



REPUBLIC OF KENYA



**Mutua & another v Moseti (Civil Appeal E005 of 2024)
[2025] KEHC 3926 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E005 OF 2024
MW MUIGAI, J
MARCH 21, 2025**

BETWEEN

GEOFFREY MUTHIANI MUTUA 1ST APPELLANT

DANIEL KAMAU 2ND APPELLANT

AND

KEFAH ARANI MOSETI RESPONDENT

*(Appeal from Judgment of Chief Magistrate Court Mavoko, before Hon.
R.Gitau (SRM) delivered on 1st August, 2023 in CMCC No 948 of 2019)*

JUDGMENT

1. By Plaintiff filed on 4/12/2019, the Respondent claimed against the Appellants damages arising from a road traffic accident that occurred on 29/5/2019. The Plaintiff/Respondent was lawfully and carefully standing off Mombasa Road when motor vehicle Reg KCM 641M' driver carelessly and recklessly drove and veered off the road and knocked off the Plaintiff occasioning him severe bodily injuries as a result he suffered loss and damage.
2. The Plaintiff/Respondent deposed particulars of negligence by driver of motor vehicle Reg KCG 641M were driving at excessive speed without due care and attention failed to control the vehicle to slow down, brake swerve or take reasonable steps to avoid the accident thereby causing the accident. The Plaintiff relied on the doctrine of Res ipsa loquitor.
3. The Plaintiff sought General damages, Special damages, Future medical expense for replacement of a tooth Costs of this suit and Interest from the date of filing this suit.
4. The 1st & 2nd Defendants Appellants filed Defense on 29/2/2021 and denied particulars of negligence by driver of the said motor vehicle Reg KCG 641M and denied that the Plaintiff /respondent was a lawful pedestrian besides the road on Mombasa Road.



5. The Defendants attributed negligence to the Plaintiff Respondent that he failed to keep proper lookout, pay attention, take heed of the Motor vehicle Reg KCG 641M, failed to observe traffic rules, courted disaster by illegally unlawfully crossing the road, inebriated while crossing the road failed to have due regard to his own safety.
6. The Defendants also relied on the doctrine of Res ipsa loquitur.

Trial Court Proceedings

7. PW1, Kefah Arani Moseki testified and relied on his Witness statement filed on 4/12/2019. He stated that on 29/5/2019 he was standing off the road along Mombasa Road near Nation area, when motor vehicle reg KCG 641M was recklessly and carelessly driven and in the process knocked him and occasioned him severe bodily injuries.
8. PW1 was rushed to Athi River Shalom Community Hospital and he was treated and discharged. Later, after medication, he went to Athi River Police Station and reported the accident and he was issued with P3 Form & Police Abstract after he recorded his statement. He blamed the driver of motor vehicle KCG 641M
9. PW2 Sgt Phyllis Mwikali from Athi River Police Station produced the Police Abstract dated 6/9/2019 -Exhibit 1; in relation to the road traffic accident that occurred on 25/5/2019 involving Motor Vehicle Reg KCG 641M which knocked pedestrian Kefah Muteti, PW1 who sustained injuries. The accident occurred at Nation Centre along Mombasa road. PW2 charged Ksh 5000/- for Court attendance.
10. The Plaintiff closed its case. The Defendants offered no evidence and also closed their case.
11. Upon submissions filed both parties before Trial Court Judgment was delivered on 1/8/2023. The Trial court found 100% liability for the plaintiff against the Defendants. On quantum, the Trial court awarded Ksh 400,000/- & Special damages Ksh 17,650/-

Memorandum of Appeal

12. That the learned Magistrates erred in law and fact in failing to consider and find that the 1st and 2nd Appellants had shown a “prima facie” case with a high probability of success.
13. That the learned Magistrate erred in law and fact in failing to consider and find that a police abstract is not conclusive proof of liability.
14. That the learned Magistrate erred in law and fact in failing to consider and find that the Police Officer was neither present at the scene of the accident nor was she the investigating officer and as such cannot render any account leading up to or surrounding the alleged accident.
15. That the learned Magistrate erred in law and fact in failing to consider and find that where there is no concrete evidence to determine how the accident occurred and who is to blame for causing an accident, both parties should be held equally liable.
16. That the learned Magistrate erred in law and fact in failing to consider and find that there can be no liability without fault.
17. That the learned Magistrate erred in law and fact in failing to consider and find that in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that not two cases are exactly alike.



Respondents Submissions

18. This court to be persuaded by the reasoning of Justice G.V. Odunga in *Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu* [2012] e KLR on the consequences of a party failing to call evidence wherein he stated: -

“.....in the case of *Motex Knitwear Mills Limited Milimani HCC834/2002* Honourable Lessit J citing *Autar Singh Bahra & Another Vs Raju Govindji HCC 548 of 1998* stated: “Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the st plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence

and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail....” Where a party fails to call evidence in support of its case, that party’s pleadings remain mere pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

19. It was not shown that the assessment by the Trial Magistrate was either based on the wrong fact or too high to warrant interference. It is our humble submission that the learned Trial Magistrate applied the correct principles of law and available facts and as such we humbly find no reason for this court to interfere with the learned Trial Magistrate judgment. In so submitting, this court is to be persuaded by the determination in the case of *Peter Namu Njeru v Philemone Mwangi* [2016] eKLR, Civil Appeal 132 of 2012, where Hon. Justice P.J.O. Otieno stated that:-

“In order for an appellate court to interfere with an exercise in discretion by a trial court in assessing damages, it must be demonstrated that the award was inordinately too high or too low as to present an entirety erroneous estimate of compensation to which the respondent was entitled or that the court took into account irrelevant factors or failed to take into account relevant factors and that the exercise of discretion was wholly injudicious not expected of a reasonable adjudicator”.

Appellants Submissions

20. The case of *Omoke v Owino & 3 others (Civil Appeal E103 of 2023)* [2024] KEHC 2652 (KLR) cited the Court of Appeal decision in *Michael Hubert Kloss & Another V David Seroney & 5 Others* [2009] eKLR in discussing the question of liability, where it was held:-

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v 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. One may find that as a matter of history several people have been at fault and that if any of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause,



but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

21. Direct Evidence is defined in Civil Appeal No. 032 of 2021, *Bwire V. Wayo & Sailoki* [2022] KEHC 7 (KLR) as;

“Evidence that establishes a particular fact without the need to make an inference in order to connect the evidence to the fact. It supports the truth of an assertion (in criminal law, an assertion of guilt or innocence) directly, i.e. without the need for an intervening inference. It directly proves or disproves the fact.”

22. The Learned Judge in the case of *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) stated his position on the probative value of indirect evidence as follows:-

“The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant. In fact, the Magistrate other than saying the appellant never adduced evidence, he never explained whether the evidence before him discharged the evidential burden of prove. Had the trial Magistrate appreciated that the initial evidential burden rests upon the plaintiff, and had he carefully applied his mind to the law, he would have held that there was nothing for the appellant to rebut since the Respondent had not discharged the legal burden of prove. However, he was blinded by the mere fact that the appellant never called evidence and overlooked binding decisions cited by the appellant before him. At that point it was irrelevant that the appellant adduced evidence at all because there was nothing to rebut. On this ground alone, I allow this appeal in its entirety”

23. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows: “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.” The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows: “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



24. In the case of *Kemfrom Africa Limited vs. Lubia & Another* (No.2)[1987] KLR30, where Kneller JA held as follows:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the 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 wholly erroneous estimate of the damage.”

Analysis & Determination

25. The Court considered the Trial Court record and submissions by parties through respective Advocates on record. The issues for determination are on liability apportionment and reasonable quantum.
26. The Court in discharging its mandate, this being a 1st appeal, it is trite law, that the court evaluates and reconsiders the evidence on record and draws its own conclusion while bearing in mind that the Court has neither seen or heard the witnesses and should make allowances in this respect. This being the first appeal court, its duty is well expressed in *Selle vs. Associated Motor Boat Co* [1986] EA 123. See also *Peters vs. Sunday Post Ltd* [1958] E.A.424; *Butt vs. Khan* [1981] KLR 349 & *Kemfro Africa Ltd T/ A Meru Express Service Gathogo Kanini vs. A. M. Lubia & Olive Lubia* (1982-1988) 1 KAR 727.
27. The Appellants took issue with the issue of 100% liability on the basis that the Respondent failed to produce evidence that the Appellants’ motor vehicle was to blame for the accident by way of OB sketch map/sheets from the scene of accident or otherwise. PW2 the Police Officer produced the Police Abstract that the matter was pending under investigations and no party was found to blame.
28. In the case of *ZAO & CAO vs Amollo Stephen* [2019] eKLR the court found that Police abstract is proof that following an accident, the occurrence thereof was reported to the Police who took cognizance of the accident.
29. The Respondent on the other hand took the view that the plaintiff testified based on his witness Statement and relied on the host of documents attached and produced in Court. Against his evidence, the same was not controverted but rather was corroborated by the said documents produced before the Trial Court.
30. The appellant failed to call any witnesses and the case of *Linus Nganga Kiongo & 3 others vs Town council of Kikuyu*[2012] eKLR on consequences of a party failing to call evidence was in reference to *Motex Knitwear Mills Ltd Milimani HCC834/2002 supra..*
31. The Plaintiff/Respondent obtained OB 74 of 29/5/2019 as shown in the Police Abstract attached and produced as evidence in the Trial Court. The Police abstract contains details of the Respondent as follows;

Name & Address of the owner of the Motor Vehicle Reg No KCG 641MLorry C/O Daniel Kamau 2nd Defendant herein. During Trial, the appellants were represented and did not contest their identity as driver and owner of the registered vehicle during cross examination of PW1 & PW2 except denying occurrence of the accident and liability.

32. How did the Police find these details in the OB and Police Abstract if such vehicle was not involved in an accident? For a busy road as Mombasa Road how & why would the Plaintiff/Respondent pick randomly, the said Reg Nos of a vehicle he did not know had never seen and claim an accident that never



happened but he was injured? The assertion that the Plaintiff did not prove the accident, ownership of the vehicle and that the Defendants were not to blame for the accident is not plausible or reasonable in the circumstances.

33. PW1 also obtained Copy of Motor Vehicle records from NTSA, that confirmed motor vehicle Reg No KCG 641M was registered as owned by Geoffrey Muthiani Mutua. He did not on receipt of Demand Letter dated 16/10/2019 object or deny ownership of the said motor vehicle or at all.
34. In an ideal situation where accidents occur and vehicle(s) and parties are in situ, Police are called to the scene and sketch plans maybe drawn and details of parties/victims are taken by the Scene Visiting Officer, but where the scene is disturbed and/or parties /vehicle(s) take off it is not possible to investigate the accident.
35. Ideally, each party ought to give its version in Court subjected to cross examination and the Trial court determines liability. In the absence of which the Court apportions liability. In this case, it was only Plaintiff's evidence on record which was not controverted.
36. In Civil cases the burden and standard of proof is that he who alleges must prove and on a balance of probabilities.
37. The Plaintiff discharged the burden and standard of proof on adducing direct evidence in the Trial Court of where he was, what he saw, what happened on 29/4/2019 and he was subjected to cross examination by the Appellants' Advocate and tested his credibility as a witness and the veracity of his evidence.
38. The Trial Court found that ' it was uncontroverted that the Plaintiff was off the road and Defendant veered off the road and knocked down the Plaintiff..... no evidence was led to show that the Plaintiff contributed in any way to the occurrence of the accident.'
39. With respect the Defendants/Appellants did not adduce any evidence in the Trial Court to cast doubt or controvert Plaintiff's testimony. Yet they have taken the opportunity on appeal to pock holes to the Plaintiff's testimony whilst it would been best done during trial through cross examination of Plaintiff and Police Officer and adducing evidence to controvert Plaintiff's case. Only then would the Trial Court have evaluated the evidence and in the absence of clearcut evidence on liability apportioned liability between the Parties.
40. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni J. citing the decision in *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”

I find on liability the evidence on record by the Respondent/Plaintiff was sufficient to apportion liability at 100% against the Appellants.

Quantum

41. The Appellants submitted that the Trial Court erred as the Plaintiff sustained injuries as outlined in the medical report and had healed.



Secondly, the trial Court in assessing compensatory damages, the law seeks to indemnify the victim for loss or injury suffered and not to mulct the tortfeasor for injury caused.

42. The Plaintiff testified on the accident that caused injuries loss and damage to him, the medical report by Dr Cyprianus Okoth Okere of 17/10/2019 confirmed the Plaintiff/respondent sustained Head injuries with facial bruises, blunt neck injury and fracture of tooth 43. He suffered recurrent headaches & neck pains. The injury was classified as severe harm and would need Ksh 10,000/- to replace the tooth.
43. The medical evidence by 2nd medical report of 19/7/2021 was by Dr W.N.Khamala who found well healed head and neck soft tissue injuries healed facial bruises with no scars and missing lower central incisor tooth(43)
44. The authorities cited by Plaintiff Trial Court considered Patrick Mureithi Mukuha vs Edwin Warui Munene & 5 other 2005 eKLR where award was Ksh 500,000/- for more serious injuries than Plaintiff's herein and the Trial Court distinguished the case.
45. Justine Nyamweya Ochoki & anor vs Prudence Anna Wambui[2020] eKLR (cited by Appellants) award was Ksh 300,000/- injuries comparable to instant case.
46. Joseph Mutua Nthia vs Fredrick Moses K.Katuya [2019] eKLR where an award of Ksh 400,000/- was upheld for injury on left face ,loose teeth, loss of 2 teeth, blunt chest injury and blunt back injury.
47. The Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR where the Court set out the parameters under which an appellate court will interfere with an award in general damages and held that: -

“ An appellate court will not disturb an award for general 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..’

In the case of Southern Engineering Co. Ltd vs. Musungi Mutia [1985] KLR 730, the court held that:

“ It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case...”

48. Each case is determined by its own peculiar facts. The inflationary trends up surged upwards, I find the assessment of damages reasonable in the circumstances at Ksh 300,000/- general damages. Special damages was strictly pleaded and proved, the Ksh 7,650/- was proved by receipts Future Medical Expense Ksh 10,000/- was on doctor's assessment to replace the tooth. A contrary doctor's expense was not given for comparison.

Disposition

49. In sum total I find the Trial Court judgment on liability is upheld and quantum reduced to Ksh 300,000/- as 2nd medical report indicated soft tissue injuries healed with no scars. The appeal partly succeeds on quantum but dismissed on liability.

JUDGMENT DELIVERED READ SIGNED DATED IN OPEN COURT AT MACHAKOS HIGH COURT ON 21/3/2025 VIRTUALLY/PHYSICALLY.



M.W. MUIGAI
JUDGE

