



MKM (A male adult of unsound mind and/or suffering from mental infirmity suing through father and next friend one JMM) v Weaver Bird Garment Manufacturers Limited & another (Civil Appeal 31 of 2019) [2025] KEHC 12400 (KLR) (3 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 31 OF 2019
EM MURIITHI, J
SEPTEMBER 3, 2025**

BETWEEN

MKM APPELLANT

A MALE ADULT OF UNSOUND MIND AND/OR SUFFERING FROM MENTAL INFIRMITY SUING THROUGH FATHER AND NEXT FRIEND ONE JMM

AND

WEAVER BIRD GARMENT MANUFACTURERS LIMITED . 1ST RESPONDENT

RONARD MURIITHI KATHENYA 2ND RESPONDENT

(Appeal from the judgment of the learned magistrate, Honorable S.M.S Soita (CM), delivered at Kerugoya on 24/4/2019 in Kerugoya CMCC No. 68 of 2016)

JUDGMENT

1. By an amended plaint dated 1/3/2015, the Appellant sued the Respondents seeking general damages for pain, suffering and loss of amenities, special damages of Ksh. 142,910, loss of future earning capacity, nursing care at the rate of Ksh. 8,000/= per month for a reasonable period, loss of consortium, cost of physiotherapy at the rate of Ksh. 50,000/= for a reasonable period and costs of the suit plus interest. The Appellant pleaded that on or about 6/12/2013 at about 9.00 am, he was lawfully standing off the Karatina – Sagana road at Kibingoti area, when the Respondents, their respective employee, servant, agent and/or authorized driver so carelessly and negligently drove, managed and/or controlled Motor Vehicle Registration No. KBN 864 Z that it lost control, veered off the road and violently knocked him down, thereby occasioning him severe personal injuries.
2. The Respondents denied the claim vide their amended statement of defence dated 15/6/2015 and prayed for the Appellant’s suit to be dismissed with costs.



3. Upon full hearing of the case, the trial court apportioned liability at 50:50 and awarded general damages for pain, suffering and loss of amenities of Ksh. 3,000,000, damages loss of future earning capacity of Ksh. 1,000,000, special damages of Ksh. 142,910 together with costs and interest.

The appeal

4. On appeal, the Appellant vide his memorandum of appeal dated 22/5/2019 set out 8 grounds as follows:
 1. The learned magistrate erred in law and fact in awarding liability at 50% to the appellant, bearing in mind the appellant was not in control of the suit motor vehicle registration number KBN 864 Z which caused the accident which occurred on the 06.12.2013.
 2. The learned magistrate misdirected himself in law and fact by failing to appreciate the evidence adduced by both the eyewitness and the police officer in relation to liability during trial held on 27.07.2017.
 3. The learned magistrate erred in law and fact by failing to consider appellant's authorities on liability made in relation to similar circumstances of the accident.
 4. The learned magistrate misdirected himself in law and fact by failing to appreciate the evidence by both the eyewitness and the police officer adduced during trial on 27.07.2017 and placed more reliance to the respondents' witness.
 5. The learned magistrate erred in law and fact in not awarding unpaid treatment and medical expenses due and owing from the Appellant of Kshs. 56,737/=, which was pleaded and proved.
 6. The learned magistrate erred in law and fact by failing to appreciate the law as relates to unpaid and treatment expenses due and owing from the appellant of Kshs. 56,737/=, who was a victim of a tort.
 7. The learned magistrate erred in law and fact by failing to appreciate the law as relates to unpaid and treatment expenses arising as a direct and natural consequence of the respondent's negligence and therefore, recoverable from the respondents.
 8. The learned magistrate erred in law and fact by failing to consider the Appellant authorities in relation to unpaid treatment and medical expenses owe from the Appellant.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

6. PW1 Jane Wangui Kariuki adopted her statement as her evidence in chief and went on to state that,

“I stay at Kibingoti. I am a business woman. MK was off the road. He was taking clothes to the store. He was carrying goods. The accident was at the market. The accident was on the right side. He was off the road. The vehicle was speeding. There are bumps where the accident occurred. MK is not well. He is not able to work now.”



7. On cross examination, she stated that,

“He was standing off the road on the Karatina Sagana road. The vehicle was going towards Sagana. He was carrying a luggage on his back. I was doing my business. I saw him being hit. From the manner he was carrying the luggage he could see. The luggage was in a bag. The bag was not a large one. There are bumps. I had not seen the vehicle before the accident. I cannot tell the speed. I do not know if the driver of the vehicle was charged. I did not record a statement with the police over the accident. It is not correct he was crossing the road and his view was obstructed by the bag. I have known him for 10 years.”

8. In re-examination, she stated that,

“When M was knocked he was off the road. The luggage he was carrying could not block his view. The vehicle was speeding. For the 10 years his work was carrying luggage. I reported to his parents the accident. Before the accident he was in good health.”

9. PW2 JMM adopted his statement dated 17/3/2016 as his evidence in chief and produced the list of documents as exhibits. He testified that, “I am a farmer. I stay at Kibingoti. MK is my son. He was working in a hotel and was also doing casual tasks. He was of good health. I was at home when I learnt he had been involved in an accident. I was called on phone by Wangui. I was not able to pay his medical bills. We left a log book at Tumutumu Hospital. My son is now mentally unsound. He cannot undertake the tasks he was doing. He now relies on me and his mother. M is in court today (points). He had a wife who left when he became sick. He was examined by Dr. Wokabi. I want court to enter Judgment in terms of the amended plaint. M is still on medication.”

10. On cross examination, he stated that, “M was examined by Dr. Wokabi. He said he was improving. He can now walk but with difficulties. It is me and his mother who are taking care of him. He has been going to hospital for injections. Communicating with his is difficult. When he is on drugs he is okay. We shall get a receipt for the unpaid bill when we pay.”

11. In re-examination, he stated that, “I am a farmer. My son goes to hospital oftenly. It is me and his mother who takes care of him. I am 65 years. I will require assistance to fend for him. He has improved well. We cannot communicate effectively. (shown P. Exhibit 11 & 12). These are from Tumutumu. My son relies on us for everything. His wife left when he was involved in an accident.”

12. PW3 Cpl Linet Makuti, attached to Sagana Police Station on traffic duties, produced the police abstract and the summons as exhibits. He testified that,

“On 6/12/2013 an accident occurred involving MKM who was a pedestrian and motor vehicle No. KBL 864 Z which was being driven by Ronald Muriithi Kathenya. This police abstract is from Sagana Police Station. The Investigating Officer was P.C Nillis Ondieki who was transferred elsewhere. I was summoned to attend court. I have been paid Kshs 7,000/-.”

13. On cross examination, he stated that,

“I did not attend the scene of accident. The driver of the vehicle was not charged. I have not come with the OB.”

14. PW4 MMM adopted his statement dated 17/3/2016 as his evidence in chief. He stated that,

“I stay in Nairobi. I am an Electrician. MK is my brother. I recorded a statement with my counsel on 17/3/2016. I wish to adopt it. My brother is still unwell. My brother's wife left



him. My brother is still under medication. There is an outstanding bill and I left my log book with the hospital. He now relies on our parents and I give financial support.”

15. PW4 Dr. Washington Wokabi produced the report dated 7/5/2014, report dated 29/3/2017 together with the receipts and the court attendance receipt for Ksh. 25,000 as exhibits. He testified that, “I am a Consultant Surgeon practicing in Nairobi. I have an assessment of injuries report dated 7/5/14. It is prepared and signed by me. It is in respect of MKM I/D xxxxxxxx. I was given the history by both parents who had accompanied him. He was involved in a Road Traffic Accident on 6/12/13. He was treated at Karatina Hospital and later at Tumutumu PCEA Hospital. Diagnosis made was of major head injury that deteriorated to a point that he lost control of his voluntary functions and involuntary functions and later became totally dependant. He was in hospital for a total of 118 days. At Tumutumu it was found he was losing blood from both ears. While in hospital he was put in supportive treatment and physiotherapy. The complaints were that he could not initiate anything for himself. When I examined him he was conscious and could walk on his own. His mood was dull and he spoke with a slurred speech. He was disoriented in place and time and was quite out of touch with his environment. I made opinion he was involved in a road accident and sustained a head injury which appeared initially mild but manifested itself after 3 days and left him physically and mentally disabled. At that time I did not make an opinion on future outcome. As he continues to heal there is a possibility he may develop epilepsy. I signed the report which I charged Kshs 2,000/- and issued a receipt. I re-examined him again on 27/3/17 exactly 3 years after the previous examination. He was still accompanied by both parents. The said patient had not made improvement and was totally dependent. He could not initiate anything for himself and was exhibiting weakness of both upper limbs. I observed his gait seemed to have changed and he was imbalanced. We could not hold a conversation. I made an opinion he had deteriorated due to progressive brain damage. He will never improve further and will remain totally dependent and I assessed the degree of disability at 100%. I charged Kshs 2,000/- for the report and issued a receipt. I have charged Kshs 25,000/- for court attendance and I issued a receipt. If the Plaintiff suffers epilepsy the situation will worsen. Physiotherapy may help as his physical activity is limited. He will never raise children of his own. He can sire. He is completely dependent and it is a good idea to have somebody who would make life more comfortable.”
16. On cross examination, he stated that,

“The CT scan I saw initially did not reveal serious abnormality. The parents said he was a normal human being. The brain is contained in a rigid container and when it swells it creates pressure. He may or may not get epilepsy. The individual can walk. During the second examination his grip was weak.”
17. In re-examination, he stated that, “The C.T scan did not reveal brain injury. This supports the parents contention that he was normal. Most head injuries manifest late.”
18. DWI Ronald Mureithi Kathenya adopted his statement as his evidence in chief and went on to state that, “I am a senior driver with Weaver Bind Garment. On 6/12/13 I was taking goods to Kamwenja Teachers College. At Kibingoti I slowed down at bumps. I was driving towards Karatina from Sagana. There was a lorry on the left. I saw somebody carrying a big bag. I slowed and hooted when he emerged from where the lorry was. The bag hit the vehicle and he fell down. I was driving a Nissan Caravan. We took him to Kibirigwi Health Centre. He had an injury on the shoulder. The medic said he had a mental problem. I blame him for emerging suddenly and hitting the vehicle which had stopped.”
19. On cross examination, he stated that, “I confirm the accident occurred. It is me who was driving the vehicle. I confirm the vehicle belongs to the Weaver Bind Garment. I confirm a person was injured. The medic called him Muchira. I recorded a statement. I did not mention the lorry in my statement.



It is the bag which hit the vehicle. In my statement I recorded the vehicle hit him. When he emerged I was 3 metres away. He was crossing from left to the right as you go to Karatina from Sagana. He was obstructed by the bag. The lorry was about 1 metre away. The lorry was so the shoulder on one side. I spotted the lorry about 15 Metres away. In that distance I did not see the pedestrian. The pedestrian emerged in front of the lorry. I had slowed because of the bump. There was no Zebra crossing from Sagana to Kibingoti. At the scene of accident there was no Zebra Crossing.”

20. In re-examination, he stated that, “I did not see the pedestrian as he was obstructed by the lorry. He emerged in front of the lorry and entered the road. He was injured on the hand. The lorry was about one metre from the edge of the road.”

Submissions

21. The Appellant urges that the accident was wholly caused by the Respondents, and cites Christopher M. Mujule v Alfred Moffat Omundi Muchira & Another (2014) eKLR, Wangari v Nkaru (2004) eKLR, Isabella Wanjiru Karanja v Washington Matele (1982-88) 1 KAR 186, Pitty Gathigia Baaru & Another v Kenya Bus Services & Another (2005) eKLR, Felista Wanjiku Gichu v Akamba Public Service & Another (2001) eKLR, John Wainaina Kagwe v Hussein Dairy Limited (2013) eKLR, Philip Keipto Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende (1982-88) 1 KAR 1036 - 1040 and Ann Mukami Muchiri v David Kariuki Mundia (2008) eKLR. He faults the trial court for failing to award unpaid hospital bills of Ksh. 56,737, which were proved, and cites Kampala City Council v Makaye (1972) E.A 449, Coast Bus Mombasa Ltd v Anne Awiti Onege (2012) eKLR and Thomas Kabaya Ngaruiya & 2 Others v David Chepsisror (2012) eKLR.
22. The Respondents cite Jamii Bora Bank Ltd & Another Ndirangu [2023] KEHC 25951 (KLR), on the duty of the appellate court. They urge that it was unclear how the accident occurred hence liability was apportioned equally between the parties, and cite Postal Corporation of Kenya & another v Dickens Munayi (2014) eKLR, Muindu v Kinyanjui & another [2024] KEHC 1794 (KLR) and Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334. On the unpaid medical expenses of Ksh. 56,737, they cite Muli v Nyoike & another [2024] KEHC 4656 (KLR), where the court determined that the special damages must be proved by producing actual receipts or invoices that are endorsed with the word “PAID.” They urge that one must prove that they incurred the expenses to justify an award of unpaid hospital bills, and cite Anne Nyachomba Gitau & another v Paul Muigai Murigi [2019] 833 (KLR).

Analysis and determination

23. From the grounds of appeal as framed, the issues for determination are whether the apportionment of liability at 50% was proper, whether the unpaid medical bills of Ksh. 56,737 were awardable, and whether the Appellant’s submissions were considered.

Liability

24. The crucial witnesses in this case were the 2 eye witnesses, PW1 and DW1. The evidence by the police officer, PW3 was at best hearsay, because he neither undertook any investigations nor visited the scene.
25. There is no doubt that the pedestrian was in robust and good health prior to the accident. Nevertheless, he was contributorily negligent in suddenly emerging in front of a stationary lorry into the road without first ascertaining whether it was safe and clear to do so. Consequently, he did not exercise the care expected of a reasonable and prudent man, and was thus blame worthy. PW1 testified that the accident motor vehicle was over speeding when it hit the pedestrian. That is not entirely accurate because there were speed bumps at the scene of the accident, rendering it improbable for the accident



motor vehicle to have been driven at an excessive speed. She stated on cross examination that, “He was standing off the road on the Karatina Sagana road. He was carrying a luggage on his back. I saw him being hit. From the manner he was carrying the luggage he could see. There are bumps. I had not seen the vehicle before the accident. I cannot tell the speed.”

26. The evidence led by the 2nd Respondent was contradictory and self-defeating. It is unclear whether the pedestrian was obstructed by the lorry or the bag he was carrying. His testimony was that, “At Kibingoti I slowed down at bumps. There was a lorry on the left. I saw somebody carrying a big bag. I slowed and hooted when he emerged from where the lorry was. The bag hit the vehicle and he fell down.” In re-examination, he stated that, “I did not see the pedestrian as he was obstructed by the lorry. He emerged in front of the lorry and entered the road. The lorry was about one metre from the edge of the road.”
27. In *Hussein Omar Farah v Lento Agencies* [2006] KECA 388 (KLR), the Court of Appeal espoused that;

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is 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, as we have said, 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.”

28. Upon a wholesome evaluation of the testimonies of the 2 eye witnesses, the court draws the inference that both the pedestrian and the driver of the accident motor vehicle, the 2nd Respondent herein were equally to blame. Accordingly, the trial court’s apportionment of liability at 50% was proper and well-founded.

Unpaid medical expenses

29. The Appellant pleaded at paragraph 7 of the amended plaint Ksh. 56,737 as unpaid medical expenses. The court takes cognizance of the Appellant’s letter dated 10/4/2014 addressed to the Finance Manager, Tumu Tumu Hospital, requesting for the release of the patient upon the deposit of the log book as security. The court further notes the invoice dated 10/4/2014 for the sum of Ksh.56,737.
30. In *Thomas Kabaya Ngaruiya & 2 Others v David Chepsisor* [2012] KEHC 1083 (KLR), cited by the Appellant, the Court (M.K Ibrahim J, as he then was) expressed that;

“Special damages are so called because they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of acts themselves. (*Ratcliffe V Evans* (1892) 2 QB 524. No case was cited to me to the effect that proof of special damage necessary means payment. It has been understood that special damages connote out of pocket expenses. The argument goes that it must be an expense where money has been paid to constitute special damages. I think this would be taking the construction of the term special damages too far. The respondent produced a document showing that he owes Moi Teaching Referral hospital Kshs. 266,000/=. I do not find the argument that the sum of Kshs. 266,000/= must have been paid first before the respondent could sue to be amenable to common sense and principles of justice. The appellants had



caused injury to the respondent. They do not pay his bills. He is unable to pay and is released on a guarantee that he still owes the hospital Kshs. 266,000. When the appellants are sued can they successfully resist the claim on the basis that the respondent had not paid. I do not think that payment is a conditional precedent to claiming special damages. As long as they are pleaded and proof is provided they are recoverable. I do not read the Court of Appeal authorities cited as advancing the proposition that special damages cannot be recovered unless the claimant has first paid.”

31. PW2 testified that, “I was not able to pay his medical bills. We left a log book at Tumutumu Hospital.” He stated on cross examination that, “We shall get a receipt for the unpaid bill when we pay.”
32. His testimony was corroborated by PW4 who stated that, “My brother is still under medication. There is an outstanding bill and I left my log book with the hospital.”
33. The court finds that the said medical bills were incurred as a result of the Respondents’ negligence, and the Appellant is thus entitled to be restituted to the position he was in prior to the accident.
34. This court finds that the trial court fell into error when it failed to award the sum of Ksh. 56,737 in unpaid medical expenses, which had been specifically pleaded and strictly proved to have been incurred, notwithstanding that payment thereof had hitherto not been made.

Consideration of the Appellant’s submissions

35. The Appellant faults the trial court for disregarding his submissions and authorities on liability and unpaid medical bills. That fault is misconceived because submissions are merely a guide to the court as they are not pleadings, and their non-consideration cannot in itself be a basis to overturn a trial court’s decision. See *Charles Mutuma M’kanake v Diocese of Meru Trustees Registered* [2021] eKLR. If the trial court was ultimately not persuaded by the submissions of the Appellant together with the authorities cited, it cannot be said that they were not considered.

Orders

36. Accordingly, for the reasons set out above, this court finds the appeal to be partially merited and it is allowed in the following terms:
 1. The Appellant is awarded Ksh.56,737 in unpaid medical expenses.
 2. The judgment of the trial Court is otherwise unaffected.
 3. There shall be an order as to costs as the appeal has only partially succeeded.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mutua for Ms. Ndung’u for the Appellant.

Mr. Kipngetich for the Respondent.

