 9. Both narratives tally, on certain aspects. It all happened at a place where vehicles had stopped, to allow pedestrians cross. The respondent was hit by a vehicle driven by 1st appellant. The respondent avers that it was the 1st appellant who did not stop like other motor vehicles, while the 1st appellant says it was the respondent who ran into the road.
 10. Which of the 2 versions is believable? The respondent attended court and validated his statement through cross-examination. The 1st appellant stayed away from being challenged in his. In his written statement and oral testimony, the respondent stated that it was a zebra-crossing. The 1st appellant did not controvert that. His witness statement is silent on that, despite the same being made and filed after that of the respondent. Given that background, the trial court did not go wrong in its judgement, that the 1st appellant was wholly liable, for hitting a pedestrian at a zebra or pedestrian crossing.
 11. On general damages, the injuries pleaded were compound open fractures of the left tibia and fibula, with the fibula injury being fixated with metals. The report by Mr. WM Wokabi, consultant surgeon, identified them as compound open fractures of the left tibia and fibula. Disability was assessed at 12%. The respondent was also seen by Dr. Wambugu, consultant surgeon, and the injuries were reflected as a compound fracture of left tibia and fibula, with a right forehead scalp abrasional wound.



12. I have looked up several decisions on comparable injuries.
13. In *Ndwiga & another vs. Mukimba* [2022] KEHC 11793 (KLR) (Njuguna, J), the claimant had sustained tenderness and swelling of the left leg and a fracture of tibia and fibula left leg, and the court awarded Kshs. 500,000.00. In *Jitan Nagra vs. Abidnego Nyandusi Oigo* [2018] eKLR [2018] KEHC 3078 (KLR) (Majanja, J), the injury was a compound fracture of the tibia and fibula bones, plus a segmental distal fracture of the femur, and an award of Kshs. 450,000.00 was made. In *Kimathi Muturi Donald vs. Kevin Ochieng Aseso* [2021] eKLR (Chitembwe, J), the injuries were a fracture of the upper right tibia and a fracture of the floor of the socket of the left acetabulum, and the award was Kshs. 1,200,000.00.
14. In *Kiama vs. Mutiso* [2024] KEHC 5135 (KLR) (Majanja, J), the injuries suffered were a fracture of the left tibia bone (upper 1/3) and a blunt injury to the left leg and thigh, and the court awarded Kshs. 400,000.00. In *George Raini Atungu vs. Moffat Onsare Aunga* [2021] eKLR (Ougo, J), the injuries were a chest contusion, fracture of the left radius and ulna, a pelvic contusion, a contusion to the right leg, and fractures of the right tibia and fibula bones, and Kshs. 650,000.00 was awarded.
15. In *Kimita vs. Travel Budget Express & another* [2024] KEHC 6435 (KLR) (Nzioka, J), the injuries suffered were fractures of the distal end of the left tibia and fibula bones, severe soft tissue injury of the left tissue injuries, cut wound on the zygomatic area leading to severe soft tissue injuries, deep cut wound on the left arm leading to soft tissue injuries, fracture of the right tibia, compound fracture of the left tibia, and deep cut wound on the chin; and the court awarded Kshs. 800,000.00. In *China Railway No. 10 Engineering Group Co. Limited vs. Osugo* [2024] KEHC 2662 (KLR) (Chigiti, J), the injuries sustained were head injury with cut wound on the scalp, blunt trauma on the neck, chest contusion, right shoulder dislocation, bruises on the lower back and right tibia and fibula fractures; and an award of Kshs. 800,000.00 was made.
16. Assessment of damages is at the discretion of the court, founded largely on comparable awards for comparable injuries. I find guidance in *Ndwiga & another vs. Mukimba* [2022] KEHC 11793 (KLR) (Njuguna, J), *Kiama vs. Mutiso* [2024] KEHC 5135 (KLR) (Majanja, J), *George Raini Atungu vs. Moffat Onsare Aunga* [2021] eKLR (Ougo, J), *Kimita vs. Travel Budget Express & another* [2024] KEHC 6435 (KLR) (Nzioka, J) and *China Railway No. 10 Engineering Group Co. Limited vs. Osugo* [2024] KEHC 2662 (KLR) (Chigiti, J). Based on that review, it would appear that the award made by the trial court was on the higher side. Consequently, I shall set it aside and substitute it with an award of Kshs. 500,000.00 general damages.
17. It is notorious that special damages should be specifically pleaded and specifically proved. In this case, Kshs. 291,980.00 was pleaded, broken down into Kshs. 530.00 copy of records; Kshs. 3,000.00 medical report; and Kshs. 288,430.00 medical costs. The receipts on record are for Kshs. 3,000.00 for medical report by Mr. Wokabi; Kshs. 120,000.00 from Belleview South Hospital Limited. The amounts paid and receipted amount to Kshs. 123,400.00; and that is what was specifically proved. There is no proof that the cheque from the Advocates of the respondent was ever paid to the payee, was cashed and receipted.
18. Overall, I find that the appeal is merited, to the extent of paragraphs 16 and 17. I thereby allow the same. The judgment of the trial court shall be re-visited, so that the trial court shall be revised, so that the amount of Kshs. 291,980.00 is set aside and substituted with an award of Kshs. 123,400.00, as proven special damages; and the award of general damages of Kshs. 900,000.00 is set aside and substituted with an award of Kshs. 500,000.00. Each party to bear own costs. Orders accordingly.



DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 31ST DAY OF JULY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyne Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Mr. Olunga, instructed by Samuell Gitonga & Associates, Advocates for the appellants.

Mr. Kaburu, instructed by Nelson Kaburu & Company, Advocates for the respondents.

