Buruchara v Muusan Trading Limited & another (Civil Appeal E351 of 2024) [2025] KEHC 1345 (KLR) (Civ) (24 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1345 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E351 OF 2024

AM MUTETI, J

FEBRUARY 24, 2025

BETWEEN

THOMAS MOMANYI BURUCHARA ..... APPELLANT

AND

MUUSAN TRADING LIMITED ..... 1ST RESPONDENT

FANCY ISUNGWA KASINA ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the Hon. W Mbilukah (PM) dated the 23rd November, 2023 in Milimani Commercial Chief Magistrate Court Civil Case No. E4021 of 2022)

JUDGMENT

Introduction

1. The appellant in this appeal seeks to challenge the judgment of the lower court on both liability and quantum.

2. The appellant raised several grounds of appeal as particularized hereunder;-

    i. The learned trial Magistrate erred in law and in fact in finding that the Plaintiff had not proved his case on both liability and quantum against the Defendant.

    ii. The learned trial Magistrate erred in both law and fact on holding that the Plaintiff's treatment notes were fraudulently acquired when there was no evidence tendered towards that.

    iii. The learned trial Magistrate erred in law and in fact by relying only on insufficient evidence thus dismissing the Plaintiff's suit.

iv. The learned trial Magistrate erred in law and in fact by failing to consider the testimony of both the Plaintiff and Doctor Okere.

v. The learned trial Magistrate erred in law and in fact by failing to assess any awardable general damages.

vi. The learned trial Magistrate erred in law and in fact by misdirecting herself by failing to consider all the Submissions made before her by counsel for the Plaintiff thereby reaching an erroneous finding on liability and quantum.

vii. In all the circumstances of the case, finding of the learned trial Magistrate on liability was characterized with misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion thus erroneously proceeded to dismiss the suit in Milimani - CMCC No. E4021 of 2022.

viii. The learned trial Magistrate erred in law and in fact by applying a very high standard beyond reasonable doubt instead of on balance of probability hence dismissing the case herein.

ix. The learned trial Magistrate erred in law and in fact by not addressing the issue of quantum otherwise awardable to the Plaintiff.

3. The issues that arise for determination are;-

a. whether the appellant proved his case against the respondents to the required standard

b. whether the learned honorable court misdirected itself on the available evidence hence arriving at an erroneous decision in law.

4. The matter arose out of a road accident which is alleged to have occurred on the 5/5/2022 when the appellant is said to have been lawfully riding his motor cycle reg. no. KMGA 841K along Mama Ngina/ Wabera street when motor vehicle Registration No. KDE 197K is alleged to have been so recklessly driven by the 2nd respondent that it knocked down the appellant causing him bodily injury thus making him to suffer loss and damage.

Appellant's Case

5. The appellant had sued the owners and/or the driver of motor vehicle registration number KDE 197K, (hereinafter referred to as the Respondents).

6. The Appellant held the Respondents responsible for the occurrence of the subject accident and the injuries he sustained contending that the accident was caused by negligence and carelessness on the part of the Respondents, their driver, servant and/or agents and as such the respondents were liable, vicariously or otherwise.

7. The appellant in the trial court sought for general damages, special damages and cost of the suit together with interest at courts rate. The learned trial magistrate delivered his judgment on 18th November 2019 dismissing the appellants suit and the Appellant being dissatisfied with the learned trial magistrate's judgment filed the current appeal vide a memorandum of appeal dated 5th March, 2024.

8. The grounds of appeal are enumerated above in this judgment.

9. In the Memorandum of Appeal, the Appellant prays for orders that:

a) That the Appeal be allowed with costs.

b) That the Judgment of Hon. Mbulikah dated 23rd November, 2023 in Milimani CMCC No. E4021 dated 23rd November, 2023 and Order dismissing the suit therein be set aside and/or varied as the Court may deem fit.

c) This Honourable Court be pleased to set aside the judgment of Hon. Mbulikah dated 23rd November, 2023 in Milimani CMCC No. E4021 Dated 23rd November, 2023 in its entirety and substitute it with this Honourable Court's judgment.

d) That the costs of this appeal be provided for.

10. The appellant in prosecuting this appeal through his written submissions consolidated the grounds of appeal into 4.

a) Ground 1-4

Whether the learned trial Magistrate erred in law and in fact in finding that the Plaintiff had not proved his case both on liability and quantum against the Defendant and that the Plaintiff's treatment notes were fraudulently acquired when there was no evidence tendered towards that.

11. The appellant in support of those grounds argued that Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he asserts must prove that those facts exist. This is of course the legal burden of proof.

12. In this regard, the Appellant testified before the trial magistrate under oath as PW1 and produced documents as per the plaintiff's list of documents in support of his case.

13. In a bid to corroborate his testimony before court the Appellant called PW2 (Dr. Okere) who testified and produced a medical report dated 1st July, 2022.

14. According to the appellant, the doctor confirmed that he had re examined the Plaintiff and that he confirmed the injuries indicated were actually suffered by the Plaintiff.

15. Further, the Plaintiff presented PW3, a (Traffic Police Officer), who testified before the learned trial magistrate and produced a police abstract dated 10th May, 2022 in support of the Appellant's case. The police officer confirmed that the accident happened and that the Plaintiff was injured as result of the accident. The police officer also confirmed that motor vehicle registration number KDE 197K belonging to the Respondents was blamed for causing the accident.

16. Further, the appellant submitted that the defence called one witness, that being DWI, who testified and produced documents in support of the respondent case. On cross examination, she confirmed that she was blamed for causing the accident.

17. The appellant went further to submit that from the witnesses' testimonies and documents produced before trial court, it was not in doubt that;

a) the subject road traffic accident occurred, involving the Appellant and the Respondents' motor vehicle registration number KDE 197K (This fact was admitted by DW1 as while as corroborated by Police abstract produced as evidence before trial court,

b) the Appellant was lawfully and carefully riding motor cycle registration number KMGA 841K along Mama Ngina/Wabera Street when motor vehicle registration number KDE 197K was so recklessly and carelessly driven that it knocked the Appellant down occasioning him severe bodily injuries.

c) the Appellant sustained serious bodily injuries as are result of the accident as per the doctor's evidence.

18. The injuries sustained by the plaintiff /appellant were particularized in the plaint and established by the doctor(Dr Okere).

19. The appellant went further to state that even though in his witness statement dated 21st July, 2022 the plaintiff alleged to have been treated at St. Catherine Health Centre, during the hearing he clarified that he was actually treated at Kaloleni Health services and produced medical reports to that effect. It is instructive to note that it is uncontroverted that the subject accident occurred and that indeed the Appellant suffered the injuries put forth.

20. According to the appellant the error was clarified and that in line with the overriding objectives it was a minor technicality which was duly cured during trial.

21. The appellant further contended that it is trite law that any allegations of fraud must be pleaded and strictly proved. If at all there was an allegation of fraud, the party who was alleging that there was a forgery had the burden to prove the allegations.

22. In support of that submission the appellant relied on the case of Kinyanjui Kamau vs George Kamau [2015] eKLR where the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

> " It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo vs Ndolo (2008)1 KLR (G & F) 742 wherein the court stated that ".. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.." In case where fraud is alleged it is not enough to simply infer fraud from the facts.

23. The appellant maintained that in the instant case, the allegation of fraud and/or forgery was not specifically pleaded nor was it proved. No evidence was adduced to prove the allegation to the required degree or at all.

24. In the appellant's view the Court misdirected itself and went into issues that were not before it thus reaching an erroneous finding.

25. The appellant went further to submit that, it is a general principle that not only parties but also the Court is bound by their pleading before it and cannot delve into matters not before it.

26. The appellant urged this court to find that the Appellant aptly prosecuted and proved his case on a balance of probabilities and that the learned trial Magistrate erred in law and fact in finding that the Plaintiff had not proved his case both on liability and quantum against the Defendant and that the Plaintiff's treatment notes were fraudulently acquired when there was no evidence tendered as proof of that fact.

b) Ground 5-7

Whether the learned trial Magistrate erred in law and in fact by failing to assess any awardable general damages and misdirected herself by failing to consider all the submissions made before her by Counsel for the Plaintiff thereby reaching an erroneous finding.

27. The appellant further submitted that it is trite law that a trial Court is under a duty to assess the general damages payable to the plaintiff even after dismissing the suit. The appellant relied on Court of Appeal case decision in Mordekai Mwangi NandwaVs Bhogal's Garage Limited Court of Appeal No. 124 of 1993 [1993] KLR 4448 where the Court held that "that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment."

28. Further, in the case of Mathiya Byabaloma & Others Vs Uganda Transport Company Limited (Uganda Supreme Court,)Civil AppealNo.10/93, quoted in the case of Joseph Ndung'u Njoroge v Lilian Atieno Siwolo [2015] cKLR the Court held that the Judge erred in not assessing the damages he would have awarded had the appellant been successful in her claim.

29. It was contended on behalf of the appellant that in this suit, the trial Court never pronounced herself and/or assessed the damages she would have awarded had the Appellant had he been successful in his claim.

30. That basically summarized the appellants case and he, consequently pleaded with this court to allow the appeal and enter judgment in his favor.

31. In his submissions, the appellant had proposed an award of Kshs. 300,000 as reasonable and sufficient general damages.

c) Ground 8-9

The learned trial Magistrate erred in law and in fact by applying a very high standard beyond reasonable doubt instead of on a balance of probability hence dismissing the case herein.

32. The appellant submitted that the burden of proof in civil cases is on a balance of probabilities as was held in the case of KANYUNGU NJOGU VS DANIEL KIMANI MAINGI [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

33. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, Jin William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "In ordinary civil cases, a case may be determined in favour 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. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

34. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un) convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

35. The appellant also cited the case Miller vs Minister of Pensions (1947)2 ALL ER 372, while discussing burden of proof Lord Denning J. had this to say-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow".

36. The appellant urged this court to find that the Respondent was wholly to blame for the occurrence of the subject accident and enter a judgment against them.

General Damages

37. To prove his case on this head, the Appellant testified before the learned trial magistrate under oath and produced documents including a medical report and treatment notes in support of his case.

38. The appellant alleged to have suffered the following injuries;Recurrent bac Blunt chest injuryBlunt injuries to both handsBruises on the right kneeTenderness on the chestBruises on both handsTenderness on both handsSwelling on the right kneeBruised scars on both handsBruised scar on the right knee 10)

39. The appellant's prayer was for an award of Kshs. 300,000/= which he deemed to be reasonable and sufficient to compensate him for the pain and suffering.

40. In so submitting, the Appellant relied on the following authorities;

> Authority of Hon. Justice S.N Riechi, dated 10th day of march 2021, in case of *Poa Link Services Co. Ltd & another v Sindani Boaz Bonzemo [2021] eKLR, Civil Appeal 17 of 2019*, where the claimant suffered; 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 and high court upheld an awarded Kshs. 350,000/=.
>
> An authority by Lady Justice C. Meoli, dated 15th day of may 2019, Joseph Kimani Gathaga & another v Dickson Ndungu Njoroge [2019] eKLR, Civil Appeal 103 of 2017, Where the claimant suffered, Blunt injury to the left leg, Blunt injury to the chest and back, Swollen

left knee (tender), Swollen face (tender), cut wound and swelling on left elbow, laceration wound on left arm, Blunt head trauma where the plaintiff was awarded Kshs. 240,000/=.

41. The appellant urged this court to find the authorities cited by him were relevant and comparable to the injuries sustained by the Appellant and as such the court should be minded to render an award that is within the same range as proposed by the appellant.

The Respondent's Case

42. The respondents are strenuously opposed to the appeal.

43. According to them the decision of the lower court was sound and urge the honourable court to uphold the same.

44. The respondents addressed this court on the duty of a first appellate court in the hearing and determination of an appeal citing the celebrated case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123". Where the court of appeal stated inter alia

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

45. According to the respondents the Appellant herein gave contradicting testimonies and hence did not meet the threshold of proving the suit herein as evident from analysis of his testimony.

46. Under the *Evidence Act* Cap 80 Laws of Kenya under section 107 provides that 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'

47. Section 108 of Cap 80 the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, the Act further proceeds to state under section 109 that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

48. Under the aforementioned provisions of Sections 107 and 108 of the *Evidence Act* Cap 80 Laws of Kenya, the person who alleges is under a duty to prove all allegations as contained in his claim against the Defendant, on a balance of probabilities, as was held in Kirugi & Another Vs Kabiya & 3 Others [1987] KLR 347, the Court of Appeal held as follows: -

> " The burden was always on the Plaintiff to prove his case on the balance of probabilities.....

49. The appellant in his testimony testified that he did not see the respondent's vehicle but when pressed further changed his position and stated that he saw the vehicle ahead of him before the accident.

50. The appellant despite testifying as to a pillion passenger being with him, failed to being her to testify and buttress his case which can only be construed to meant the evidence she would have adduced would have been detrimental to the appellant as was held in Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR

51. According to the respondents the failure to call a particular witness or voluntarily to produce documents or objects in one's possession is conduct evidence. (See J. Wigmore, Evidence § 265, at

87 (3d ed. 1940). In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavourable to his cause.

52. The police officer called did not shed any light as to happenings as he did not have the occurrence book to help the court understand the circumstances of the accident neither the police file nor the sketch map of the scene of the accident and only produced the police abstract.

53. The Appellant produced treatment notes from Kaloleni Health Centre and a P3 filled on the same date; however, the said documents do not form part of the Appellant's own testimony as he states in his statement that after the accident, he rode the motorcycle to the police station he went to St Catherine Health Centre for treatment but did not produce any treatment notes from the said facility nor mbagathi hospital which he referred to in oral testimony and written statement.

54. In Daniel Otieno Migore Vs South Nyanza Sugar Co. Ltd [2018] eKLR the high court observed

> 'It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -".....it is now trite principle in 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 fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

55. The Respondents urged this court to find that the account given by them was more credible and consistent more so that the Appellant herein wasn't injured and rode the motorcycle to the station with no any injuries reported at time of recording the occurrence at the police station.

56. This explains why the Appellant chose to have his witness-the police officer not to avail the occurrence book as it would contradict his testimony.

57. The respondents also took issue with the inconsistency as to the hospitals visited by the appellant to show a person who was bent on manufacturing evidence in a bid to reap from a misfortune.

The respondents cited the case of Multiple Hauliers V Patricia Anyango & 2 others [2012] eKLR. The respondents argued that it was not possible to establish the blame worthiness of the matatu driver based on the police abstract.

The respondents further relied on Helle Sejer Hansen & 2 others v Julius Kakungi Mukavi [2020] eKLR in which the court held that ;-

> It was not enough for the respondent to merely plead and, thereafter testify, that an accident occurred and that it was caused by the 3rd appellant's negligence. He had to establish on a balance of probability that indeed the 3rd appellant was negligent in his manner of driving.

58. The respondents' urged this court to find that Appellant was obviously not keen on the road as he indicates to have seen the motor vehicle ahead of him but failed to stop and entered the junction hitting the front left-hand side door

59. The Appellant confirms the point of impact was after the zebra crossing which confirm the Respondents account that the Appellant was riding at a high speed and negligently as he failed to give way to pedestrians at the zebra crossing entered the junction at high speed and rammed into the vehicle which was already exiting the junction hence the point of collision.

60. According to the respondents the Appellant was the author of his own misfortune and sought to rely on the doctrine of ex turpi causa non oritur actio and hence should be estopped from claiming any damages.

61. He negligently entered the junction at a high speed just past a pedestrian crossing and crushed into the respondent's vehicle occasioning the accident

62. In view of the two competing probabilities the respondents urged this court to consider that the suit ought to have been dismissed and was properly so dismissed. see also Kanyungu Njogu vs Daniel Kimani Mainal (2000) eKLR.

63. The respondents however concluded by submitting that in the alternative the court should apportion liability 50:50 since there was no certainty of who was to blame for the accident guided by the decision in

> Aburili J in Commercial Transporters Limited v Registered Trustees of the Catholic Archdiocese of Mombasa [2015] the court held that :-
>
> > "Where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally liable. In the circumstances, I apportion liability at the ratio of 50:50 between the drivers of the two vehicles."
>
> Nelson Njihia Kimani v David Marwa & another [2017] eKLR
>
> I must state here that both the plaintiff and the 1st defendant blame each other for the causation of the accident. The evidence before the court does not give the true story and the truth as to the real cause but scrutiny of the same shows that and it is my finding, that both parties played a role, to the causation..... In that limbo the best I can do is to find that both the plaintiff and the 1st defendant were equally to blame for the accident,
>
> It is however important to note that the appellant testified that he was hit by the motor vehicle KDE 197K while riding a motor cycle KMGA 841K. The motor vehicle was owned by the 1st respondent and driven by the 2nd respondent at the time of the accident.

Quantum

64. On quantum the respondents proposed that should the court be inclined to award any damages, a sum of Kshs.100,000/- would be sufficient noting the appellant pleaded he sustained minor soft tissue

injuries namely blunt chest injury, both hands, right knee, chest, both hands, right knee, bruises both hands and right knee .

65. The proposal of a ksh 100,000 was made on the strength of the following decision of Elisha Akello Raga v Shajanand Holdings Limited & another [2016] eKLR where the late Majanja.j observed,

> wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.'
>
> The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant."

66. The respondents urged this court to find that the objective of damages was not to punish the defendant but to seek to redress the harm by giving an award that is a reasonable compensation for the injury -

> Rege v LA *(Minor suing through her father and next friend GAA) (Civil Appeal E111 of 2021*) [20221 KEHC 16634 (KLR) (20 December 2022) (Judgment) Where the court on appeal set aside the award by the trial court and substitute it with an award of Kes. 80,000/- for general damages for sustaining bruises on the right hand, blunt trauma to the right hand and chest contusion.
>
> Daniel Odhiambo Ngesa Vs Daniel Otieno Owino & Another [2020] eKLR Where the trial Court awarded Kshs. 90,000/- for blunt chest injury, sprain on the neck, dislocation of the right shoulder joint, blunt abdominal injury, friction lacerations on the left lower limb and dislocation at the ankle joint.
>
> HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another [2021] eKLR
>
> Where the appellate court upheld the decision of the trial court and found that the assessment of damages is not amenable to appeal. The trial court awarded Kes. 60,000/- for soft tissue injuries.

67. However, the respondents concluded by urging this court to dismiss the appeal in its entirety.

Analysis and Determination

68. The appeal turns on the sole question as to whether or not the appellant established his case before the lower court to the required standard.

69. The facts as established through the testimonies of various witnesses leave no doubt that an accident involving the motor cycle of the appellant and the respondents motor vehicle occurred.

70. It is not clear from their respective versions of evidence who exactly was to blame but certainly the appellant suffered injury.

71. The duty of this court as a first appellate court is to re-evaluate the evidence in its totality and drawn independent conclusions therefrom as to whether the appellant proved his case while appreciating the fact that this court unlike the lower court did not have the opportunity to hear and see the witnesses. See Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123

72. From my analysis of the evidence, the learned honorable magistrate in his judgment appears to have drawn conclusions not based on evidence but supposition and suspicion.

73. For instance, where did the magistrate get the evidence of fraud for her to state in the judgment that 'in the alternative his medical documents could have been fraudulent?''. The statement by the court betrays the fact that the court was minded to dismiss the plaintiffs claim.

74. It is possible for inconsistencies in evidence to happen but that alone cannot be taken to be evidence of fraud.

75. The doctor gave evidence and the court had an opportunity to pose any questions to the witness as to the veracity of the medical evidence. It cannot be that a witness appears, testifies and the court simply lets him leave the witness stand with doubts lingering in the mind of the court as to probative value of the evidence tendered by the witness. It must never be the business of the court to imagine things that could be elicited during the hearing.

76. In the instant case if at all the court doubted the authenticity of the medical evidence, the proper thing to do would have been to confront the appellant and his witness on the evidence. The court does not appear to have done so therefore the dismissal of that evidence was erroneous in law.

77. Looking at the totality of the circumstances surrounding the occurrence of the accident I find that respondents as well as the appellant were to blame for the occurrence of the accident. It was a case of drivers not extending courtesy to each other. The accident did occur and injuries were suffered. None of the parties can escape liability all together. This court holding the scales of justice finds fault on both parties.

78. In the circumstances liability is hereby apportioned at 50;50 between the appellant and the respondents jointly and severally. The damages payable to the appellant are assessed at ksh.300,000 considering the authorities cited and taking into account the prevailing economic circumstances.

79. The appellant shall have the costs of the matter in the lower court as well as costs for this appeal.

80. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Musili absent for the Appellant

Momanyi for the 1st Respondent

Chengecha 2nd Respondent