



**Kosgei v Okwara (Civil Appeal E013 of 2024)
[2025] KEHC 5895 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E013 OF 2024**

A MABEYA, J

MAY 9, 2025

BETWEEN

SAMMY KIPKORIR KOSGEI APPELLANT

AND

PAUL SIMAIGA OKWARA RESPONDENT

JUDGMENT

1. By a Complaint dated 15/7/2022, the appellant claimed general and special damages as a result of a road traffic accident that occurred on 15/6/2021. The defendant denied the claim in total and a trial ensued. By a judgment delivered on 25/1/2024, the trial court (Hon. Oanda, SPM) found the appellant 100% liable for the accident and awarded damages of Kshs.800,000/=.
2. By a Memorandum of Appeal dated 15/7/2022, the appellant set out 6 grounds of appeal. These can be summarized into two as follows: -
 - a. That the trial court erred in holding the appellant 100% liable for the accident.
 - b. That the trial court erred in assessing general damages at Kshs.800,000/= in the circumstances of the case.
3. This being a first appeal, it is incumbent upon this Court to re-assess and re-evaluate the evidence afresh with a view to arriving at its own independent finding and conclusion but bearing in mind that it did not see the witnesses testify. (See *Selle & Anor vs Associated Motor Boat Co. Ltd & Anor* (1968) EA 123.
4. The case of the appellant before the trial court was that on the material day, 15/6/2021, he was lawfully walking towards Mamboleo direction along the Kondele-Mamboleo road, Kisumu within the divider dividing the dual carriage road when the respondent's motor vehicle registration No. KAV 125G



swerved from its position and knocked him. He suffered several injuries for which he was treated at Jaramogi Oginga Odinga Teaching and Referral Hospital and discharged.

5. He blamed the respondent for the accident and set out a total of 11 particulars of negligence. He produced treatment notes and a medical report to prove the injuries. (P. Exhibit 1(b) – (d) and P. Exhibit 2). He also produced a bundle of receipts in proof of the special damages.
6. In cross-examination, he told the court that he was walking along the divider. That he was crossing the road to the other side when he found being hit from behind.
7. PW 2 was Joshua Otieno, a Police Officer attached to Kondele Police Station. He confirmed the occurrence of the accident. He testified on behalf of the Investigating officer and told the Court that from the records, the Motor vehicle hit the appellant while he was walking on the divider. That the appellant was crossing from the left side of the road to the right. That there was no Zebra Crossing at the place.
8. The defence called only one witness, the respondent. Although the proceedings show that when he testified, he adopted his statement dated 12/6/2021 as his evidence in chief, that statement was neither in the Record of Appeal nor in the original court file. In any event, there is no way he could have recorded a statement on 12/6/2021 for an accident that occurred on 15/6/2021.
9. In view of the foregoing, I will consider the statement he recorded with the Police on 17/6/2021 as the one he must have relied on as his evidence in chief!
10. His evidence was that on the material day at about 7.30am, he was driving the subject motor vehicle when at the scene the respondent was walking along the pavement of the road. When he was about to pass him, the respondent slipped, lost balance and was run over by the rear tyre of the vehicle. The respondent suffered injuries and he rushed him to Russia Hospital where he was treated and discharged.
11. It is on the foregoing evidence that the trial court held the appellant 100% liable. The Court's view was that, having hit a pedestrian who was in the middle of the road, on a divider, the respondent was wholly to blame for the accident.
12. The parties filed their respective submissions dated 28/10/2024 and 20/1/2025, respectively. The Court has carefully considered them as well as the record.
13. The first ground of appeal is that the trial court erred in holding the appellant 100% liable for the accident. The appellant relied on the case of Hussein Omar Farah vs Lento Agencies Ltd (2006) eKLR for the proposition that since there was no concrete evidence as to who was to blame, liability should be shared equally.
14. On his part the respondent relied on the case of Michael Hubert Kloss & Anor vs David Seroney & 5 Others (2009) eKLR for the proposition that, in determining liability, the question to be answered is "who was responsible for the accident." That the respondent was to blame as he swerved across the divider to take a short cut.
15. From the record, the evidence is clear that the accident occurred at the place and time alleged in the plaint. The only dispute is who caused it. The Court has to determine between the testimonies of the appellant and that of the respondent which is more plausible. As regards, the testimony of PW 2, the Police officer, only relied on records for what he told the Court. The accident does not seem to have been investigated. It is not clear if any sketch plan of the scene was prepared. It is not clear how wide the road divider was and at what point on the divider the respondent was hit.



16. The testimony of the respondent was that he was walking on the divider when he was hit from behind. On the other hand, the appellant alleged that the respondent slipped and was run over by the rear tyres of the vehicle. PW 2, the Police officer alleged that the respondent was crossing the road from left to right.
17. Notwithstanding such conflicting evidence, it is clear that the accident occurred on the divider. The place has no Zebra Crossing. It is not clear from the evidence on record whether there was any other place designated for crossing the subject road.
18. In the normal cause of events, it is not expected that a vehicle would be driven on a divider. At the same time, it is not expected that a pedestrian would be walking on a divider. It is expected that a pedestrian would be walking on either of the pavements, the left or right side of the road. A pedestrian would also be expected to cross a road on a designated pace, Zebra Crossing, unless there is absolutely none.
19. In view of the foregoing, the Court's opinion is that the respondent should have shouldered some liability for crossing a road on an undesignated point and or for walking on a divider instead of the pavement. The court assesses such negligence at 20%.
20. It should be remembered that the appellant did allege at paragraph 8 of his defence that the respondent caused the accident and alleged several (8) particulars of negligence. Important of them was that, the respondent failed to take any adequate precaution for his own safety for crossing the road on an undesignated place and walked on the divider instead of the pavements. The other relevant particular was 'failing to observe traffic regulations.'
21. Accordingly, liability should have been shared at 80% - 20% in favour of the respondent.
22. The next ground was that the quantum awarded was too high. The starting point is the jurisdiction of this Court on matters quantum on appeal. An appellate court has to consider if the trial court took into account an irrelevant factor, or left out of account a relevant one or that the amount awarded is so inordinately high or so inordinately low as to amount to an erroneous estimate of damages.
23. In *Kemfro Africa Ltd t/a Meru Express Services (1976) & Another vs Lubia & Another (No. 2) (1985)* eKLR, the Court of Appeal held: -

“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 that 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 a wholly erroneous estimate of damage.”
24. From the Medical Report dated 7/11/2021 by Dr. Jenipher Kahuthu, the respondent sustained compound fracture of the left tibia and fibula, loss of one lower incisor, deep cut wound left leg and other soft tissue injuries.
25. The trial court awarded Kshs.800,000/=. The appellant had submitted for Kshs.300,000/= before the trial court and Kshs.500,000 before this Court. He relied on *Daniel Otieno & Another vs Elizabeth Atieno Owuor (2020)* eKLR. On the other hand, the respondent submitted for Kshs.2 million before the trial court but urged before me that the sum of Kshs.800,000/= awarded by the trial court be maintained.



26. In *Kigaragavi vs Aya* (1985) 273, the Court of Appeal held that: -

“In awarding damages for personal injury, the Courts should consider that there is need to develop consistency in the awards and that the awards should both be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.”

27. I have considered the appellant’s submission. The appellant relied on case of *Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor* (supra) where the Court reduced an award of Kshs.600,000/= to Kshs.400,000/= on injuries which were almost similar. The difference between that authority and the case at hand is that in addition to the compound fracture of the leg and the other soft tissue injuries as in the *Daniel Otieno* case (supra), the respondent herein suffered loss of lower incisor.

28. In this regard, the view this Court takes is that the injuries suffered by the respondent were more serious as compared to those in the authority relied on by the appellant. The appellant has not shown that the trial court took into consideration any irrelevant matter or failed to take into account a relevant matter. There is also nothing to show that the award of Kshs.800,000/= was so manifestly excessive as to amount to an erroneous estimate of damages. That ground fails.

29. Accordingly, the appeal partially succeeds. The judgment of the trial court is set aside on liability and judgment entered for the plaintiff in the lower court at 80% in his favour, and 20% for the defendant. The quantum of Kshs.800,000/= is undisturbed. Since the appellant was only partially successful, the Court orders that each party do bear own costs of the appeal.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE

