



**Omwoyo & another v Musumba (Civil Appeal E0147 of 2022)
[2025] KEHC 11900 (KLR) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 11900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E0147 OF 2022
SM MOHOCHI, J
JUNE 16, 2025**

BETWEEN

ROBERT OMWOYO 1ST APPELLANT

NGATA SACCO 2ND APPELLANT

AND

DENNIS OKUMU MUSUMBA RESPONDENT

*(Being an Appeal from the Judgment/Decree of the Honourable K.I Orenge
(P.M) a delivered-on 12th October 2022 in Nakuru CMCC No. 824 of 2018)*

JUDGMENT

1. This appeal arises from the Judgment delivered on 12th October 2022 in Nakuru CMCC No. 824 of 2018 where the Appellants were held 100% liable and judgment entered in favour of the Respondent herein for Kshs. 1,100,000.00 awarded as general damages and Kshs. 16,550/= as special damages.
2. It is the Appellants grievement in their fifteen (15) grounds as is contained in the memorandum of appeal dated 28th October 2022 that;
 - i. That the Learned Magistrate erred in fact and in law, when he failed to consider the Appellants evidence and submissions on points of law and facts on finding that the Appellants were wholly and jointly liable for the accident which was the subject matter of the suit.
 - ii. That the Learned Magistrate erred in fact and in law, when he failed to consider the Appellants evidence and submissions on points of law and facts on finding that the Respondent was entitled to General Damages of Kshs.1,100,000/- which is inordinately high in the circumstances.



- iii. That the Learned Magistrate erred in fact and in law, when he failed to consider the Appellants evidence which was tendered by the defence on liability during the hearing of the suit and the submission filed.
 - iv. That the Learned Magistrate erred in law and in fact, when he over relied on the Respondent's submissions.
 - v. That the learned magistrate erred in fact and in law, by weighing the Respondent's case in isolation from the Appellants case precluded himself from assessing the magnitude of liability impartially,
 - vi. That the Learned Magistrate erred in fact and in law, by weighing the Respondent's case in isolation from the appellant case precluded himself from assessing the magnitude of damages impartially.
 - vii. That the Learned Magistrate erred in law and in fact by disregarding the evidence of the Appellants witnesses in totality thus precluding himself from assessing the magnitude of liability impartially.
 - viii. That the Learned Magistrate erred in law and in fact, in aiding the Respondent's case as against the Appellants case.
 - ix. That the learned magistrate erred in law and in fact, when he relied on erroneous principles of law in arriving at an excessive award on quantum.
 - x. That the Learned Magistrate erred in fact and in Law in failing to apply the relevant and pertinent judicial principles, precedents and trends regarding the award of quantum.
 - xi. That the Learned magistrate grossly misdirected himself, by treating the evidence and submissions before him on liability superficially and consequently arrived at a wrong decision without any basis in law or fact.
 - xii. That the Learned magistrate grossly misdirected himself by treating the evidence and submissions before him on quantum superficially and consequently arrived at a wrong decision without any basis in law or fact.
 - xiii. That the learned magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probabilities in view of the evidence on record.
 - xiv. That the Learned Magistrate erred in fact and in law in failing to accord the Appellant evidence and submissions due consideration.
 - xv. That the Learned magistrate's findings on liability and quantum of damages are not supported by facts or law hence irregular.
3. The Appellants consequently pray that this Court allows the Appeal and the Judgment on quantum of the HON, K.L. ORENGE Principal Magistrate be set-aside and substituted with a fresh award and that the costs of this Appeal and that of the Trial Court be awarded to the Appellants.
 4. The Appeal was admitted as ripe for hearing on the 30th January 2024 and the Court directed that the hearing shall be by way of filed written submissions.

Appellant's Submissions

5. The Appellant submitted in favour of the appeal contingent on two issues: -



- i. Liability
 - ii. Quantum
6. With regards to quantum the Appellants submits that, the Respondent alleges that on 10th May, 2018, he was a standing outside the County Assembly stage when he was hit by a motor vehicle registration number KAU 122H and thrown under a bus that was parked by the stage.
 7. That according to the plaint dated 20th July 2018, as a result of the accident, the Respondent sustained the following injuries:
 - a. Head injury with multiple fractures of the skull subdural haematoma.
 - b. Fracture on one upper canine and one lower canine tooth.
 - c. Laceration and swelling of the upper limb.
 - d. Soft tissue injuries of the left leg.
 8. That the P3 form dated 10th May, 2018 and the medical report dated 16th July, 2018 from Dr. Kiamba lists different injuries as those that are in the Plaint and Dr. Wellington K. Kiamba medical report. However the treatment notes from Rift Valley Provincial Hospital on 10th May, 2018 indicates the Respondent was treated for nasal bleeding, mouth swelling-lips and abrasions and wound on the head. The same was confirmed by Nakuru Memorial Hospital which indicates that the Respondent sustained soft tissue injuries. It is therefore clear that the Respondent sustained soft tissue injuries. The Lower Court awarded Kshs. 16,500.00 as special damages and Kshs. 1,100,000.00 as general damages. This was inordinately high considering the injuries sustained by the Respondent.
 9. The Appellants humbly submit that the sum of Kshs. 100,000.00 would be reasonable and sufficient compensation as the Respondent suffered minor soft tissue injuries which have healed well with no complications suffered.
 10. Reliance is placed upon the case of Power Lighting Company limited & another -versus- Zakavo Saitoti Naingola & another (2008) eKLR cited in the case Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR. The Court held; On quantum Court the in determining whether to interfere with the same or not, the Court has to bear in mind the following principles on assessment of damages;
 - i. Damages should not be inordinately too high or too low
 - ii. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
 - iii. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
 - iv. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shillings, then at the time of the judgment....
 11. That in lieu of the above, the Appellants apply the same case law and invites this Court to consider the following cases cited in determining this matter:
 - a) Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR
The Respondent had the following injuries to these: blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands. That report also says that the



Respondent still experiences back pains and chest pains on exertion. The Court stated that, "if one takes into consideration the actual injuries suffered by the Respondent - to wit soft tissue injuries to the lower right leg and to the back-it becomes readily obvious that an award of Kshs. 300,000/-is manifestly excessive. Given the policy goal of Courts to try to compensate comparable injuries as far as possible by comparable awards, these two factors call for this Court to revise the quantum awarded to the Respondent. In my view an award of Kshs. 100,000/- would be adequate to compensate for the injuries suffered in this case.

b) *Eva Karemi & 5 others v Koskei Kieng & another* [2020] eKLR

Where the Court awarded the 1st appellant was awarded Kshs. 70,000/-. She sustained injuries to her right thigh and bruises on her lower and upper limbs. The 2nd appellant was awarded Kshs. 40,000/- for injuries on the right shoulder pain and cut wound on her mouth. The 3rd appellant was awarded Kshs. 45,000/-for injuries on and pain on her back and right shoulder pain. The 4th appellant was awarded Kshs. 40,000/- for cuts on the chin and right shoulder tenderness. The 5th appellant was awarded Kshs. 60,000/ for injuries sustained; 2cm cut on the forehead, cut wound on the right elbow and right limb (leg and ankle joint). The 6th appellant was awarded Kshs. 65,000/- for injuries sustained being bruising on the forehead, hip and left ankle

12. The Appellants submits that the sum of Kshs. 250,000.00 be substituted with the sum between Kshs. 50,000.00 and Kshs.100, 000.00 if the Court is less inclined to dismiss the Trial Court's finding on liability in favour of the Appellant.
13. On the Second issue of Liability it is the Appellants submissions that the Respondents called 4 witnesses: PW1, Dennis Okumu Musumba; PW2, Dr. Wellington Kiamba; PW3 PC Nkongge; and, PW4, Nahah Nyamwaya Mosei (eye-witness).
14. That, the Appellants called 2 witnesses- DW1-PC Okello and DW2-Dennis Okerio Antel (Driver).
15. That PW4 and PW2 testimony has no bearing on liability as the testimonies of PW1. Furthermore, PW1 testimony contradicts that of PW3 as he alleges that, he was hit after successfully crossing the road while PW3 states that PW1 was attempting to cross the road when he was hit. PW3's testimony was corroborated by that of DW1.
16. That, DW1 could however not ascertain the credibility of the eye-witness as he was not indicated in the OB.
17. That, DW2 stated that, he was dropping a passenger at the county assembly stage but there was a bus parked and the space behind the bus was small therefore, he opted to go in front of the bus. That he slowed down and just as he was about to enter the stage, PW1 emerged in front of the bus while on his phone and got hit by his left side mirror which caused him to fall under the parked bus causing him to sustain injuries. He also confirmed that there were two vehicles parked, and he was to park in-between the two vehicles when PW1 emerged after the bus while on his phone. On cross-examination, he indeed confirmed that PW1 was on his phone and therefore blames him solely for the accident as if he had been keen and not on his phone, he would have seen the said vehicle.
18. That, furthermore, it is not in dispute that there was a bus parked at the stage and that the Respondent was at the stage. What is disputed is whether or not he was crossing the road. The Respondent and PW4 stated that he was not crossing the road when all witnesses including DW1, DW2 and PW3 stated that he was attempting to cross the road. PW1 and PW4 statement were therefore not corroborated.



19. That, from the above testimonies, it is clear that the Respondent was partly to blame for the accident as he was talking on the phone while crossing the road. Section 107 of the *Evidence Act* Cap 80 Laws of Kenya provides that; "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."
20. The Appellant further relies on the case of Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142, Potter, JA cited in the case of Bash Hauliers Limited v Anastacia Ndinda Kimonye [2020] eKLR, held that:

“There can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. There is no reason for a pedestrian's complete failure to see a motorist and vice versa.... The doctrine of last opportunity is obsolete as no distinction can be drawn between negligence after seeing danger and negligence in not seeing it beforehand. The two causes of the accident cannot be severed and so the trial Judge was right to find both were at fault.”
21. That, in view of the foregoing, the Appellant urges this Honourable Court to set-aside the Judgment of the Trial Court herein and find that the Respondent was to blame for causing the accident and dismiss the Trial Court's finding on liability.
22. The Appellants equally crave for the Costs of the Appeal as well as the Trial Court costs.

Respondent's Case

23. The Respondent contends that the Appeal challenges the Lower Courts finding on General Damages and Liability ONLY.
24. On general damages the Respondent submits that, the only issue that the Appellants raise in regard to this award is that the Respondent suffered soft tissue injuries only and therefore the award of Kshs.1,100,000/= in general damages was inordinately high as it was not in tandem with the injuries that he suffered and hence they urge this Court to allow the Appeal herein and reduce the said award to Kshs.100,000/=.
25. It is the Respondent's view, that the Appellants aforesaid contention is unmerited as the totality of the evidence on record suffices to prove that the Respondent suffered among others head injury with multiple fractures of the skull. Radiological reports from Nakuru War Memorial Hospital (at page 19 of the record of Appeal) were produced by consent of parties as exhibits and which clearly shows that the Respondent suffered multiple fractures of the skull, i.e. on the right frontal bone, right orbital roof, anterior and posterior walls of the right frontal sinus ethmoid and right sphenoid.
26. That the said fractures are also captured in both preliminary and final medical legal reports of Dr. Kiamba PW-2 (at page 24-25 and 43-45 of the record) and no query about the said fractures was put to Dr. Kiamba when he testified in Court as can be seen at page 86 of the record. Of most important, we urge the Court to note that the said injuries were also confirmed by the Respondent herein PW-1 when he testified in Court as can be seen at page 82-83 of the record.
27. Most importantly, the Respondent urges the Court to note that, the said radiological reports were produced and admitted in evidence by consent of both parties herein and no contrary evidence/ medical report was produced by the Appellants herein to prove otherwise and hence the Learned Trial



Magistrate cannot be faulted for his findings on injuries. We rely on the case of Benson Charles Ochieng & another v Susan Odhiambo Otieno [2013] eKLR where the Court held that: -

“The Appellants made the choice not to refer the Respondent to be seen by a doctor of their choice for a second opinion. The only evidence on record is therefore that adduced by the doctor of the Respondent. That medical evidence is uncontroverted.”

28. Further reliance is placed on the case of Dick Omondi Ndiewo T/A Ditech Engineering Service v Cell Care Electronics [2015] eKLR where the Court held that; evidence of an expert can only be challenged by evidence of another expert but not from the bar and lastly the case of Eldoret Express Company Limited v Nandabelwa (Civil Appeal 120 of 2017) [2022] KEHC 3226 (KLR) (5 May 2022):-
29. That the Appellant having consented to the production of the only evidence on record cannot at the appellate stage, seek to impugn its authenticity. In particular, the Appellant consented to the production of Plaintiff's Exhibit 3A-a Medical Report by Dr. Kiamba. That report described the injuries which the Respondent allegedly sustained from the road traffic accident which was the subject of the trial.
30. That, by accepting its production as evidence and producing no alternative version, it was left to the Learned Trial Magistrate to assign probative value to the Report. It was permissible for the Court to conclude, on the basis of that report, that the alleged injuries by the Respondent were, indeed, sustained as a result of the accident.
31. That, having consented to the production of the Report, the Appellant cannot go behind it to request the Court not take it into consideration because some background documents used in the preparation of the report had not been made available to Dr. Kiamba.
32. That, if the Appellants impugned the authenticity of the Report, they should have insisted that the author appears for cross-examination.
33. That the Appellants agrees that indeed the Respondent was involved in the subject accident and that he sustained injuries. The Appellant's point of difference is that the Respondent did not prove that the injuries were caused by the subject accident and not any other. Even if he was to accept the Appellant's argument that a consent on liability did not translate into a consent on the injuries, the Respondent was only required to prove on a balance of probability that he sustained the injuries from the subject accident. From the totality of the evidence admitted by consent, the Respondent discharged this duty. There was enough material presented for a reasonable tribunal to conclude that the Respondent sustained the injuries during the subject accident.
34. The Respondent submit that failure by the Appellants to adduce any evidence to controvert/challenge the Respondent's evidence on injuries is fatal since submissions and/or cross-examination no matter how good they are cannot substitute evidence on whose basis cases are proved / decided. We relied on the case of Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] KLR where the Court found that;

“Where Defendant fails to call evidence in support of his case, the evidence adduced by the Plaintiff against the defence remains uncontroverted as even if the Defendant cross-examines Plaintiff's witness, he can only rebut the issues raised during cross-examination by calling witnesses and hence failure to call witness leaves the Plaintiff's evidence on liability unchallenged.”



35. Further reliance is placed on the case of PMM (minor suing through the mother and next friend MNM v Family Bank Limited & another [2018] KLR where the Court held that;

“submissions cannot take the place of evidence and therefore where a party fails to prove their case by evidence, submissions cannot come to their aid since submissions are generally parties' "marketing language" each side endeavoring to convince the Court that its case is the better one but do not constitute evidence.”

36. That it is in view of the foregoing that the Respondent urges the Court to find and hold that this ground is unmerited.

37. On the second issue of liability the Respondent submits that the Appellants wanted him to be held partly liable for the accident, since the evidence on record shows that the Respondent was hit while crossing the road and not after crossing it.

38. However, and in the Respondent's view, the totality of the evidence on record confirms that the Respondent was hit after he had crossed the road and not while crossing the same as contended by the Appellants and hence the Lower Court's decision of holding the Appellants herein 100% liable for the accident herein was merited.

39. That the evidence of both police officers PW-3 and DW-1 and the information/contents of the initial OB report & police abstract that they read to Court/produced as evidence are not conclusive as to how the accident herein occurred or who was to blame for the collision herein As they both admitted, neither of them witnessed the accident herein nor visited the scene of the accident nor investigated the same and hence their evidence is at its best pure hearsay which is inadmissible to prove a fact. On the other hand, no police file/sketch plan/witness statements were produced in Court as evidence to support, lay a basis, prove or justify the police findings and most importantly, the police investigations were still pending. See the case of Commercial Transporters Limited v Registered Trustees of the Catholic Archdiocese of Mombasa [2015] eKLR where the Court held that evidence of a police officer who did not investigate an accident cannot be conclusive as to liability or how the accident occurred and also the case of Alfred Mutua Ndutu v Peter Musau Wambua [2019] eKLR where the Court held that:-

“PW 2 was not the investigating officer and was not at the scene of the accident...DW 1 was also not the investigating officer and did not visit the scene... The testimony of DW-1 could not be admitted as evidence of fact as per the submissions of the appellant. His account was not something he had witnessed or concluded from investigations. His evidence was properly disregarded by the trial Court.”

40. Further reliance is placed on the case of David Karanja v Tofwa Vutaqwa [2015] eKLR where the Court held that blameworthiness in a police abstract/occurrence book is of no evidential value where investigations are still pending/yet to be concluded like in this case

41. That, after discounting the evidence of both police officers in so far as establishing liability is concerned, this leaves this Honourable Court with the evidence of the Respondent (PW-1), eye witness (PW-4) and the Matatu driver (DW-2) to consider when determining liability as was held in the case of Annastacia Nduku John v Aggrey Oqutu Oyugi [2020] eKLR:-

“The police officer called by the Appellant was rightly dismissed by the trial Court as unhelpful to the Appellant's case since he did not participate in the investigations and also



did not avail the sketch plans taken at the scene. This then left the Appellant's evidence and that of the Respondent for scrutiny as to who between them was negligent”.

42. That as the Court will note, nowhere did the eye witness (PW-4) in his evidence at page 89-90 testify that the Respondent (PW-1) was hit while crossing the road (as submitted by the Appellants herein). His evidence was consistent and in agreement with that of the Respondent that he had finished crossing the road when he was hit by the Matatu herein. As such, the Appellants submissions that their evidence was contradictory on that aspect is unfounded and we urge the Court to find so.
43. That, in respect to the evidence of the matatu driver (DW-2), the Respondent urges the Court, to note that, the trial magistrate found him to be untruthful witness (See Lower Court's judgment at Page 105 line 22 of the record) and thereby making it unsafe to accept, act or rely on his evidence. As such and DW-2 having been found to be untruthful witness (and which finding has not been challenged by the Appellants herein), then in no way can his evidence suffice to controvert that PW-1 and PW-4 as to how the accident occurred and who was to blame for the same and hence the evidence of PW-1 and PW-4 sufficed to prove on a balance of probability which was described in the case of Susan Kanini Mwangangi & Another v Patrick Mbithi Kavita [2019] eKLR as "establishing your case to a percentage of 51% as opposed to 49% of the opposing party 'that DW-1 was the one solely and wholly liable for the accident herein and hence the trial Court's finding on liability to that effect cannot be faulted.
44. In conclusion the Respondent cites the case of Susan Munyi v Keshar Shiani [2013] eKLR where the Court of Appeal held as follows:-

“As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial Court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common-sense reason, an appeal Court must accord due respect to the factual findings of the trial Court and will be circumspect and slow to disturb them. The general rule is that an appellate Court will not interfere with a finding of fact made by a trial Court unless the Court is satisfied that the finding of the trial Court is plainly wrong...An appellate Court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand but this is a jurisdiction which should be exercised with caution. It is not enough that the appellate Court might itself have come to a different conclusion... The Court of Appeal in considering evidence should be mindful of the advantage enjoyed by the trial judge who saw and heard the witnesses and that the judge was in a better position to assess the significance of what was said and equally important what was not said...An appellate Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did... The issue before the trial Court was one that was nearly balanced between the two sides and dependent on the word of one party against the other. In those circumstances we are persuaded that the proper approach is the one expressed by the House of Lords in Watt Vs. Thomas (supra) In his speech, Lord MacMillan stated, and we respectfully concur, as follows; Kiruga Vs. Kiruga & Another, "So far as this case stands on paper it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be



said of the present case, then the decision of the trial judge who has enjoyed the advantage not available to the appellate Court becomes of paramount importance and ought not to be disturbed.”

45. The Respondent submits that none of the issues raised in the Appeal herein meets the said threshold to warrant interference by this Honorable Court. In our humble view and since the Trial Court's award in general damages was being challenged on the ground of mistaken injuries alone which has not been demonstrated, we urge the Court to uphold the said award. Equally and since the Trial Court's finding on liability was being challenged on the basis of the fact that PW-1 and PW 4's evidence being contradictory as to whether the Respondent was hit while crossing the road or after he had crossed it and which has not been demonstrated, we urge the Court to uphold the Lower Court's finding on liability.
46. That, in view of the foregoing that the Respondent urges the Court to dismiss the Appeal with costs to the Respondent since it follows the event as is provided for in Section 27 of the [Civil Procedure Act](#).

Analysis and Determination

47. Having considered the Record of Appeal and the material before Court, as the first Appellate Court in this case, the Court is not bound to agree with the finding of fact by the Trial Court but obligated to re-analyse and re-consider and re-evaluate the evidence adduced before the Trial Court and reach its own independent conclusion while taking due regard to the fact that the Trial Court had the benefit of hearing the witnesses.
48. This Court considers the following two issues as emerging for consideration;
- a. Whether the Trial Court erred in finding the Appellants 100% liable?
 - b. Whether the Trial Magistrate 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 as to represent an entirely erroneous estimate?
49. On the 1st issue this Court has considered the trial proceedings and the Record of Appeal noting that the trial magistrate arrived at a finding of fact of liability based on the evidence on record holding that;
- “The 1st Appellant had a duty of care as he approached the bus stop. His evidence was found unbelievable as he denied existence of a traffic offence and charge against him only to admit the same in cross-examination”.
50. This Court is unable to find fault with the finding by the Trial Court on liability including the observation that the 1st Appellant was an untruthful witness and on a balance of probability based on evidence including an eye witness account, the Trial Court's finding was sound .
51. The second issue which is on the quantum of the general damages, the question that the Court will strive to answer is, whether the award was manifestly excessive to warrant interference? The Court is alive to the parameters of its jurisdiction to disturb and award of damages as set out in *Butt v. Khan* [1981] KLR 349 where the Court of Appeal held:-

“An appellate Court will not disturb an award of 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”.



52. The Court shall only disturb the quantum award where it is manifest that in exercise of its discretion the Trial Court misdirected itself to arrive at an award that was erroneous and manifestly excessive and in this instance the Appellants never impeached in any way the exercise of the discretion to warrant interference.

53. In the end the Appeal is found to be lacking merit and is hereby dismissed.

54. The costs of the appeal are awarded to the Respondent.

It is so ordered.

DATED, SIGNED & DELIVERED AT NAKURU THIS 16TH JUNE, 2025

MOHOCHI. S. M.

JUDGE

