



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwirichia v Karata (Civil Appeal 55 of 2020)  
[2025] KEHC 3258 (KLR) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 55 OF 2020  
PN GICHOHI, J  
FEBRUARY 12, 2025**

**BETWEEN**

**JORAM M’NARANGU MWIRICHIA ..... APPELLANT**

**AND**

**JOSHUA NYAGESERO KARATA ..... RESPONDENT**

*(An Appeal from the Judgement of Hon. W.K Kitur (RM)  
delivered on 27th August, 2019 in Nakuru CMCC 1322 of 2016)*

**JUDGMENT**

1. The background of this Appeal is that Respondent herein sued the Appellant vide a plaint dated 19<sup>th</sup> December, 2016 seeking judgment against him for:-
  - a. General damages.
  - b. Special damages of Kshs. 11, 490.
  - c. Costs of the suit.
  - d. Interest on (a), (b) and (c).
  - e. Any other or further relief that the court may deem fit to grant.
2. His claim was that on or about 16<sup>th</sup> March, 2016, the Respondent was lawfully riding his motor cycle registration number KMCS xxxU along Nakuru-Nairobi Highway near Nakuru State house gate when the Respondent Motor Vehicle Registration number KBA xxxY, drove on the wrong side of the road, encroached on his lane and collided with him head on as a result of which the Respondent sustained compounded open fracture of the right tibia and fibula.



3. In the particulars of negligence, the Respondent stated that the driver of the said vehicle made a U-turn across the Highway in undesignated area, while driving the vehicle at excessive speed, thus unable to control the vehicle to avoid the accident.
4. The Appellant herein filed his defence dated 22<sup>nd</sup> February, 2017 on 24<sup>th</sup> February, 2017 denying the entire claim. He denied the occurrence of the accident as well as the alleged negligence on his part.
5. He pleaded in the alternative and without prejudice, that if an accident occurred then the Respondent was substantially to blame for accident having failed to keep safe distance on the road and riding at a high speed on the wrong side of the road. He further stated that, if an accident occurred, the same was inevitable and occurred despite exercising caution. He therefore prayed for dismissal of the suit with costs.
6. After hearing both parties, the trial court delivered its judgement on the 27<sup>th</sup> August, 2019 and entered judgment in favour of the Respondent as against the Appellant as follows : -Liability .....100% .General damages.....Kshs. 900,000/= .Special damages.....Kshs. 11,490/=costs and interest of the suit.
7. Aggrieved by this decision, the Appellant filed a Memorandum of Appeal dated 18<sup>th</sup> March, 2020, on the following grounds:-
  1. The learned magistrate erred in law and in fact by disregarding the Evidence of the Appellants thus failing to judiciously exercise his discretion.
  2. That the learned magistrate erred in law and in fact by failing to take into account the evidence and the submissions on liability given on behalf of the Applicant while considering his judgement.
  3. That the learned magistrate erred in law and in fact by failing to appreciate the totality of the evidence before him and in not considering the submissions on behalf of the Appellant.
  4. That the learned magistrate erred in law and in fact by finding that the Applicant was 100% liable.
  5. That the learned magistrate erred in law and in fact in awarding general damages that was too high.
  6. That the learned magistrate erred in law and in fact in placing a lot of weight on the Applicant's evidence as opposed to the Respondent.
8. He therefore urged this Court to make the following orders:-
  - a. Judgement of the lower court on liability and quantum be set aside.
  - b. The Appeal be allowed as prayed.
  - c. Costs of this Appeal and of the judgement in the subordinate court be awarded to the Appellant.

### **Appellant's Submissions**

9. The Appellant condensed the grounds of Appeal into three issues being:-
  1. Whether the Respondent proved his allegations on liability.
  2. Whether the damages awarded are exorbitant.



3. Who should be awarded costs of Appeal.
10. On liability, the Appellant submitted that the burden of proof rests on the Respondent under Section 107-109 of the *Evidence Act* but he failed to substantiate his allegations of negligence against the Appellant. In support he cited among others, the case of Alexander Mwendwa Mwova & Others V Attorney General [2021] eKLR where High Court held that:-

“The silence of the Defendants cannot be used to assist the Plaintiffs in law. The courts are always alive to the veracity of Sections 107 and 108 of the *Evidence Act*.”

11. It was submitted that though the Respondent alleged that the Appellant made a U-turn on the highway and hit him head on, that allegation was not established and the eye witnesses mentioned by the Respondent did not testify in support of the case.
12. It was further submitted that the Police Officer who testified was not the Investigating Officer but only produced the Police Abstract that merely affirmed that an accident occurred but did not blame any party and therefore, liability was not proved.
13. On quantum, the Appellant submitted that the trial court awarded excessive general damages based on an irrelevant consideration and therefore this Court has powers to interfere with the said award guided by the case of Kemfro Africa Ltd t/a Meru Express Services [1976] & Another -VS- Lubia & Another (No.2) where the Court of Appeal held that:-

“The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it must be satisfied that either that 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.”

14. He further submitted that the Courts have time and again emphasised that comparable injuries should be compensated by comparable awards. In support, he placed reliance on case of Maselus Eric Atieno Vs United Services Limited [2017] eKLR where High Court upheld award of Kshs. 250,000 for fractures of the right leg tibia and fibula bones, bruises on the right elbow, tenderness and swelling of the right knee, injury of the pelvic region, thigh and elbow.
15. Further, he relied on the case of Alice Nyawira Miano Vs Dr. Moses Mburu Mwaura [2015] eKLR, where the Respondent was awarded Kshs. 350,000 for compounded fractures on the right leg and the case of SDV Transami K Ltd Vs Scholatica Nyambura [2012] eKLR where the Respondent suffered compounded fracture of the right tibia and fibula, cut wound on the left leg, multiple cut wounds on the right leg and the court awarded Kshs 350,000 which was reduced to Kshs. 250,000 on appeal.
16. He therefore urged that the trial court’s award of Kshs. 800,000/= be reduced to Kshs. 200,000/= considering that the Respondent herein suffered only a fracture of the fibula and tibia bones.

### **Respondent’s submissions**

17. On liability, the Respondent submitted that PW3 confirmed that it was the officer manning the state house who volunteered information of the accident and gave them the registration number of the subject motor vehicle.
18. The Respondent argued that the issue raised of the motor vehicle being a Toyota Sprinter and not a Lexus was raised before the trial court but the Respondent failed to tender any evidence to confirm



that there existed another vehicle with the same registration number. That his alibi that he was in Chogoria, Tharaka Nithi County at the material time was not established and on that basis, the Respondent argued that the trial court was right in finding the Appellant 100% liable.

19. On credibility of the Appellant testimony, it was submitted that the claimant stated during hearing that he first visited Nakuru on 29<sup>th</sup> May, 2018, however, upon cross examination, he admitted that he came to Nakuru on two occasions in 2017. He also denied being charged but later changed the position and stated that he was charged with a traffic offense touching on the same accident.
20. On quantum, the Respondent cited the case of Butt Vs Khan [1981] KLR 349 where the Court held that:-

“An appellate court will not disturb an award of 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.”
21. In support of the award granted by the trial court, the Respondent cited the case of George William Awuor v Beryl Awuor Ochieng [2020] eKLR where the Court awarded Kshs. 1,300,000/= for fractured of the right femur and the left tibia and fibula.
22. The Respondent also cited the case Teresiah Ngugi & Anther v Michael Masia Kimended [2018] eKLR, where the High Court upheld an award of Kshs. 1,500,000/= for mild head injuries, blunt chest injury with fractured ribs, cut would right leg below the knee, and compounded fractures of the fibula.
23. In conclusion, the Respondent urged this Court to find that it had established its case on a balance of probability and the trial court’s award was justified. He prayed that the award be upheld.

### **Analysis and determination**

24. This being the first appeal, this Court’s duty is to re-assess and re-evaluate the evidence and draw its own conclusion bearing in mind that it has neither seen nor heard the witnesses- See Selle and another –vs- Associated Motor Boat Company Ltd.& Others [1968] EA 123.
25. Towards that end, it is clear that the Appellant contests the trial court’s finding on both liability and quantum.
26. On liability, the Respondent (PW1) testified that he was riding his motor cycle along Nakuru-Nairobi highway and upon reaching State House areas, the Appellant vehicle abruptly crossed from its rightful line to his, hitting him head on collision. He stated that he did not see the registration of the vehicle because he lost consciousness.
27. The Respondent’s daughter named Eunice Nyaboke (PW2) told the court that she was called at around 10.45 am on the material day and informed that her father had been hit by a speeding vehicle that run away. She rushed to the scene and on arrival, she was informed by eye witnesses how the accident occurred and the Police Officer manning State House gave her the registration number of the vehicle KBA xxxY.
28. The third witness, CPL Jackson Nkonge, (PW3) confirmed that the accident occurred on 16/3/2016 involving motor vehicle registration number KBA xxxY, Toyota lexus and motor cycle registration number KMCS xxxV Sony. He produced the Police Abstract and stated that the vehicle crossed pavement and drive on the opposite direction, hitting the motor cycle rider. He blamed the driver for crossing pavement and failing to keep to his lane.



29. The Appellant on the other hand, denied being at Nakuru vicinity on the material day and maintained that he was in Chogoria and that he has never been to Nakuru before this case was instituted. He also stated that his car has never been involved in any accident and neither has he been charged in any traffic case.
30. In cross-examination, he told the court that he first came to Nakuru in June, 2017. He admitted that he was charged in a traffic case recently but maintained that his car has never been driven to Nakuru. However, he reverted back to his statement and stated that he first came to Nakuru on 29<sup>th</sup> May, 2018 thus showing inconsistency in his evidence.
31. The Respondent was consistent on how the accident occurred and that was corroborated by his daughter who went to the scene of the accident and received information as to how the accident occurred. The Police Officer equally corroborated the evidence of the PW1 and PW2 and stated that the information was obtained from the Occurrence Book.
32. The Appellant on the other hand denied his involvement in the accident, but contradicted himself by giving two varying dates on when he first came to Nakuru. His statement that he was at Chogoria, Tharaka Nithi on the material day was not supported by any evidence.
33. The Appellant added that Police Abstract shows that the vehicle involved in the accident was a Toyota Lexus while his car was a Toyota Sprinter and therefore, the Appellant alleged that there could have been another car with the same plate. However, there was no evidence to support this allegation.
34. Further, the trial court did not address the issue of the car model but all the witnesses stated was that the accident motor vehicle was registration number KBA xxxY. This number was given to the PW2 at the scene of the accident. The Police Officer who testified also confirmed that the number plate was indicated in the Police Abstract by the Investigating Officer.
35. It is notable that even in this Appeal, the issue of the model of the car was not pursued and the Appellant did not make any argument around this issue.
36. Having been placed at the scene of the accident, the Appellant was required to produced evidence to dislodge that fact but failed to do so. In the circumstances, this Court is satisfied that the Appellant's vehicle was was involved in the accident and in the manner narrated by the witnesses. The Appellant moved to the pavement and drove on the wrong side of the road thus causing the accident. The trial court's finding on liability at 100% against the Appellant was justified and therefore upheld.
37. On quantum, the Respondent stated that he suffered fracture of the tibia and fibular bones. These injuries are indicated in the P3 Form dated 13/9/2016 and the Medico-legal report by Kinoo Medical Clinic dated 5/12/2016 which showed degree of disability was 10%.
38. The trial court awarded general damages of Kshs. 900,000/=, basing the award on the case of Veronica Mwangezi Kilonzo Versus Robert Karume [2003] eKLR, where the plaintiff suffered Compound fracture right tibia/fibula which was immobilized with an external fixator and later skin grafted and a fracture/dislocation of the left ankle. She was awarded Kshs. 500,000/= as general damages for pain and suffering.
39. The Appellant argued that the award herein was excessive and proposed that it be substituted with a reasonable award of between Kshs. 200,000/= and Kshs. 250,000/=. In support he cited several cases including the case of Maselus Eric Atieno v United Services Limited [2017] eKLR where on appeal, the Court upheld an award of Kshs. 250,000/= for fracture of of the right leg tibia/fibula bones, bruises



on the right elbow joint, tenderness and swelling on the right knee , injury on the pelvic region , injury on the right thigh, injury on the elbow joint and pain on the abdomen.

40. It is settled that the award of damages is within the discretion of the trial court and an appellate court should be hesitant to interfere with such discretion. Indeed, the Court of Appeal in *Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates* [2013] eKLR had this to say on the issue:-

“...this court will not ordinary 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.”

41. Further, in *Butt v Khan* [1981] KLR 349 where Law, JA held thus:-

“... An appellate court will not disturb an award of 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...”

42. It is also settled that comparable injuries should attract comparable award of damages. In this case, the medical report by Dr. G.K. Mwaura of Kinoo Medical Clinic shows that the Respondent herein sustained compound (open) fracture- right tibia and fibula - 1/3 herein had healed save for pain on the right leg upon exertion, cannot walk for long or carry heavy objects. The doctor opined that the degree of disability was 10%.
43. In *Mohammed Younis Quereshi & Another v Chris Maina Mathu* [2020] eKLR , the Respondent therein sustained fracture of left tibia, bruises on the head, both hands and left leg. It was opined that the injuries would heal but leave him with disability at 20%. The appellate court reduced the trial court’s award of Kshs. 800,000/= to Kshs. 400,000/=.
44. In *Kiama v Mutiso (Civil Appeal 40 of 2023)* [2024] KEHC 5135 (KLR) (13 May 2024) (Judgment), the Respondent had sustained a fracture of the left tibia bone (upper 1/3) and a blunt injury to the left leg and thigh. High Court reduced the trial court’s award of Kshs. 700,000/= to Kshs. 400,000/=.
45. On the other hand, the injuries sustained by the Respondent in *Teresiah Ngugi & Another* (supra) cited by Respondent herein and those in *Veronica Mwangezi Kilonzo* (supra) relied on by the trial court are more serious than those sustained by the Respondent herein.
46. In *Karanja & another v Mwachala (Civil Appeal E749 of 2021)* [2024] KEHC 7171 (KLR) (4 June 2024) (Judgment), the Respondent sustained compound (open) fracture of the left tibia and compound (open) fracture of the left fibula and the degree of disability was assessed at 10%. On appeal, R.E. Ougo J found the trial court’s award of Kshs. 900,000/= excessive and substituted it with an award of Kshs. 700,000/- putting into account the rate of inflation too.
47. In the circumstances, this Court finds the award of Kshs. 900,000/= excessive and calls for interference by this Court. That award is set aside and substituted with an award of Kshs. 700,000/=.
48. In regard to special damages, the Respondent specifically pleaded a sum Kshs. 11,490/= and produced receipts in support thus strictly proving the said sum. The award upheld.



49. In conclusion, the Appeal partially succeeds and the trial court decision is set aside and substituted with judgment in favour of the Respondent as against the Appellant as follows: -

1. Liability-100%
2. General damages.....Kshs. 700,000/=.
3. Special damages .....Kshs. 11,490/=.  
Total .....Kshs. 711,490/=.
4. Each party to bear its own costs of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

Ms. Odhiambo for the Appellant

Ms. Waweru for the Respondent

Ruto, Court Assistant

