



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wenani v Ahmed & another (Civil Appeal E013 of 2024)  
[2025] KEHC 4056 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E013 OF 2024  
F WANGARI, J  
MARCH 20, 2025**

**BETWEEN**

**THOMAS WAMALWA WENANI ..... APPELLANT**

**AND**

**HASSAN SALIM AHMED ..... 1<sup>ST</sup> RESPONDENT**

**MOYO CLINICS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the Judgment and Decree of Hon. J. Nyariki Resident Magistrate delivered on 14/12/2023 Mombasa CMCC No. 1232 of 2021.)*

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of Hon. J. Nyariki Resident Magistrate delivered on 14/12/2023 Mombasa CMCC No. 1232 of 2021.
2. The Appellant who was the Plaintiff in the Complaint dated 30/7/2021 claimed damages for an accident that occurred on 30/09/2020 involving Motor Vehicle Registration Number KCN 467D driven by the 1<sup>st</sup> Defendant /Respondent, and owned by the 2<sup>nd</sup> Defendant/ Respondent, while the Plaintiff/Appellant was driving his motorcycle registration number KMFG 102J.
3. It was pleaded that the Plaintiff was lawfully and carefully driving his motorcycle when the 1<sup>st</sup> Defendant carelessly drove his motor vehicle and hit the Plaintiff's motorcycle as he joined the T-junction off Fidel Odinga road at Cinemax area in Nyali. The Plaintiff sustained serious injuries as a result of the accident.
4. The Plaintiff set forth particulars of negligence for the accident. The Plaintiff pleaded Kshs. 4,815/= as Special Damages and injuries as follows:
  - a. Fractured left distal/ fibula bone with post traumatic swelling of the left leg



- b. Stiffness of the left ankle
5. The Respondent entered appearance and filed a Statement of Defence dated 08/10/2021 denying the particulars of negligence and injuries pleaded in the Plaint. Instead, the Defendants blamed the Plaintiff for the negligent riding of his motorcycle thus causing the accident.
  6. The Trial Court heard the Plaintiff witnesses and proceeded to render judgement on 14/12/2023. The Defendants did not adduce any evidence. In the Judgement, the Court dismissed the Plaintiff's suit for failing to prove his case on a balance of probabilities.
  7. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

### Analysis

8. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
9. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
10. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...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...”
11. I have perused the Record of Appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal. I am asked to establish whether the trial court erred in dismissing the Plaintiff's suit for failing to prove his case on a balance of probabilities.
12. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



13. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. Further, in *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

14. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

“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.”

15. Similarly, Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

16. Furthermore, 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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 lose because the requisite standard will not have been attained.”

## Liability

17. Both parties admit that there was an occurrence of the accident. The Plaintiff stated that it was the defendant’s driver who negligently drove his motor vehicle and hit his motorcycle resulting to injuries sustained. Further, CPL Richard Cheruiyot (PW3), the police officer who testified on behalf of the



- Plaintiff informed the court that the Plaintiff was to blame for the accident as he joined the T-junction from the main road, without stopping to give way to the Defendants' vehicle which had the right of way.
18. Even though the police officer was not the investigating officer in the traffic case, he relied on the police abstract in adducing his evidence. There was no independent eye witness. The Defence did not adduce any evidence.
  19. I have perused through the judgement of the trial court where it was found that the Plaintiff caused the accident was caused by the careless driving of the Plaintiff. The trial court was in agreement with the findings of the traffic police that the Plaintiff ought to have waited for the road to be clear before joining the junction road.
  20. I do concur with the submissions by the Defendants/ Respondent that the Plaintiff having not adduced evidence to rebut the evidence by the traffic police officer and the police abstract being relied upon as proof of liability. (See Wellington Nganga Mathiora v Akamba Public Road Services Ltd & another [2010] eKLR as relied on by the Respondents).
  21. It is common knowledge for drivers that vehicles on the main road has a right of way over the vehicles intending to join the side road, or vehicles from the side road intending to join the main road. In this case, the main road is Fidel Odinga road, while the side road was the junction road at Cinemax area, the old Nyali road. The Defendants' vehicle had a right of way and the Plaintiff ought to have paved way and not vice versa. The Plaintiff/ Appellant was 100% liable for the accident.

## **Quantum**

22. As required by law, I am mandate to give the damages that would have been awarded to the Appellant should the appeal have been successful. The Appellant submitted that an award of Kshs. 1,000,000/- would be adequate compensation while the Respondent submitted that the trial court correctly assessed general damages for pain and suffering as commensurate compensation in the circumstances of this case at Kshs. 200,000/=.
23. There is no dispute that the Respondent suffered a fracture of the left leg. Though the trial court did not make a determination on damages that should have been awarded, I have made perusal of the authorities relied by the parties in their submissions on appeal.
24. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Maureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"
25. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
  - 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  - 2) The award should be commensurable with the injuries sustained.
  - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.



- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
  - 5) The awards should not be inordinately low or high.
26. Having taken into consideration the cases relied on by the parties, the nature of injuries sustained, I find that an award of Kshs. 500,000/= in General Damages would have been adequate compensation based comparable authorities cited in the submissions.
27. On costs, I consider that the Plaintiff suffered pain due to the injuries sustained in the accident. He need not suffer more distress by condemning him to pay costs both in this appeal and in the lower court. Litigation must come to an end, and no further proceedings need to be entertained. I hereby exercise the discretion of the court and order that each party shall do bear its own costs.

#### **Determination**

28. In the upshot, I make the following orders: -
- a. The Appeal lacks merits and is hereby dismissed.
  - b. Each party to bear its own costs both in the appeal and the lower court.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON 20<sup>TH</sup> DAY OF MARCH, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Takkah Advocate for the Appellant

N/A by the Respondent

M/S Salwa, Court Assistant

