

KENYA / JUDGMENT

Mwilu & another v David

[2026] KEHC 13475 (KLR)

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COURT

High Court

BEFORE

JN Onyiego

CASE / FILE NUMBER

Civil Appeal E032 of 2024

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Mwilu & another v David (Civil Appeal E032 of 2024) [2026] KEHC 13475 (KLR) (15 September 2026) (Judgment) (with dissent) Neutral citation:

[2026] KEHC 13475 (KLR) Republic of Kenya In the High Court at Makueni Civil Appeal E032 of 2024 JN Onyiego, J September 15, 2026 Between Josephat Mulandi Mwilu 1 st Appellant Nthoka Josephat Mulandi 2 nd Appellant and Christine Mulekyo David Respondent (Appeal from the Judgment of Hon. E. Mbicha (PM) in the Principal Magistrate's Court at Makindu, Civil Case No. E094 of 2021, delivered on 29th February 2024)

Judgment

Introduction

1. The Respondent filed a suit before Makindu SPM's Court seeking General Damages for personal injuries sustained from a road accident which occurred on 05/12/2019 (material day) along Makindu-Kikaoni Road. She averred that she was lawfully and carefully travelling as a pillion passenger on motor cycle registration No. KMDV 553A along the said road when the Appellants' motor vehicle registration No. KBX 719Q was driven so recklessly and carelessly that it knocked her and occasioned her severe bodily injuries as well as loss and damage. She also prayed for special damages, costs of the suit and interest. 2. The Appellants filed a joint Statement of Defense whereby they denied in toto the allegations contained in the plaint and called for strict proof. They averred that if the Respondent sustained any injuries or damage as pleaded, then the same was caused or substantially contributed to by her negligence and the negligence of the rider. 3. The Respondent replied and joined issues with the Appellants' Statement of Defence and reiterated the contents of the plaint. 4. After the preliminaries, the matter proceeded to full trial whereupon the trial court apportioned liability in the ratio of 90:10 in favor of the Respondent and assessed damages as follows; General damages.....Kshs. 140,000/= Special

damages..... Kshs. 6,210/= Total..... Kshs.

146,210= Less 10%.....Kshs. 14, 621/= Net

Total.....Kshs. 131,589/= The Appeal 5. Aggrieved by the award, the

Appellants filed this appeal and raised 5 grounds where they averred that the learned magistrate erred in law and fact; a. By failing to consider the evidence on record on liability hence finding the Defendants wholly liable for the accident. b. By failing to consider and/or completely disregarding the Defendants' submissions on liability hence reaching an

erroneous conclusion that the Defendants were wholly liable for the accident. c. By failing to consider and appreciate the nature of injuries suffered by the Respondent and awarding damages that were too high and incomparable to the injuries sustained. d. By failing to appreciate the totality of the evidence before him and the submissions on record on liability and quantum of damages. e. By failing to apply the principles applicable in award of

damages and comparable award made for similar injuries. 6. The parties elected to canvass the Appeal through written submissions and appropriate directions were given. Accordingly, the parties complied and filed their respective submissions. The Appellants' Submissions 7.

With regard to liability, it was submitted that the evidence of the Police Officer called by the Respondent during the trial should be taken with caution as he was not the Investigating

Officer (I.O) and could not testify on the status of investigations. That, on cross-examination, he admitted that, from the Police Abstract, no one was blamed for the accident and the matter was still pending under investigations. Reliance was placed on the case of Kenya

Power & Lighting Co. Ltd -vs- Nathan Karanja Gachoka & Anor (2016) eKLR for the submission that a Plaintiff must prove its case on a balance of probabilities whether the evidence is unchallenged or not. 8. This court was urged to find that the Respondent was

fully liable and dismiss her case or, in the alternative and without prejudice, to find the Respondent 50% liable. 9. With regard to quantum, it was submitted that the trial magistrate

failed to appreciate the general principle that; comparable injuries should as far as possible be compensated by comparable awards. 10. It was submitted that an award of Kshs. 60,000/=

would be fair and just based on the following cases; a. Daniel Odhiambo Ngoosa -vs- Daniel Otieno Owino & Anor (2020) eKLR where an award of Kshs. 150,000/= was made for; blunt chest injuries, sprain on the neck, dislocation of the right shoulder joint, blunt abdominal

injuries and dislocation of the ankle joint. b. Godwin Ileri -vs- Franklin Gitonga (2018) eKLR where an award of Kshs. 300,000/= was reduced to Kshs. 90,000/= on appeal for the following injuries; soft tissue injuries to the left shoulder, blunt chest interior, bruises of left wrist

region and blunt injury left arm. The Respondent's Submissions 11. With regard to liability, it was submitted that the Respondent testified and called a Police Officer who supported her case but the Appellants closed their case without calling any witness. 12. It was submitted

that a driver is professionally trained to handle a lethal machine on a public road and having the relevant license to do so he is expected to adhere to traffic rules and always avoid road traffic accident by utilizing the skills acquired. That, the driver in this case had in his

disposal several safety measures which he has been trained to use including; braking, indication, warning, swerving and/or stopping the vehicle to avoid an accident. 13. That, from the Respondent's testimony and statement before the trial court, it is clear that the

Appellant must have been highly speeding or carelessly driving hence explaining why he was unable to slow down, warn, apply emergency brakes and/or bring the vehicle to a halt to avoid the accident. 14. Reliance was placed on the case of William Kabogo Gitau -vs- George Thuo & 2 Others (2010) 1 KLR 526 for the submission that in ordinary civil cases, a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. It was submitted that the balance of proof in civil cases is on a balance of probabilities and not as high as in criminal cases. That, the trial magistrate did not err in any law or principle while apportioning liability in the ratio of 90:10 in favor of the Respondent. 15. With regard to general damages, it was submitted that the Respondent sustained severe bodily injuries and proposed an award of Kshs. 380,000/= based on the following cases; a. Poa Link Services Co. Ltd & Anor -vs- Sindani Boaz Bonzemo (2021) eKLR where an award of Kshs. 350,000/= was upheld for; blunt injury to the chest, bruises of the lower abdomen, bruises of the right hip joint, bruises of the thigh and bruises on the knee. b. Catherine Wanjiru Kingori & 3 Others -vs- Gibson Theuri Gichubi (2005) eKLR where an award of Kshs. 350,000/= was made for the following injuries; multiple injury to the left elbow joint and injuries on both ankles. 16. It was submitted that the trial court's award of Kshs. 131,589/= was in line with the pleadings and the law and that it is not a must for the trial magistrate to consider authorities cited by the parties. That, it is within his/her discretion to find the relevant one if any and if none, then he/she has a duty to rely on any other that may be appropriate for each particular case. 17. Reliance was placed on the case of Peter Namu Njeru -vs- Philemon Mwagoti (2016) eKLR for the submission that no two cases are of precise similar injuries hence the decided cases are merely but a guide as much as they would be of a binding nature on the trial court being a subordinate court. 18. In conclusion, this court was urged to dismiss the appeal with costs as the same is not sustainable. Duty of Court 19. It is now settled that the duty of a First Appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. [Selle -vs- Associated Motor Boat Company (1969) E.A 123]. 20. Having looked at the grounds of appeal, the rival submissions and entire record, it is my considered view that the only issues for determination are; a. Whether the finding on liability should be disturbed. b. Whether the award on quantum should be disturbed. Whether the Finding on Liability should be Disturbed. 21. PW1 was the Respondent and she adopted her statement, dated 27/12/2020, as her evidence-in-chief. She stated that on 05/12/2029, she was travelling as a pillion passenger on motor cycle registration No. KMDV 553A along Makindu-Kikaoni Road when motor vehicle registration No. KBX 719Q which approached from behind was so recklessly and carelessly driven. That the driver was over speeding and attempted to overtake them without ensuring that it was safe to do so and, in an effort, to return to the left lane to avoid collision with an oncoming vehicle, he knocked them and occasioned severe bodily injuries to her. 22. On cross - examination, she said that they were two pillion passengers i.e., herself and her child. She blamed the motor vehicle as it was over speeding. They were going on the same direction and the motor vehicle was behind them. That they were hit from behind at 3.00 p.m. yet the road was straight. She admitted that she did not do

anything to protect herself as a passenger. 23. PW2 was P.C Joseph Mugo of Makindu Traffic Department. He testified that the in question was travelling in the same direction with the motor vehicle when the motor vehicle rammed into the from behind. He produced the Police Abstract as Exhibit 1. 24. On cross-examination, he reiterated that the motor cycle and motor vehicle were heading in the same direction. He stated that the rider had slowed down to avoid a pothole when he was hit from behind. He agreed that paragraph 7 of the abstract indicates that the result was pending under investigations. 25. He stated that he was not aware whether the investigations had been completed as at the date of testifying. He agreed that the abstract did not indicate who was to be blamed for the accident. 26. On their part, the Appellants did not call any witness. 27. It is not in dispute that an accident involving the motor cycle and motor vehicle occurred on 05/12/2019 along the Makindu-Kikaoni Road. The Appellants' grounds of appeal are that the trial court erred by finding them wholly liable yet it is clear from the judgment that liability was apportioned in the ratio of 90:10 in favor of the Respondent. This raises the question as to whether the Appellants are conversant with their own appeal. Be that as it may, this court still has a duty to re-evaluate the evidence and reach its own conclusion. 28. In the plaint, it was pleaded that motor vehicle No. KBX 719Q was driven so carelessly and negligently that it knocked the which the Respondent was riding on, consequences whereof, she sustained serious injuries. The Respondent, being the victim, was an eyewitness and her evidence in court was that the motor cycle was hit from behind by the motor vehicle. The Police Officer, PW2, reiterated that the was hit from behind by the motor vehicle. The Appellants argued that his evidence should be taken with caution because he was not the Investigating Officer, however, it is noteworthy that he had the OB in court and was testifying on its contents. 29. The Kenya Highway Code provides that drivers must maintain a safe following distance of at least 1.8 meters (6ft) in slow traffic and apply the two-second rule on faster roads. On a balance of probabilities therefore, the Respondent discharged her legal burden by demonstrating that, prima facie, the motor vehicle driver was liable for hitting the from behind as he was expected to have maintained a safe distance. 30. In the case of Orioki -vs- Kevian Kenya Limited [2025] KECA 780 (KLR), the Court of Appeal held: " Under common law, a driver who hits another vehicle from behind is generally presumed to be at fault, unless there is sufficient evidence to rebut this presumption. (See: Njuguna v Chogo [1985] KLR 452). In this case, the appellant admitted that he collided with the respondent's vehicle from behind. This fact alone placed the burden on the appellant to prove that the collision was not due to his negligence." 31. Having discharged her legal burden, the Appellants had a duty to rebut the Respondent's version and demonstrate that there was no negligence on their part. They failed to do that as they closed their case without calling any witness and as such, the contents of their defense remained mere averments. 32. The Appellants had pleaded that the Respondent was also negligent for, inter alia, failing to take due care and attention for her own safety. In apportioning 10% liability to the Respondent, the trial magistrate stated as follows; " From the evidence adduced, the driver of the subject motor vehicle KBX 719Q hit the subject motor vehicle from behind. This evidence has not been challenged. However, it also came out that the Plaintiff was with her child as pillion passengers and she ought to

have been more careful as a pillion passenger.” 33. In my view, the trial magistrate took into consideration an irrelevant factor because it was never demonstrated how the Respondent’s act of riding with her child on the contributed to the being hit from behind yet she was not the one in control of the motor vehicle or . 34. In the persuasive case of PAS -vs- George Onyango Orodí [2020] eKLR, the Court stated; “ The minor was a pillion passenger. A pillion passenger cannot be held liable for the causation of an accident... In any case the minor received a fracture of the right femur. Even if she had been wearing a helmet as submitted this could not have prevented the said injury. The learned trial magistrate erred in relying on hearsay evidence to dismiss the appellant’s case. In my view the appellant had proved on a balance of probability that the respondent was entirely to blame for the accident.” 35. I am also persuaded by the case of Maina -vs- Nyamweya (Civil Appeal 30 of 2021) [2022] KEHC 14357 (KLR) (11 February 2022) (Judgment) where the Court stated; “ There is no dispute that the appellant’s motor vehicle hit the motor cycle the respondent was travelling on. As a pillion passenger the respondent did not contribute to the occurrence of the accident. Since the appellant did not take-out third-party notice as provided by the law, she is wholly liable in damages to the respondent. The apportionment of liability between the appellant and a motor cyclist who was not a party to the case was legally untenable. In the premises, I set aside the trial court’s finding on liability and enter liability against the appellant at 100%.” 36. Similarly, in the instant case, the trial magistrate ought not to have apportioned 10% liability on the pillion passenger without any evidence of contributory negligence. However, since there was no cross appeal, it is therefore my considered view that the Appellants should not complain of 90% liability for the accident. Whether the Award on Quantum should be Disturbed. 37. Awarding damages is largely an exercise of judicial discretion and the instances that would make an Appellate Court interfere with that discretion are well established. In Butt -vs- Khan (1977)1KAR it was held that; “ An appellate Court will not disturb an award for 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”. 38. The injuries sustained were pleaded as follows; a. Soft tissue injuries on the right hand. b. Swelling on the right thumb. c. Soft tissue injuries in the left knee joint. d. The right thumb is tender. 39. The Medical Report by Dr. Esther Nzomo Musyoki dated 24/12/2019 (P. Exh 7) indicates the injuries, sustained by the Respondent, to be; a. Soft tissue injuries right hand swollen and tender thumb. b. Soft tissue injuries left knee joint. 40. Dr. Nzomo assessed the injuries as harm and concluded that the Respondent had healed with no major complications. 41. The Medical Report by Dr. Wambugu P. M. dated 14/03/2023 (D.Ex 1) indicates the plaintiff sustained; Bruises on the right hand and Blunt trauma left knee. 42. In her evidence in court on 10/08/2023 which was approximately 3 and a half years after the accident, the Respondent testified that she was injured on the hand and leg but had gotten well. Evidently, the Respondent sustained soft tissue injuries that had healed without complications. It is on the basis of this evidence that this court should determine whether the award of Kshs. 140,000/= as General Damages should be disturbed. 43. It is trite that the Appellate Court will not disturb the trial court’s award of

damages unless the trial court took into account an irrelevant factor or left out of account a relevant one or that the amount is so inordinately low or high that it must be a wholly erroneous estimate. It must be shown that the trial court proceeded on wrong principles or that it misapprehended the evidence in some material respect. 44. One of the principles in assessment of damages is that comparable injuries should attract comparable awards. I have looked at the injuries sustained by the Respondent and I am alive to the fact that no two cases can be completely similar. 45. In the cases cited by the Appellants, it is my view that the injuries sustained by the Plaintiff in Daniel Odhiambo Ngoosa -vs- Daniel Otieno Owino & Anor (supra) were more serious as there were dislocations of the shoulder and ankle joint. The court awarded Kshs. 150,000/= in 2020. 46. On the other hand, the Respondent cited two cases where awards of Kshs. 350,000/= were made for mostly blunt injuries. 47. I have also taken the liberty to look at other cases like Channan Agricultural Contractors Ltd -vs- Fred Barasa Mutayo (2013) eKLR, where an award of Kshs. 250,000/= was reviewed downwards to Kshs. 150,000/= for 'moderate soft tissue injuries that were expected to heal in eight months' time.' There is also the case of Purity Wambui Muriithi -vs- Highlands Mineral Water Company Ltd (2015) eKLR where an award of Kshs. 700,000/= was reviewed downwards to Kshs. 150,000/= for injuries to the left elbow, pelvic region, lower back and left knee. It is noteworthy that these two cases were decided over seven years ago. 48. It is evident from the judgment that the trial court was guided by the aforesaid Appellate decisions and found a middle ground by awarding Kshs. 140,000/=. In my view, the award is within an acceptable range for the injuries sustained by the Respondent and the Appellants have not demonstrated that the threshold required, to interfere with discretion of the trial magistrate, has been met. In the absence of any error on the part of the trial court, the Appellate Court is not at liberty to interfere with an award just because it would have awarded a different award if it tried the case at first instance. 49. The upshot is that the appeal has no merit hence dismissed with costs to the Respondent. DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15 TH DAY OF SEPTEMBER 2026 J.N.ONYIEGO JUDGE

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