



REPUBLIC OF KENYA



**Ng'eno v Karau (Civil Appeal E172 of 2023)
[2025] KEHC 8598 (KLR) (18 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E172 OF 2023**

**E OMINDE, J
JUNE 18, 2025**

BETWEEN

WESLEY KIPKORIR NG'ENO APPELLANT

AND

JOHN KARIUKI KARAU RESPONDENT

*(An appeal arising from the judgement and decree in Eldoret Small
Claims Court Case No. E880 of 2023 delivered on 26/07/2024)*

JUDGMENT

1. This appeal arises from the judgement and decree in Eldoret Small Claims Court Case No. E880 of 2023 delivered on 26/07/2024. The respondent herein instituted a claim against the Appellant vide a Statement of Claim dated 28/09/2023 seeking general damages and special damages for injuries sustained in an accident that occurred on 15/09/2023. The brief facts underlying the claim are that the respondent was a pedestrian along the Eldoret –Iten road when the Appellant who was driving motor vehicle registration no. KCE 912G knocked him down.

Hearing at the trial court

2. The claimant called Police Corporal Elishaba Mweru as CW1. He testified that the accident occurred on 15/09/2023 at around 8.30 pm at Marura area along the Eldoret – Iten road involving motor vehicle KCE 912G and a pedestrian, John Kariuki Kamau. That the vehicle was being driven towards Eldoret and knocked down the pedestrian who was standing on the left side of the road. He produced the Police Abstract and the P3 form and stated that the driver was to blame for the accident. In cross examination, he stated that he was not the investigating officer but that he visited the accident site with the investigating officer.



3. CW2 was Dr. Sokobe who presented the Medical Report for the respondent for which he charged him Kshs. 6,000/-. He produced the said report and the receipt for payment as exhibits. CW3 was Dr. Edwin Rono who produced continuation notes and a prescription form for the respondent from Moi Teaching and Referral Hospital. CW4 was Wycliffe Nyambane who presented the P3 form as well. The claimant testified as CW5 and stated that he adopted his witness statement dated 28/09/2023 in its entirety and prayed that it be adopted as his evidence in chief.
4. The claimant in his defence testified that on the material date he was driving from Iten to Eldoret and on arriving at Marura, being a market day, there were vehicles parked on both sides of the road. One person was placing luggage on top of a vehicle and when he reached near that vehicle, the person jumped down onto the road and he tried to avoid hitting him but the side mirror hit him and it fell down. He denied hitting someone out of the road and maintained that he was on his lane and that is why the pedestrian hit the side mirror only. That he was hit on the tarmac and not out of the road and he blames this person for causing the accident.
5. In cross and re-examination, he reiterated that someone jumped from on top of a vehicle which was a matatu and that he did not stop because he feared for his life for it was a market day. That he reported the accident the next day
6. Upon the conclusion of the case, the Trial Court entered judgement in favour of the respondent and against the Applicant as follows;
 - a. Liability 100%
 - b. General Damages Ks. 500,000/-
 - c. Special damages Ks. 6,000/-
 - d. Costs
 - e. Interest (a), (b) and (c) above
7. Being aggrieved with the judgement by the trial court, the appellant instituted the present appeal vide a memorandum of appeal dated 19/08/2024 premised on the following grounds;
 1. That the learned trial magistrate/adjudicator erred in law and in fact by failing to dismiss the Respondent's suit whereas negligence on the Appellants was not proven during trial.
 2. That the learned trial magistrate/adjudicator erred in law by failing to dismiss the Respondent's suit whereas the Respondent herein failed to discharge the burden of proof so as to warrant a judgment in her favour.
 3. That the learned trial magistrate/adjudicator erred in law and in fact by failing to take into account the relevant facts relating to the suit thus arriving at a decision that is wholly erroneous in law and facts and/or that a reasonable tribunal would arrive at in view of the evidence adduced.
 4. That the learned trial magistrate/adjudicator erred in law and in fact by holding the Appellant 100% liable for causing the accident contrary to the evidence on record and/or adduced during trial.
 5. That the learned trial magistrate/adjudicator erred in law and in fact by failing to elaborate on a balance of probability, how the Respondent proved negligence and/or adduce reasons for holding the Appellant liable to the degree of 100%.



6. That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's written submissions and legal authorities and/or precedents both on liability and quantum thereby arriving at a determination which is wholly erroneous in law.
7. That the learned trial magistrate misdirected herself by failing to take into account the well-established principle requiring comparable awards to be made for comparable injuries sustained thereby falling into an error by awarding Kshs. 500,000/= which award is manifestly excessive.
8. That the sum of Kshs. 500,000/= as general damages which award is excessive in view of the injuries sustained by the Respondent thereby deviating from the principle of stare decisis requiring comparable awards being made for comparable injuries sustained.
9. That the learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering at Kshs. 500,000/- which is very high all circumstances and injuries considered.

Hearing of the appeal

8. The parties filed submissions to the appeal. The appellant filed submissions dated 22/02/2025 through the firm of Messrs. Kairu & McCourt Advocates whereas the Respondent filed submissions dated 10/12/2024 through the firm of Messrs. Kimaru Kiplagat & Company Advocates.

Appellants' submissions

9. The Counsel for the Appellant in their submissions reiterated the testimony in support of the Claimant's case and pointed out the following; That in cross examination CW1 conceded to not being the Investigating Officer and that she did not visit the scene of the accident. The witness also admitted that she did not have the police file and sketch maps and further and that at the conclusion of the investigations, the matter was referred to the insurance and no charges were preferred against either party. Finally, that even though the witness admitted that she could not tell the circumstances of how the accident occurred clearly as she was not the one who visited the scene of the accident, on reexamination she informed court that blood stains were on the left side facing Eldoret general direction beside the road and that this begs the question as to how she knew where the blood stains were if she did not visit the scene.
10. Counsel restated the evidence of the Appellant and submitted that based on this evidence, negligence on the part of the Appellant was not proved on a balance of probabilities. That the burden of proof lies with he who alleges the existence of a fact, citing sections 107,108 & 109 of the *Evidence Act*. That the Police Officer who testified was not the Investigating Officer and admitted that she did not visit the scene of the accident. Additionally, that during cross examination she conceded that she could not tell the circumstances of the accident as she was not part of the investigating team. That for these reasons, the evidence of the police officer can only be condemned as hearsay.
11. Counsel relied on the holding *Simpsons vs Peat (1952) 1 ALL ER 447* to the effect that errors of judgement do not amount to careless driving even in circumstances where an accident has occurred. That the Respondent has failed to discharge the burden placed upon him and demonstrate that the accident occurred as a result of the negligence of the Appellant. That as a consequence, He failed to meet the requisite standard of proof with regard to the evidential burden. Counsel urged that the claimant was the author of his own misfortune and only has himself to blame. That this is more so because it is the Appellant's testimony that it is the Respondent who suddenly alighted onto the



road after getting of the roof of the matatu (sic) and that upon noticing him, the Appellant tried his best to apply emergency brakes but due to the proximity and suddenness of the appearance of the Respondent, the accident occurred.

12. Counsel urged that even though the Respondent pleaded to have been sustained by the Respondent to wit; Fracture of the right distal radius Blunt injury to the back Blunt injuries to the lower limbs.

There were no X-ray films in furtherance of this averment and that Medical Report filed by the Respondent confirmed that upon being X-rayed, the injury of the radius bone produced in court confirms that there was no injury of the said bone. That in opposition, the Appellant filed a Medical Report that indicated that the injuries sustained by the Respondent were a fracture of the tibia fibula bone. Counsel therefore submitted that the alleged injuries were not proved.

13. Counsel therefore submitted that if the court be satisfied nonetheless that damages are awardable then because no incapacitation or disability was assessed an award of Kshs. 350,000/= will suffice in view of the injuries sustained by the Respondent. Counsel urged that the court be guided by the awards in *Mary Akinyi Atella v Omondi Beatrice Monica* (2021) eKLR. He additionally cited the findings in *Patrisia Adhiambo Omolo v Emily Mandela* (2020) eKLR, *George Raini Atungu v Moffat Onsare Aunga* 2021 eKLR among others. He urged the court to allow the appeal.

Respondents' submissions

14. Learned Counsel for the Respondent in his submissions restated the evidence and urged that the testimony of the claimant stands unchallenged. Further that the Appellant's driver gave very contradicting statements which ought not to be relied upon and as such, it is clear that the appellant was to blame for the accident. He urged the court finds the Appellants liable 100% for the severe injuries sustained by the Respondent herein.
15. On damages, counsel urged that the court should consider the fact that damages awarded to him actually corresponded with the injuries sustained even though money cannot renew the physical frame of a body as was very well illustrated in the case of *Tayab vs Kinanu* [1983] eKLR, Nairobi HCCA NO. 29 OF 1982. That from the Medical Report prepared and produced by Dr. Sokobe after medical examination, the Respondent sustained the following injuries; - a) Fracture of the right distal radius; b) Blunt injury to the back and c) Blunt injury to the left lower limb.
16. Counsel submitted that the award of Kshs. 500,000 as general damages by the trial court was reasonable and commensurate to the injuries sustained by the Respondent. He cited the decision and award in the case of *Ndungu & Another c Munene* (Civil Appeal No. 31 of 2020) (2022) KEHC 3023 (KLR) (21 April 2022) (Judgment) where the High Court substituted the award of Kshs. 1,000,000/= with an award of Kshs. 700,000/= to the Plaintiff who sustained the following injuries; - Cut wound and abrasion on the right forehead and bruises on the upper and lower lips; Blunt injury to the right cheek with a broken right incisor and extracted molar tooth; Fracture of the distal end of the left radius bone; Blunt injury to the pelvis; Blunt injury to the chest; Bruises on the left leg.
17. The respondent urged the court to uphold the decision of the trial court and dismiss the appeal.

Analysis & Determination

18. Section 38 of the Small Claims Court provides as follows:

“ 38.



- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

19. In the case of Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the court of Appeal stated as follows: -

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”

20. In *Mwangi v Kibiu (Civil Appeal 16 of 2023)* [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment) when handling an Appeal emanating from the Small Claims Court, the court stated as follows:

“Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal vis-à-vis the pleadings in the court below

21. In *Mbogo vs Shah 1968 EA 93* the court held thus: -

“The duty of this court in an appeal against the exercise of that discretion is not to interfere unless the Judge has exercised his or her discretion wrongly in principle or perversely on the facts of the case.”

22. In light of these findings by the courts on what a point of law entails, and particularly the finding of the Court of Appeal in *Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013*, the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law and further that the exercise of judicial discretion is a point of law, then in view of the grounds of appeal raised by the Appellant, this court does have the jurisdiction to consider the Appeal.

23. This being the first appellate court, the guiding principle is as set out in the case of *Selle v Associated Motor Boat Co. [1968] EA 123* as follows: -

The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular



circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence.

24. In this regard, I have read the impugned judgement of the Learned Trial Magistrate. I have considered and re-evaluated the evidence of both parties as adduced in the Trial Court. I note that the Appellant's in their submissions have taken issue with the testimony of CW1 for reasons that she was not the Investigating Officer. However, the said witness stated that she did visit the scene in the company of the Investigating Officer. This evidence was not controverted, rebutted and/or denied. This being the case, contrary to the submissions by the Appellant that her evidence is merely hearsay evidence, the court is satisfied that she is sufficiently competent to testify on what she observed at the scene everything else notwithstanding.
25. The evidence in support of the Respondent's claim is that the Appellant was driving from the direction of Iten to Eldoret when he knocked down the Respondent who was standing on the left side of the road facing Eldoret direction. CW1 testified that the point of impact was on the left side of the road on the far end. CW1 further testified that that this point was established based on the bloodstains that they found on the road when they visited the scene with the investigating Officer.
26. Of particular significance, I note that the injuries sustained by the Respondent were too serious to have been caused by the Respondent being hit by the Appellant's side mirror as the Appellant has stated in his testimony. Over and above, upon a further consideration of the injuries, it is my well-considered opinion that they are also consistent with the Respondent's evidence on how the accident occurred.
27. I am therefore satisfied that the Appellant did knock down the Respondent on the left side of the road on the far side off the road as per the evidence in support of the Respondent's case and not on the tarmac as was testified and submitted by the Appellant, the Respondent did not contribute to the occurrence of the accident in anyway. In this regard, I am satisfied that the Learned Trial Magistrate properly applied himself in finding the Appellant 100% liable to compensate the Respondent and I now hereby uphold the Hon Magistrate's finding on liability.
28. On quantum, I have considered the authorities cited by both Counsel in their submissions vs-a –vis the injuries sustained. I am satisfied that all the authorities are relevant in that they involve injuries that are closely related to the injuries herein sustained and I find no harm in relying on them. However, in considering the age of these authorities which range between 4 to 6 years, by dint of this fact and the attendant increased inflationary rates and high cost of living.
29. In the case of Mohamed Juma vs. Kenya Glass Works Ltd, CA NO. 1 OF 1986(unreported) Madan, JA aptly observed as follows;
- an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award.....There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons.”
30. In associating myself fully with the above observations of the Learned Justice Madan JA therefore, I am well satisfied that the award of Ks. 500,000/- is both fair and reasonable and I therefore uphold the same. The upshot of my above findings then is that the Appellant's Appeal on both liability and quantum lacks merit and the same is dismissed in its entirety with costs to the Respondent

READ DATED AND SIGNED AT ELDORET ON 18TH JUNE 2025.

E. OMINDE



JUDGE

