



REPUBLIC OF KENYA



**KENYA LAW**  
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**Stanely v Ndung'u (Civil Appeal E081 of 2023)  
[2025] KEHC 11942 (KLR) (6 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11942 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E081 OF 2023  
HI ONG'UDI, J  
AUGUST 6, 2025**

**BETWEEN**

**MURUNGAH N STANELY ..... APPELLANT**

**AND**

**SAMUEL NDUNG'U ..... RESPONDENT**

*(Being an appeal from the Judgment of the Hon. Y. Barasa (Principal Magistrate) delivered on 24th August 2023 in Naivasha CMCC No. 245 of 2021)*

**JUDGMENT**

1. The respondent who was the plaintiff in the lower court sued the appellant who was the defendant for damages arising from injuries suffered as a result of road traffic accident which occurred on 25<sup>th</sup> December 2020 along Moi South Lake Road. The accident involved a motorcycle registration number KMFF 619U & motor vehicle registration number KBJ 561K.
2. The appellant filed a defence denying the claim and the matter proceeded to full hearing. Thereafter the trial magistrate found in favour of the respondent 100% liability and awarded him Kshs. 2,000,000/= as general damages, Kshs. 200,000/= for future medical expenses, Kshs. 47,875/= for special damages, plus costs and interest.
3. Being aggrieved by the judgement the appellant filed this amended appeal dated 17<sup>th</sup> October 2023 on the following grounds;-
  - i. That the Honourable Learned Magistrate erred in law and in fact in finding the appellant wholly liable.
  - ii. That the Honourable Learned Magistrate erred in law and in fact in disregarding the overwhelming evidence tendered by the defence in apportioning liability between the appellant and the respondent



- iii. That the Honourable Learned Magistrate erred in law and in assessment of damages payable.
  - iv. That the Learned Magistrate misdirected himself by failing to consider and apply some weight on the evidence and the submissions by the appellant while arriving at the judgment.
  - v. That the Honourable Learned Magistrate erred in law and in facts in relying on extraneous evidence in arriving at the decision on liability and quantum.
  - vi. That the Learned Magistrate erred in law and fact by failing to find that the respondent lacked the capacity to institute the suit in his own right.
4. A summary of the case is that the respondent was with his brother Kelvin Kimani on 25<sup>th</sup> December 2020 coming from the lakeside while being carried on a motorbike. They were hit at Lake Naivasha Resort by motor vehicle registration number KBJ 561K which turned without indicating. He suffered injuries on the left leg, right hand and head. The leg actually broke. He was admitted at Naivasha District Hospital for 3 weeks. The matter was reported at the police station.
  5. In cross-examination he said they were from Karagita heading to Naivasha town. That the motor bike hit the motor vehicle at the front right wheel. The rider tried to swerve to the left and that is when he hit the vehicle. He said he had not healed and insisted that the motor vehicle never indicated, it was turning. Further that it is the motor vehicle that hit the motor bike.
  6. Dr. Obed Omuyoma – PW2 who examined the respondent said the patient had sustained a fractured distal end, left femur soft tissue injuries on the neck, left hand and the left leg. The X-rays confirmed the fractures. He assessed the injuries as grievous harm and permanent disability at 20%. The implant would require Kshs. 200,000/= for removal with Kshs. 30,000/= for future medical expenses. The ulna fracture had not healed. He produced the report and receipt as P. Exhibit 2 & 3. He had charged Kshs. 30,000/= for court attendance.
  7. In cross examination he did not agree with the 2% liability suggestion. He added that the functioning of the respondent’s limbs had reduced.
  8. PC Rodgers Wafula – No. 76934 testified as PW3. He is based at Naivasha Police Station traffic section. He confirmed the occurrence of the accident on 25<sup>th</sup> December 2020 as stated by the respondent (PW1). He said the driver of the motor vehicle KBJ 561K was called Hannah Waitira. She was to blame as she turned near Naivasha Resort Hotel to the right to join the South Lake road without due care and knocked down a motor bike registration number KMFF 619U from the opposite direction. He confirmed there were two pillion passengers who were injured as a result of the accident. He produced 2 police abstracts as Exhibit 8 and 9.
  9. In cross examination he said he was not the investigating officer and neither did he visit the scene. He did not have the statements of both the rider and the appellant. He said the scene was at a junction.
  10. For the defence DW1 Dr. Wambugu Mwangi a consultant surgeon stated that he examined the respondent who he confirmed had suffered a fracture left femur mid shaft, fracture left ulna and laceration on the neck. He had metal implants and plaster, in the left leg which was shortened by 1cm. His opinion was that the injuries were consistent with blunt trauma and residual shortening of the left leg and would benefit from a shoe heel raise. The implants could be removed on electrical basis at an inclusive cost of Kshs. 75,000/= in medium cost hospitals. The scar on the neck could be treated at Kshs. 30,000/= . He awarded 2% permanent injury due to the respondent’s tender age.
  11. In cross examination he said he examined the patient on 8<sup>th</sup> June 2022, who complained of pain and was limping. He also had shortening of the leg by 1cm. He confirmed that the functioning of the leg



had been reduced and that the shortening of the leg is permanent. Treatment would be required and a 2<sup>nd</sup> surgery. He did not conduct any further x-rays.

12. DW2 – Hannah Waithera was the driver of the motor vehicle KBJ 561K. She said she had already negotiated a corner when the accident occurred, and her car had left the main road. She blamed the motor cycle rider for over speeding.
13. In cross examination she admitted to not having produced her driving licence. She explained that she was going to Naivasha Resort which is on the right side as one faces Karagita. She indicated before turning and reducing speed as the road was clear. Police found her at the scene. It was her evidence that when the accident occurred her vehicle was not in motion at the gate. Her vehicle was damaged on the front side mirror. She confirmed that the motor bike was from Karagita direction, and that she could not move as the gate was locked. She could however see the motor bike approaching.
14. The appeal was canvassed by way of written submissions.

### **Appellant's submissions**

15. These are dated 12<sup>th</sup> February 2024 and were filed by Joe Ngigi & Co. Advocates. Counsel submitted that PW3 was not the investigating officer. Secondly that when the accident occurred the vehicle was stationery and was off the road. Thus the vehicle could not have hit the motorcycle. He argued that the respondent had not proved his case on liability as required by the law.
16. He further submitted that where it was difficult to establish blame worthiness the court apportions liability. Reliance was placed on the cases of: Domitila Wangui Karugu & Another vs Dagu Hidris Heide [2020] eKLR; Evans Osuga Mboi vs James Lesaaya & Another [2021] eKLR. In the 2<sup>nd</sup> case liability was apportioned at 50:50 between a driver and a rider as is in the present case.
17. On quantum counsel compared and contrasted the two medical reports. He thus submitted that the injuries suffered by the respondent were not as serious as those suffered by the respondent in the case of Gideon Ndungu Nguribi & Another vs Njagu Koruni [2017] eKLR which the trial court wholly relied on. To him the case of George Raini Atungu vs Moffat Onsare Aunga [2021] eKLR was more comparable to the present case.
18. Lastly he submitted that the respondent having been aged 17 years at the time of examination on 1<sup>st</sup> March 2021 was a minor and the suit ought to have been filed in his name through a next friend. The same was not done hence the filing of the suit by himself was fatal. Counsel urged the court to re-evaluate the evidence on liability and quantum and arrive at a just decision. He prayed for costs both in the lower court and high court.

### **Respondent's submissions**

19. The same were filed by Gekong'a & Company Advocates, and are dated 15<sup>th</sup> May 2024. Counsel gave a background to the case before the court. His submission is that the respondent proved his case before the trial court. He submitted that on liability there is no dispute that the accident occurred and the respondent was a pillion passenger on the motor bike registration number KMFF 619U, when it was knocked by the motor vehicle registration number KBJ 561K.
20. On the respondent's capacity to sue counsel argued that the appellant had introduced a new ground at the appeal stage. That the said allegation is not supported by evidence. He referred to the first paragraph of the plaint which introduces the respondent as an adult. He urged that the appellant had



not in its defence challenged the respondent's age. Reference was made to the case of Philmark Systems Company Ltd vs Andermore Enterprises [2018] eKLR where the court held;

“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd. (2018) eKLR as cited in the case of Raila Amolo Odinga & Another v IEBC & 2 Others (2017) eKLR.

In absence of pleadings, evidence if any, produced by the parties, and cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration.”

21. Still on the issue of age counsel submitted that the appellant could not rely on a medical report to raise issues on the respondent's age when the same were never raised before the trial court. He cited the case of Otieno Ragot & Co. Advocates vs National Bank of Kenya Limited [2020] eKLR cited in Wanga & Co. Advocats vs Pan Africa Insurance Co. Ltd in support.
22. On the issue of quantum counsel referred to the awards made and the medical report (P. Exhibit 2) plus the case of Gideon Ndung'u Nguribi (supra) and submitted that the award was not inordinately high and so this court should not interfere with it. In support he cited the case of Tridey Construction vs Charles Wekesa Kasembeli Civil Appeal No. 121 of 2002 which referred to the decision in Kemfro Africa Limited t/a Meru Express Service Gathongo Kanini vs A. M. Lubia & Olive Lubia (1982 -88) 1 KAR 727 at page 730 in which it stated;-

“In the Kemfro Africa Limited case the court was of the opinion that the appellate court must be satisfied that “either the judge in assessing damages took into account an irrelevant factor, or left out of account a relevant one or that short of this the amount is inordinately low or so high that it must be a wholly erroneous estimate of damages.”

23. Counsel thus urged the court not to interfere with the award made by the trial court as there was no misdirection. He prayed for dismissal of the appeal with costs.

### **Analysis and Determination**

24. This being a first appeal, it is this court's duty under Section 7 of the *Civil Procedure Act* to re-evaluate and assess the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses testify. This was the principle laid out in the cases of Selle vs Associated Motor Boat Co. Ltd. [1968] E.A. 123, & Kiruga [1988] KLR 348.
25. In view of the above authorities and upon careful consideration of the record of appeal, grounds of appeal, submissions by both parties, cited authorities and the law I find the issues falling for determination to be as follows:-
  - i. Whether the respondent had capacity to file suit.
  - ii. Whether liability should be apportioned.



- iii. Whether the award on general damages and future medical expenses by the trial court are excessively high, requiring this court's interference.
- iv. Who should bear costs.

**Issue (i) - Whether the respondent had capacity to file suit**

26. It is the appellant's submission that when the respondent was examined by the doctors it is shown that he was 17 years old and so ought to have sued through a next friend, as is the position in law. This submission has been opposed by the respondent.
27. I have seen the medical documents i.e. P3 form, report by Dr. Omuyoma, discharge summary, X-ray request form all showing the respondent was 17 years. It is only the report by Dr. P. M. Wambugu who did not indicate the respondent's age. Despite all this, the appellant never raised this issue before the trial court yet counsel was in possession of all these medical documents. The same is nowhere pleaded in the defence.
28. I wish to point out that parties are bound by their pleadings. Evidence in medical documents and not pleaded is not usable and cannot assist the parties. See *Philmark Systems Company Ltd. (supra)*; *Independent Electoral & Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR*; *Daniel Otieno Migore vs South Nyanza sugar Co. Ltd. [2018] eKLR* & *Ogando vs Watu Credit Ltd & Another (Civil suit E098 of 2022 [2024] KEHC 3074 (KLR)* among many others.
29. The mere fact that the figure of 17 years was shown did not mean that as at the time of filing the Plaintiff on 5<sup>th</sup> May 2021 the respondent was not an adult. We are all aware that official documents never show the number of months above the number of years. To assist the court the appellant ought to have raised the issue in the pleadings or before the trial court during the hearing for necessary action to be taken. Raising it on appeal goes against the principle which provides that parties are bound by their pleadings. I therefore find the issue of age to be moot.

**Issue No. (ii) - Whether liability should be apportioned.**

30. I have considered the evidence by the respondent and the driver of the vehicle (DW1) on what really transpired. According to the respondent DW1 turned to the right abruptly without indicating. On the other hand DW1 said she was off the road and at the gate when she was knocked by the rider. The question that comes to mind is where was this rider if indeed he hit DW1 who was at the hotel's gate. The hotel cannot be on the road.
31. DW1 at first said when she turned the road was very clear, so where did the rider appear from to hit her at the gate? I agree with the trial court that the evidence of DW1, on the occurrences of that day is not convincing and truthful. The evidence by the respondent is very consistent.
32. I do not find any reason to make this court interfere with the trial court's finding which was at 100%.

**Issue No. (iii) – Whether the award on general damages and future medical expenses by the trial court are excessively high, requiring this court's interference.**

33. As I deal with this issue I am guided by the principles set out in the case of *Kemfro Africa Ltd t/a Meru Express Services & Another vs A. m. Lubia & Another [1998] eKLR* where it was stated;

“It must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is



so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

Also see *Bashir Ahmed Butt vs Ilwais Ahmed Khan* [1982-88] KAR 5.

34. It is not disputed that the respondent suffered serious injuries as a result of the accident. He was admitted on 25<sup>th</sup> December 2020 and discharged on 15<sup>th</sup> January 2021 which was after 21 days. That explains the seriousness of the injuries. Secondly the two medical reports P. Exhibit 2 (page 29) record of appeal and D. Exhibit 1 (page 21 record of appeal) clearly state the nature of the injuries suffered by the respondent. The only point they have disagreed on is the assessment of permanent disability. Dr. Omuyoma put it at 20% while Dr. Wambugu put it at 2%. Dr. Wambugu confirmed that the shortening of the left leg by 1cm is permanent, and it had reduced its functioning.
35. All in all, the respondent suffered two fractures on the left ulna and left femur. When he was examined by Dr. Wambugu on 6<sup>th</sup> June 2022 the ulna fracture had healed. There were still some procedures to be undertaken.
36. The appellant relied on the case of *George Raini Atungu vs Moffat Onsare Aunga* [2021] eKLR in proposing a figure of Kshs. 650,000/= as damages. In that case the plaintiff sustained a fracture of the left radius and ulna, pelvic contusion, chest contusion, contusion to the right leg and fracture of the right tibia/fibula borus.
37. On the other hand the respondent relied on the case of *Gideon Ndungu Ngurubu* (supra) in proposing Kshs. 2,000,000/=. In the said case the plaintiff suffered fractures of the left femur among other lesser serious injuries.
38. It is a fact that no two cases can be indeed very similar in the injuries suffered hence the difference but almost similar awards. I have considered the case of *Mwangi vs Siloma & Another* [2023] KEHC 26140 (KLR) in which a sum of Kshs. 1,200,000/= was awarded to a plaintiff who suffered about 5 fractures among other injuries, with a permanent incapacity assessed at 30%. Further in the case of *Njuguna vs Mwakindo* [2023] KEHC 24136 (KLR) which involved a plaintiff with multiple fracture injuries with a degree of incapacity placed at 55%, an award of Kshs. 1,400,000/= was made.
39. Taking into consideration all the authorities cited above among others, injuries suffered by the respondent, his age and the other procedures to be undertaken I am satisfied that the award of Kshs. 2,000,000/= was on the higher side and I hereby reduce it to Kshs. 1,200,000/=.
40. Besides what PW2 and DW1 told the court on the expected costs of implants and others no documents were presented from any health facility to enable the court know the exact costs. What is however clear is that Government and Mission hospitals would charge much less. I will place the figure for future medical expenses at Kshs. 150,000/=.
41. As for costs, it is the constant position that they follow the event. I therefore allow the appeal and set aside the judgment of the lower court and substitute it with a Judgment against the appellant as follows;-
  - i. Liability at 100% against the appellant.
  - ii. General damages - Kshs. 1,400,000/=
  - iii. Special damages - Kshs. 47,875/=
  - iv. Future medical expenses - Kshs. 150,000/=TOTAL - 1,597,875/=



- v. Lower court costs plus interest at court rates from date of Judgment to the respondent.
- vi. ½ costs of the appeal to the appellant

42. Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 6<sup>TH</sup> DAY OF AUGUST, 2025 AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

