



**Karoli v Sang (Civil Appeal E042 of 2023)
[2024] KEHC 17006 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E042 OF 2023
JK NG'ARNG'AR, J
APRIL 29, 2024**

BETWEEN

TOO K KAROLI APPELLANT

AND

MICHAEL SANG RESPONDENT

*(Being an Appeal from the Judgment of Principal Magistrate, Kwambai T.
at the Principal Magistrate's Court at Sotik, Civil Suit Number 108 of 2021)*

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for general and damages arising from a road traffic accident on 24th December 2020. The Respondent stated that he was riding motorcycle registration number KMFG 903F along Mogogosiek-Kapkoros road when he was hit by motor vehicle registration number KAZ 138E (allegedly belonging to the Appellant) thereby occasioning him injuries. The Respondent blamed the Appellant for causing the accident.
2. The trial court conducted a hearing where the Respondent called three (3) witnesses and the Respondent called one witness before closing their respective cases.
3. In its Judgement dated 18th July 2023, the trial court found the Appellant 100% liable for causing the accident. The trial court further awarded the Respondent general damages of Kshs 150,000/=, special damages of Kshs 3,206/= and future medical expenses of Kshs 75,000/=.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 16th August 2023 and relied on the following grounds that: -
 - I. The learned trial Magistrate erred and misdirected herself in fact and law by awarding damages to the Respondent that were manifestly excessive.



- II. The learned trial Magistrate erred in fact and in law in assessing damages and failed to apply the principles applicable in award of damages of comparable awards made for analogous injuries.
 - III. The learned trial Magistrate erred in failing to consider and critically analyse the submissions made on behalf of the defendant and thus arrived at an unjustifiably high award for the injuries sustained.
 - IV. The learned trial Magistrate's award on damages was so inordinately high.
 - V. The learned trial Magistrate erred in fact and in law in awarding damages that were neither properly pleaded nor sufficiently proved as by law required.
 - VI. The learned trial Magistrate was in error of law and fact in awarding damages that were not proportionate to the injuries sustained by the Respondent.
 - VII. The learned trial Magistrate failed to consider the Plaintiff had fully or substantially healed while assessing the award on damages.
 - VIII. The learned trial Magistrate erred in law and in fact in finding the Appellant 100% liable for the accident.
 - IX. The learned trial Magistrate's findings on liability went against the weight of evidence.
 - X. The learned Magistrate erred in law and in fact in failing to find that the Plaintiff/Respondent had failed to make out his case and hence dismiss the same.
 - XI. The learned Magistrate was in error of law and fact in failing to take into account certain considerations material to an estimate of evidence.
5. My work as the 1st appellate court is to re-evaluate the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR).
 6. I now proceed to summarise the respective parties' cases in the trial court and their submissions in the present Appeal.

The Plaintiff's/Respondent's case.

7. Through his Amended Plaint dated 21st March 2022, the Respondent stated that he was riding motorcycle registration number KMFG 903F when he was hit by motor vehicle registration number KAZ 138E.
8. The Respondent stated that the Appellant was the owner of motor vehicle registration number KAZ 138E and was negligent in causing the accident. The particulars of the negligence were listed in paragraph 6 of the Plaint.
9. That as a result of the accident, he the following injuries: -
 - a. Bruises on the right wrist.
 - b. Mild fracture of the finger.
 - c. Swelling and tenderness on the right lower limb.



10. The Respondent's claim against the Appellant was for special and general damages as a result of the accident.
11. In his written submissions dated 28th February 2025, the Respondent submitted that the award of Kshs 3,206/= as special damages was reasonable despite him pleading for Kshs 13,406/=. He further submitted that the trial court's award on general damages and future medical expenses was reasonable.
12. It was the Respondent's submission that the trial court correctly found the Appellant 100% liable for causing the accident. That the same was arrived at after the court considered PW2's testimony that the Appellant was entirely to blame for the accident. It was his further submission that the Appellant admitted into entering into an agreement to avoid being prosecuted for causing the accident. Further that the Respondent's testimony was confirmed by the pillion passenger who was the Plaintiff in Sotik Civil Suit Number E096 of 2021 that the motor vehicle hit them as it tried to avoid hitting a pothole. He relied on Rural Electrification Authority vs Shashon Ole Leuka (2017) eKLR.
13. The Respondent submitted that the driver of the motor vehicle did not keep to his rightful lane. He further submitted that on the issue of the rider carrying two pillion passengers, the Appellant had failed to demonstrate how that contributed to the occurrence of the accident. He relied on Barongo Sevelius Yophen vs Jared Ndemo (2020) eKLR.
14. It was the Respondent's submission that the Appeal lacked merit and ought to be dismissed.

The Defendant's/Appellant's case

15. Through his Amended Statement of Defence dated 30th March 2022, the Appellant denied that he was the registered owner of motor vehicle registration number KAZ 138E and further denied the occurrence of the accident on 24th December 2020.
16. The Appellant denied the particulars of negligence levelled against him. That if any accident happened, it was caused solely by the negligence of the Respondent. He particularized the negligence in paragraph 8 of his Defence. The Appellant also denied that the Respondent suffered any injuries.
17. In his written submissions dated 25th October 2024, the Appellant submitted that he wished to abandon his appeal on damages and focus solely on the issue of liability.
18. It was the Appellant's submission that there were two pillion passengers aboard the motorcycle contrary to the provisions of section 60 (1) of the Traffic Act and that the Respondent ought to assume some liability. He relied on Rentco East Africa Limited vs Dominic Mutua Ngonzi (2021) eKLR, Ndatho v Chebet [2022] KEHC 346 (KLR) and Omoke v Owino & 3 others [2024] KEHC 2652 (KLR).
19. The Appellant submitted that the police officer (PW2) confirmed that he was not the investigating officer and that on the hearing day, he confirmed that he did not have the police file in court. He relied on Samuel Irungu Njuguna vs Francis Kibe & another (2016) eKLR, Lochab Brothers Ltd & another vs Johana Kipkosgei Yegon (2017) eKLR and Kennedy Nyangoya vs Bash Hauliers (2016) eKLR.
20. It was the Appellant's submission that the police officer (PW2) was not a credible witness as his testimony was contradictory hence doubtful. That he testified that the accident occurred at 2350 hrs while the Police Abstract indicated that the accident occurred at 8 pm. It was the Appellant's further submission that the rider of the motorcycle did not have a riding license and was thus unqualified to ride.



21. The Appellant submitted that the Respondent failed to prove his case to the required legal standard. That as such liability ought to be apportioned equally among him and the Respondent. He relied on Isaac Onyango Okumu vs James Ayere & another (2019) eKLR.
22. I have gone through and carefully considered the Record of Appeal, the Appellant's written submissions dated 25th October 2024 and Respondent's written submissions dated 28th February 2025. From the Appellant's submission, it was clear that the Appeal was limited to liability only. The only issue for my determination therefore was whether the trial court erred when it held the Appellant 100% liable for the accident.

Liability

23. Michael Sang (PW1) testified that he was the rider of motorcycle registration number KMFG 903F and on the material day, he was hit by motor vehicle registration number KAZ 138E that was driven by the Appellant. PW1 testified that the Appellant did not take any precautionary measures to prevent causing the accident and hence blamed him for causing the same. When PW1 was cross examined, he stated that he had carried two pillion passengers and that the Appellant took them to hospital afterwards. Upon further cross examination, PW1 stated that the Appellant left his lane, moved to their lane and caused the accident.
24. Kiprop Laban (PW2) testified that he was a pillion passenger in motorcycle registration number KMFG 903F and they were involved in an accident along Mogogosiek-Kapkoros road with motor vehicle registration number KAZ 138E that was driven by the Appellant. PW2 blamed the Appellant for causing the accident. When PW2 was cross examined, he stated that they were two pillion passengers onboard the motor cycle and further that the motor vehicle moved from its lane to theirs thereby causing the accident.
25. No. 238806 Inspector Ahmed Swaleh testified as PW3. He testified that he blamed the Appellant for causing the accident. He further testified that the motor vehicle came was coming from Bomet heading towards Mogogosiek and at some point, along the road, the Appellant lost control and hit the oncoming motorcycle and as a result three people were injured. PW3 produced a Police Abstract as P. Exh 2. When PW3 was cross examined, he stated that he was the in charge of Konoin Traffic Police Station and was not the investigating officer. That he read through the police file before he came to court. Upon further cross examination, PW3 stated that the said road had potholes and further that the rider had carried more than two pillion passengers. PW3 testified that the matter was still under investigations.
26. On the other hand, the Appellant testified as DW1. He testified that on the material day, he drove motor vehicle registration number KAZ 138E when suddenly motorcycle registration number KMFG 903F came from the opposite direction, encroached on his lane as it tried to avoid a huge pothole and hit his motor vehicle. He further testified that the motorcycle carried two pillion passengers.
27. It was the Appellant's testimony that he tried to avoid the accident by braking, hooting and flashing his lights all to no avail. It was his further testimony that he rushed the Respondent and his two pillion passengers to hospital and thereafter reported the matter to Konoin Police Station. When the Appellant was cross examined, he stated that he was not charged with any offence relating to the accident and that he had entered into an agreement so that he could not be charged.
28. From my analysis of the above, it was uncontested that the accident occurred on 24th December 2020 between the Appellant's motor vehicle registration number KAZ 138E and the Respondent's



motorcycle registration number KMFG 903F. Further, both parties blamed each other for causing the accident.

29. In trying to determine liability, I have carefully looked at the evidence above and it was unclear to this court who was to blame for causing the accident. The witness who would have helped to shed light on the circumstances of the accident was No. 238806 Inspector Ahmed Swaleh (PW3). However, from his evidence, he stated that he was not the investigating officer and the testimony he gave to the trial court was based on the contents he read in the Police File, which I must note was not produced as evidence in the trial court. PW3 relied on the contents of the Police File which was filled out by the investigating officer who was not called as a witness. This evidence is hearsay and thus inadmissible. I therefore disregard PW3's evidence.

30. What was clear to this court was the Respondent carried two pillion passengers on his motorcycle. It is the position of this court that a motorcycle ought to carry one pillion passenger and carrying two pillion passengers was against the law. The *Traffic Act* Cap 403 Laws of Kenya provided for the law relating to traffic on the road. Section 68(3) of the *Traffic Act* provides: -

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 any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) 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.

31. Section 60 (1) of the *Traffic Act* provides that: -

It shall not be lawful for more than one person in addition to the driver to be carried on any two-wheeled motorcycle, nor shall it be lawful for any such one person to be so carried otherwise than sitting astride the motorcycle and on a proper seat securely fixed to the motorcycle behind the driver's seat.

32. I am persuaded by Odunga J. (as he then was) in the case of *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] KEHC 1079 (KLR), where he held that: -

“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. Such conduct cannot go un-condemned and it should not be rewarded.”

33. The Court of Appeal in *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] KECA 146 (KLR) held that: -

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs. 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.....”

34. The Appellant and his two pillion passengers exposed themselves to risk when they boarded and rode an overloaded Motor Cycle. It is proper and just that they assume some form of liability. It is my



finding therefore that the Appellant and his two pillion passengers each assume 40% liability while the Appellant assumes 60%.

35. In the end, the Memorandum of Appeal dated 16th August 2023 is successful as the Appellant is found to be 60% liable and the Respondent is found to be 40% liable for the accident.

Hence, the sums payable to the Respondent shall be: -

i. General Damages Kshs150,000/=

Add special damages Kshs 3,206/=

Kshs 153,206/=

Less 40% Contribution Kshs 61,282/=

Kshs 91,924/=

36. The Appellant shall have half the costs of this Appeal while the other half goes to the Respondent.

The costs in the original suit shall remain as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF APRIL, 2025.

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the absence of the parties and their advocates. Siele/Susan (Court Assistants).

