



Nyabuto v Ascot Engineering Solutions Limited & another (Civil Appeal E1144 of 2023) [2025] KEHC 1883 (KLR) (Civ) (18 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1144 OF 2023

JM NANG'EA, J

FEBRUARY 18, 2025

BETWEEN

EVANS NYABESA NYABUTO APPELLANT

AND

ASCOT ENGINEERING SOLUTIONS LIMITED 1ST RESPONDENT

JOYCE MUKAMI 2ND RESPONDENT

(Being an appeal from the Judgement of the Chief Magistrate's Court at Milimani, Nairobi Commercial Courts (Hon. G.M. Gitonga- PM) delivered on 16/10 2023 in CMCC NO. 1547 of 2020)

JUDGMENT

The Pleadings

1. The appellant herein is challenging the said learned trial magistrate's judgement in which he dismissed the appellant's suit with costs to the respondents for want of proof of the claim to the required legal standard.
2. The summary of the case before the trial court is that the appellant sued the respondents jointly and severally for general damages, special damages, the costs of the suit and interest following a road traffic accident that occurred on 18/1 2020 in which the appellant suffered bodily injuries. The 2nd respondent was accused of negligently driving the 1st respondent's motor vehicle registration number KBMU 513 E ("the vehicle") as a result of which it lost control and hit the appellant who was riding motorcycle registration number KMDZ 419 S ("the motorcycle") thereby injuring him.



3. The respondents filed a joint defence traversing all the material particulars of the suit putting the appellant to strict proof. In the alternative, they attribute any such accident that may be proven to have occurred to negligent driving of the motorcycle.

The Evidence

4. The appellant's evidence before the trial court is that as he rode the motorcycle on the Nairobi-Mombasa highway, the vehicle suddenly veered onto his lane and collided head-on with the motorcycle causing him injuries to the face, right hand, right leg and the groin area. He attributed the collision to the vehicle which was said to be overlapping and driving at high speed when it was not safe to.
5. PW1 (police officer) testified that the accident was reported to Athi River police station. He produced the police abstract report of the accident. The officer neither visited the scene of the accident nor investigated the same.
6. Dr Cyprian Okoth Okere (PW2) told the court that he examined the appellant on 30/1/2020 and confirmed his injury. The injuries were noted as deep cuts and bruises on the forehead and right face; bruises on the mandibular region; right coles fracture; dislocation of the right metatarsal-phalangeal joint and further bruises on the perineal region. The injuries were classified as grievous harm. Resulting permanent incapacity was assessed as 20%.
7. The vehicle driver (Peter Mbira Karaoke) testified as DW2. He explained that the 2nd respondent was his wife and the registered owner of the vehicle. He further stated that on the material date he was driving the vehicle to the left of the road on the service lane when he saw the motorcycle approaching at high speed. He swerved to the right to avoid a collision but the motorcycle still hit the left side of the vehicle. The witness ascribed blame on the appellant for speeding on the wrong side of the road and failing to apply brakes.
8. DW (Dr Wambugu) examined the appellant on 23/11/2020 for a second medical-legal report at the request of the respondents around 10 months after Dr Okere's examination. His opinion was that the 1st respondent's injuries largely healed save for mild stiffness of the wrist. The degree of permanent disability had reduced to 2% because of the successful healing.
9. The appellant's Grounds of Appeal as stated in his Memorandum of Appeal dated 27/ 10/2023 may be condensed as hereunder:
 - a. That the learned trial magistrate erred in law and fact by finding that the appellant did not establish the respondents' liability against the weight of evidence.
 - b. That the learned trial magistrate erred in law and fact in applying wrong principles of law and thus arriving at an erroneous conclusion.
and
 - c. That the learned trial magistrate erred in law and fact by relying on extraneous considerations and inferences.
10. The appellant therefore prays for the appeal to be allowed with costs and that the lower court's judgement dismissing the suit be set aside and/or vacated. The court is also urged to grant any other reliefs it may deem necessary.
11. The parties filed written submissions vide the court's e-filing platform which I have perused together with the record of this appeal.



12. It is trite law that the appellate court can only interfere with the findings and /or award of the trial court if the court misdirects itself on matters of fact and /or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd vs Oakdale Commodities Ltd* (1997) eKLR Civil Appeal No. 198 of 1995). The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle vs Associated Motor Boat Co.* (1968) EA 123. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
- “i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
13. This appeal is on the trial court’s judgement on liability for the claim. In dismissing the suit the learned trial magistrate noted that there was no independent eye witness to the accident, while the appellant and the driver of the accident vehicle gave different accounts of how the accident occurred. Citing the case of *Statpack Industries Limited vs James Mbiti being Nairobi HCCC No. 152 of 2003*, the trial court observed that the appellant shouldered the burden of proving the causal link between his injuries and the manner of driving of the vehicle . The court reached the conclusion that the appellant failed to discharge the burden and proceeded to dismiss the suit.
14. The appellant’s advocates submit that their client proved the respondents’ liability for the claim in the lower court on a balance of probability. I was referred to various decided cases including *William Kabogo Gitau vs George Thuo & 2 Others* (2010) KLR 526 and *Nakuru Civil Appeal No. 108 of 2020* (*Peter Kibe Waweru vs Moses Maina*). It was held in these decisions that a party must persuade the court that it is more probable than not that the allegations made in a suit took place in order to successfully prove the claim. The appellant further places reliance on *Nairobi Court of Appeal Case No. 34 of 2005* (2006) eKLR where it was observed that where it is not reasonably possible to decide blameworthiness on the evidence presented , both sides should be held equally to blame.
15. On the issue of damages the appellant submitted for a sum of Kshs. 700,000 in general damages for pain and suffering. Reference was made to the Court of Appeal decision in *Appeal No. 118 of 2002* (*George King’oina Maranga & Sammy Kinyanjui vs Lucy Nyokabi Ndambuki*) in which general damages of Kshs. 420,000 were assessed and awarded to the claimant. The claimant therein sustained a fracture of the right radius in the distal third; a fracture of the styloid process of the right ulna and dislocation of the right wrist joint.
16. On their part, the respondent’s advocates submit that the trial court rightly dismissed the suit. The court is told that the appellant failed to discharge his burden of proof of the claim on a balance of probability. Among other judicial determinations, Counsel make reference to superior courts decisions in *Palana Investment Limited vs Geoffrey Kariuki Mwenda & Another* (2015) eKLR and *Benter Atieno Obonyo vs Anne Ng’ang’a & Another* (2021) eKLR in which it was observed that where neither party convinces the court on blameworthiness, the party bearing the burden of proof loses.



17. From the evidence adduced before the lower court, the appellant and the accident vehicle driver blame each for causing the accident by veering onto the other's lane. There is no other independent evidence explaining the circumstances leading to occurrence of the accident. The police officer who testified in support of the appellant's evidence never witnessed the accident and didn't visit the scene. It is therefore difficult to tell how the accident occurred, and in particular who caused it. The Court of Appeal in *Stephen Obure Onkanga vs Njuca Consolidated Limited* (2013) eKLR has held that where there is;
- “No concrete evidence to distinguish between the blameworthiness or otherwise of the appellant or respondent, both should be held equally to blame”.
18. Accordingly, I find that this is a suitable case for ascribing responsibility for the tortious act equally between the parties, and I so find and hold. The grounds of appeal accordingly succeed.
19. It is established judicial practice that where a suit such as the instant one is dismissed, the court should assess damages it would have granted to the claimant had liability been determined in his/her favour, for the benefit of the appellate court in the event of any appeal. The trial court therefore wrongly failed to assess damages. The usual practice in such circumstances is to refer the matter to the trial court for assessment of damages. I will, however, proceed to assess the damages claimed as both parties have addressed the court on the issue.
20. The respondents think that Kshs. 100,000 general damages would be sufficient to compensate the appellant in the event that he establishes liability against him. The case of *Patricia Adhiambo Omolo vs Emily Mandala* (2020) eKLR is said to offer useful guidance to the court. For a fracture of the left forearm radius and ulna bones; Colles fracture of the left forearm; swollen and deformed distal aspect of the left forearm and other multiple bodily injuries the claimant therein was awarded Kshs. 180, 000/= general damages.
21. Indeed it is now settled that similar injuries in cases of tort are to be compensated by comparable awards in other superior courts' decisions.
22. To sample a few other relevant cases, in *Kibue & Another vs Ngige* (2022) KEHC; *Jackson Mbaluka Mwangangi vs Onesmus Nzioka & Another* (2021) eKLR; *John Mwangi Munyiri & Another vs Paul Wachira Njuguna* (2020) eKLR; *Joseph Mwangi Thuita vs Joyce Mwole* (2018) eKLR and *Daneva Heavy Trucks & Another vs Chrispine Otieno* (2022) eKLR relating to various comparable injuries that include fractures and other injuries the claimants therein were granted between Kshs. 500, 000/= and Kshs. 1,000,000/= in general damages for pain, suffering and loss of amenities.
23. Upon considering all the relevant factors which also include the incidence of inflation regard being to passage of time since the cited cases were determined, I would grant the Appellant Kshs. 500,000/= in general damages for pain and suffering he endured.
- a. The trial court's judgement dismissing the suit is set aside and substituted with an order apportioning blameworthiness equally between the parties.
 - b. The Appellant is granted Kshs. 500,000 general damages for pain and suffering.
 - c. The parties will bear their own costs of this appeal and in the lower court.
24. Judgement accordingly.

J. M NANG'EA, JUDGE.

Judgement delivered virtually this 18th day of February, 2025 in the presence of:



The Appellant's Advocate, Ms Owino

The 1st and 2nd respondents' Advocate, Ms Machora for Mr. Thuita

J. M NANG'EA, JUDGE.

