



REPUBLIC OF KENYA



**KENYA LAW**  
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**Simba v Langat (Civil Appeal 84 of 2021)  
[2024] KEHC 2110 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2110 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 84 OF 2021  
SM MOHOCHI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**YUSUF ROBERT SIMBA ..... APPELLANT**

**AND**

**DOMINIC KIPRONO LANGAT ..... RESPONDENT**

*(Appeal from the Judgment and Decree of Hon. A. MUKENGA- SRM, Molo Law Courts in MOLO CMCC No. 300 of 2019 delivered on the 21.07.2021.)*

**JUDGMENT**

**Introduction**

1. The Respondent vide Plaintiff dated 30<sup>th</sup> October, 2019 and filed on 12<sup>th</sup> November, 2019 moved Court seeking compensation for injuries which the Respondent sustained on 17<sup>th</sup> August, 2019 as a result of a road traffic accident. The Respondent, then Plaintiff, claimed that on the fateful day he was lawfully riding motor cycle registration KMDD 459G along the Nakuru – Kericho Road, when the driver of the vehicle registration number, KBX 950Z (owned by the Appellant) drove the said motor vehicle in a careless, reckless and negligent manner, tried to overtake a trailer and realized there was oncoming traffic, thus swerved to the right side and hit the Respondent causing him as the rider and his pillion passengers to fall sustaining serious injuries.
2. The Appellant, the Defendant therein, entered appearance and filed his defence dated 19<sup>th</sup> December, 2019. He denied occurrence of the accident as well as the particulars of negligence. He blamed the Respondent for the injuries sustained. The Appellant also pleaded contributory negligence with thirteen particulars.
3. The matter proceeded to full hearing and the Trial Court delivered judgement delivered on 21<sup>st</sup> July 2021 in favour of the Respondent as follows;



- a. Liability 100%
- b. General damages Kshs 800,000/-
- c. Special Damages Kshs. 5,350/-

### **The Appeal**

4. The Appellant being dissatisfied with the decision of the Trial Court filed the instant Appeal vide Memorandum of Appeal dated 11<sup>th</sup> April, 2023 on the following nine (9) grounds;
  - i. The Learned Trial Magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on the same.
  - ii. The Learned Trial Magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on the evidence adduced and the submissions filed by the Appellant.
  - iii. The Learned Trial Magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong Conclusion on the same.
  - iv. The Learned Trial Magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.
  - v. The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the Appellant.
  - vi. The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.
  - vii. The Learned Trial Magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the Respondent and failed to apply precedents and tenets of law applicable.
  - viii. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.
  - ix. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
5. The Appellant sought that the Appeal be allowed with costs to the Appellant and the Judgment on liability and quantum by the Trial Court be set aside.
6. Parties were directed on 30<sup>th</sup> May, 2023 to file written submissions. The Respondent filed submissions on 21<sup>st</sup> July, 2023 whereas the Appellant's submissions were filed on 27<sup>th</sup> July, 2023.

### **Appellant's Case**

7. The Appellant contends that the Trial Court did not sufficiently consider the doctrine of contributory negligence based on the evidence adduced and the submissions filed by the Appellant. That the finding of the Trial Court on liability was neither proper nor well founded.



8. The Trial Court erred in awarding a sum in respect of damages which was so inordinately high in the circumstance.
9. As to whether the Trial Court did not sufficiently consider the doctrine of contributory negligence based on the evidence adduced and the submission filed by the Appellant the Appellant submits that, the Trial Court failed to consider the question of contributory negligence, when the Respondent deliberately exposed himself to the dangers that are involved in roads by failing to adhere to the regulations governing the traffic. The following are the breaches: -
  - i. Riding without a reflector.
  - ii. Riding without helmet.
  - iii. Ferrying two pillion passengers.
  - iv. Speeding on a wrong lane.
  - v. Riding without a license.
10. Section 68 subsection (3) of the *Traffic Act* Cap 403 Laws of Kenya provides that: -

“A failure on the part of any person to observe any provisions of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in the proceedings’ be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.”
11. The basic principle underlying the defense of contributory negligence is that people should take reasonable care for their own safety as well as for that of others. The Respondent had not protected himself against the risks, he even went ahead to ride on the Appellant’s lane.
12. The investigation report produced by the defense as DEXBL found that the driver of motor vehicle Reg. No. KBX 9502 Toyota Fielder was keeping to his lawful lane, and noticed at a very close distance a motorcycle registration number KMDD 459G carrying two pillion passengers encroached to his lane. This resulted in it ramming into the vehicle from the left side despite of the driver’s effort to avert the accident by swerving to the adjacent lane.
13. The Appellant relies on the case of *Rentco East Africa Limited V Dominic Mutua Ngonzi* [2021]e KLR. The Court observed;

“That the plaintiff rode the motor cycle against the law and that the law does not allow for two pillion passengers and the respondent was apportioned liability. By riding on the said motor cycle against the law, the Respondent exposed himself to danger”
14. It was not disputed that the Respondent ferried two pillion passengers on the said motor cycle. The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law. the Respondent exposed himself to danger.
15. As to whether the finding of the Trial Court on liability neither proper nor well founded? The Appellant submits that the Trial Court failed to note that the rider of the motor- bike of registration number KMDD 4569G was Jackson Kipkorir and not the Respondent. Case number Molo PMCC No. 304 OF 2019, arising out of the same accident shows that the Plaintiff therein was not among those involved in the accident, this as per the investigation report marked Dexh-1.



16. The abstract issued to the Appellant was certified as true copy of the original, it indicates that Jackson Kipkorir was the rider of the motor- bike of registration number KMDD 4569G. however. the Trial Court failed to make a determination on whether he was involved in the accident or not.
17. Notwithstanding, the Appellant submit that the rider was in breach of the Traffic Act. We rely on the National Transport and Safety Authority Highway Code for all road users (herein to be referred to as the Highway Code).
18. The rider contravened The National Transport and Safety Authority (Operation of Motorcycles) Regulations, 2015 under Section 6 states that,  

“ Every rider of a motorcycle shall (a) have a valid driving license issued by the Authority.”
19. He was also riding a motorcycle without driving license contrary to Section 103B (5) as read with 103B (7) of the Traffic (Amendment) Act 2012 Cap 403 Laws of Kenya.
20. Riding motorcycle on a public road without Insurance contrary to Section 103 B (3) (7) of the Traffic Amendments Act No.37 of 2012 Cap.405 Laws of Kenya.
21. Riding motorcycle on a public road without helmet contrary to Section 103 B (1) (7) of the traffic Amendments Act No.37 of 2012 Cap.405 Laws of Kenya.
22. Riding motorcycle on a public road without reflective jacket contrary to Section 103 B (1) (7) of the Traffic Amendments Act Cap.405 Laws of Kenya.
23. Ferrying two pillion passengers contrary Section 7(1) (a) and (b) of the National and Safety Authority Operation of Motorcycle Regulation, 2015.
24. The Appellant submits that, the rider of the motorcycle was further in breach of the provisions of the NTSA Highway Code, as he failed to ride strictly on his lane when he ought to have exercised due diligence and observance of the traffic rules, while ferrying two pillion passengers.
25. The Appellant invites the Court to be guided by the case of Pesa Hamisi vs P.N. Mashru Limited (2020] eKLR where the Court reiterated the case of Lang vs London Transporters Executive (1959; WLR P in which Havers J. as he then was expressed inter alia that. 'if the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence. He acted in contravention of the Law and one must never be allowed to benefit from an illegality.
26. It is not in dispute that the accident occurred however, what is disputed is how it occurred. While the Respondent argued that the Appellant veered off to his lane, it was the Respondent who encroached the Appellant's lane. The Appellant swerved to avoid hitting the Respondent as captured in the investigation report marked as DEXb- 1. It is important to note that the respondent unlawfully ferried two pillion passengers. all with unprotected gears, this as per the investigation report marked DEXb-1.
27. The Appellant submits that, it is in the best interest of justice, as the doctrine of volenti non-fit injuria expounds, that a Person who contributes to their own suffering by negligently allowing themselves to be prone to danger is restrained from seeking unjust compensation from another party. In this matter. the Respondent negligently exposed himself by failing to comply with traffic laws and regulations, and riding at high speed disregarding the presence of other road users. hence be apportioned a blame, the Appellant relies on the case of Rentco East Africa Limited V Dominic Mutua Ngonzi (2021| e KLR. the Court apportioned liability in the ratio of 70:30, stating that by riding the motorcycle against the law, the rider exposed himself to danger such conducts cannot go un-condemned and should not be awarded. The Respondent ought to shoulder some blame for such reckless conduct. The Court



stated; “I find that the Appellant ought not to have been found 100% liable. I set aside that finding and substitute therefore 70% liability for the driver of the motor vehicle and find the Respondent 30% liable,”

28. That, the fact that the Appellant was charged and convicted in a Criminal Court on his own plea does not mean that he was 100%o liable, Traffic and Civil proceedings are different. In tort, there is the apportionment of liability depending on the contributions of the parties to the accident without prejudice to the foregoing, if the Honorable Court be obliged to compensate the Respondent, then Respondent submit that, Liability be apportioned at 70%:30% in favor of the Respondent. The negligence on the part of the Respondent (motorcycle rider) must not be overlooked just for the mere reason that he suffered some alleged injuries.
29. As to whether the trial Court erred in awarding a sum in respect to damages which was so inordinately high in the circumstance? The Appellant submit that the Trial Court gave high awards and out-rightly in error in assessment of damages. In coming to the amount awarded. the Trial Court took into account irrelevant matters and failed to take into account relevant matters. The Appellant relies on the case of Ken Odondi & Two others Vs James Okoth Omburah T/a Okoth Omburah & Company Advocates [2013] eKLR in which the Court held as follows-

“ We agree that this Court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this Court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this Court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.”
30. An Appellate Court will disturb an award of damages if it is so inordinately high or low as to represent an entirely erroneous estimate. Where the trial magistrate proceeded on wrong principles and misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high.
31. The Respondent is alleged to have sustained the following injuries. multiple fractures, total amputation of the 4<sup>th</sup> and 5<sup>th</sup> toes of the right foot, injuries to metatarsals, large wound on the right foot and multiple skin bruises. The Trial Court awarded the respondent Kshs.800.000, which was too high and dissimilar to other past cases.
32. That in the assessment of General Damages, the Appellant invites this Court to be guided by the Judgment of the High Court of Kenya John Kipkemboi & Anotherv Bramwel Vukinu (2020] eKLR where the Court awarded Kshs. 200,000. The Respondent suffered the following as per the medical report by Dr. L. W Okombo, dated 14<sup>th</sup> March 2014 and refers to injuries to the left leg, cut wound, on the left knee and on the left toe. The x-rays indicated a fixation, there is amputation of the left big toe, a scar on left knee and tenderness around those areas.
33. The Appellant relies further on the case of National Cereals and Produce Board V Protas Wafula Wanyama ELD HCCA No. 89 of 2016 [2018] eKLR. In the case the plaintiff sustained a swollen and tender right foot, cut wound on the right middle toe which was tender, traumatic amputation of the right 4<sup>th</sup> toe which was tender and a cut wound on the right 5<sup>th</sup> toe which was tender. The Court reduced an award of Kshs. 400,000/- to Kshs. 200,000/- in 2018. The Court in the case cited Peter Kioko & Another V Hellen Muthee Muema Kimbu HCCA NO. 153 OF 2014 [2018] eKLR in which the Respondent suffered blunt head injury and crush injury of the left big toe, resulting in amputation



of the toe. The Appellate Court reduced the sum awarded by the lower Court from Kshs. 300,000/- to Kshs. 200,000/- in 2018.

34. The Appellant prays that, in considering the effluxion of time, factoring in inflationary trends and economy, the Respondent be awarded Kshs.400, 000 regarding the injuries sustained. On apportionment of the liability at 70%:30% which shall arrive at 280, 000:120.000 in favour of the Respondent.
35. The award under Special Damages is not disputed and the Appellant urges the Court to find that, the Respondent was not involved in the accident and Dismiss this claim with costs to the Appellant.
36. Find the rider liable, as he contributed to the negligence and he be obliged to award General Damages to the rider, then liability be shared at 70%:30% by both parties with General Damages being assessed at Kshs. 400.000, less 30% liability Kshs. 280,000/=.
37. The Appellant submit that an award of Kshs. 280,000/= would be sufficient to compensate the Respondent herein.

### **Respondent's submissions**

38. The Respondent in opposing the Appeal submitted that there was no error on the part of the Trial Court and that the Respondent proved his case on a balance of probabilities, the driver of the vehicle registration number, KBX 950Z was arraigned charged and pleaded guilty and was fined kshs. 20,000 and that Section 18 of the *Evidence Act* would incorporate this as an admission and thus the Court should not interfere with the Trial Court's discretion while laying reliance in Robert Edwin Otieno Japaso Vs Easy Coach Bus Company Kisumu Civil Appeal No. 11 of 2014 and Dickson Ciuri Wanjiru Vs Municipal Council of Nakuru & Another (2020) eKLR at page 56-63 on quantum of damages and its validity.

### **Duty of the Court.**

39. This Court as a first Appellate Court has a duty to re-evaluate the evidence and infer its own conclusions while bearing in mind that it did not have the advantage of hearing the witnesses. This position was held in *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 where the Court of Appeal stated inter alia that:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally...Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions...”

### **Analysis and Determination**

40. The Court has carefully considered the Grounds of Appeal and the evidence adduced, the written submissions as well as the authorities relied on, I find that the twin issues for determination are on liability and quantum.

### **Liability**

41. The question on liability is thus who is to blame for the accident?



42. The Court of Appeal in Michael Hubert Kloss & Another –v- David Soreney & 5 Others 2009 eKLR stated that:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663* at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a Court of law this question must be decided as a properly instructed and reasonable jury would decide it.....

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

43. The Appellant challenged the Trial Court’s decision and contended that liability should not have been apportioned at 100% since there was apparent evidence on record of the Respondent’s contributory negligence.

### **Quantum**

44. The conditions that have to be met before an Appellate Court can interfere with the Trial Court’s discretion in assessment of damages were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services & Another v Lubia & Another Civil Appeal No 21 of 1984 [1985] eKLR* thus:

“The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that 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.”

### **General Damages**

45. The trial magistrate awarded Kshs 800,000 as general damages for pain and suffering, which amount the Appellant regards as inordinately high. The Respondent agrees with the trial magistrate on the award and submitted that it should not be disturbed.

46. On the circumstances under which a first Appellate Court would interfere with an award of general damages was stated by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR* as follows:

‘An appellate Court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low..’



47. Similarly, in *Butler V Butler* [1984] KLR 225 the Court held:

“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate Court should be slow to reverse the trial judge unless he has acted on wrong principles or awarded so excessive or so little damages that no reasonable Court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision.”

48. In evaluating compensation for general damages, the Court has to evaluate the nature of the injuries and the awards given by other Courts. The Court of Appeal observed in *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR that –

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

49. In evidence, PW1, Dr. Dominic Kiprono Lagat testified that that on the fateful day on the 17<sup>th</sup> August 2017 he was riding motor cycle KMDD 459G while carrying two pillion passengers (Leonard and Kevin Kipngetich); he admitted lying in his written statement, that he had lied that he had only one pillion passenger.

50. PW1 admitted that it was illegal to ride a motorcycle while not being licensed, to ride an uninsured motor cycle, but asserted that his pillion riders had reflective jackets on. That, the two pillion riders were equally injured with Kevin suffering fatal injuries.

51. The Respondent sustained the following injuries:

- a. Multiple fractures of the metatarsals of the right foot involving the lateral aspect of the foot,
- b. Total amputation of the 4<sup>th</sup> and 5<sup>th</sup> metatarsal, large excavating wound with irregular margins on dorsum of the right foot affecting the lateral aspect of the foot,
- c. Partial amputation of the 3<sup>rd</sup> toe in the right foot losing terminal phalanx, multiple skin bruises over the dorsum of the right hand.

52. It is the evidence of the Respondent and in cross examination that has given rise to this Appeal on quantum. The Appellant contents that there was blatant contributory negligence by the Respondent to disturb the trial magistrate finding of 100% liability against the Appellant.

53. The pertinent question therefore is whether the learned trial magistrate disregarded crucial evidence in arriving at her finding of quantum?

54. This Court confirms that the Respondent was negligent to the extent of riding an uninsured motor cycle on a public road while he was unlicensed and he illegally carried two pillion riders one of whom suffered fatal injuries. This action by the Respondent is bare impunity, lawlessness and negligence that any Court of Law ought to note and condemn.

55. The Appellant proposes the Ratio of quantum of liability be set at 70:30.

56. In *Butt V Khan* (1977) 1 KAR the Court of Appeal held as follows;

“An appellate Court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded



on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....”

57. The Appellant has not discharged his burden to show that, the trial magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high.

58. I, however, do not find the Trial Court’s assessment of the damages as so inordinately high as to amount to an erroneous estimate, and I do not find it necessary to interfere with the award on general damages.

59. With the foregoing, the appeal has partially succeeded and the Trial Court’s Finding of 100% liability is hereby set aside and substituted with an apportionment of liability at the ratio of 70% liability for the driver of the motor vehicle and find the Respondent 30% liable. The General damages award at ksh 800,000/- remains undisturbed. The special damages of shall remain as awarded.

General Damages ksh  $800,000 \times 70/100 =$  kshs 560,000/-

Special Damages kshs 5,350/-

Total Kshs 565,350/-

60. Costs shall follow the event.

Orders accordingly.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024**

**MOHOCHI S. M.**

**JUDGE**

