



REPUBLIC OF KENYA



KENYA LAW
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**Gitonga v Ndwiga (Civil Appeal E1194 of 2023)
[2025] KEHC 11780 (KLR) (Civ) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1194 OF 2023

DKN MAGARE, J

JULY 24, 2025

BETWEEN

PERIS WANGARI GITONGA APPELLANT

AND

ELIAS MUCHIRA NDWIGA RESPONDENT

*(Appeal from the Judgment and decree of Hon. S.N. Muchungi (PM)
delivered on 8.09.2023 in Milimani CMCC No. E11204 of 2021.)*

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S.N. Muchungi (PM) delivered on 8.09.2023 in Milimani CMCC No. E11204 of 2021. The Appellant was the defendant in the lower court. After hearing the parties, the court entered judgment as follows:
 - a. Liability 100% for the Respondent
 - b. General damages Ksh. 200,000/=
 - c. Special damages Ksh. 5,530/=Total Ksh. 205,530/=
- d. Costs and interest
 1. The Appellant was aggrieved and filed this appeal vide a memorandum of appeal dated 6.10.2023 on the following grounds:
 - a. That the learned magistrate erred in law and fact in awarding damages that were excessively high in the circumstances.



- b. That learned magistrate erred in law and fact in failing to consider the medical evidence.
 - c. The learned magistrate erred in not considering the submission by the Appellant on similar awards.
3. The appeal is thus against the award of the quantum of damages only.

Pleadings

4. The Respondent filed the lower court suit vide a plaint dated 17.09.2021. The Respondent pleaded that he was riding motorcycle registration No. KMFC 655E along Mirema Drive on 4.8.2021 when the Appellant's motor vehicle registration No. KCC 517T was so negligently driven that it lost control and hit the Respondent who suffered injuries.
5. The Respondent pleaded the following particulars of special damages:
 - a. Medical report Ksh. 3,000/=
 - b. Medical expenses Ksh. 1,980/=
 - c. Copy of records Ksh. 550/=
6. The Respondent pleaded the following as particulars of injuries:
 - a. Blunt injury on both lower limbs
 - b. Blunt injury to the right upper limb
 - c. Bruises on the right knee
7. The Appellant entered appearance and filed a defence denying the averments in the Plaint. They attributed liability to the Respondent for not taking precautions for his safety.

Evidence

8. PW1 was No. 81446 PC John Ouko. He testified that the driver of the accident motor vehicle was entering Mirema Lane from Mirema Drive when he collided with the motorbike. The driver was blamed. He produced the police abstract.
9. PW2 was the Respondent. He testified that he was involved in a road traffic accident. He relied on his witness statement dated 5.8.2021. He testified that he sustained injuries on both limbs. He still felt pain.
10. DW1 was the Appellant. She was the one driving the accident motor vehicle. She had started to enter the junction. The Respondent did not stop for her to enter hence the accident.

Submissions

11. The Appellant filed submissions dated 4.12.2024. It was submitted that the award of Ksh. 200,000/= for general damages was inordinately high. The Appellant submitted that Ksh. 80,000/= would be adequate compensation. Reliance was placed inter alia on *Amref Health Africa v Obadha (2024) KEHC 14210 KLR* where it was submitted that the Plaintiff who suffered tenderness to the neck, chest and lower limbs, minor bruises to the upper, and swollen right elbow was awarded Ksh. 200,000/= which was upheld on appeal.



12. Reliance was also placed on *LNK (minor) v Simon Gatuni Njuki* (2022) KEHC 2497 where the court enhanced the award from Ksh. 20,000/= to Ksh. 80,000/= for the Plaintiff who sustained soft tissue injuries to the lower limbs, tempered parietal region, soft tissue injuries to the shoulder and chest.
13. On the part of the Respondent he filed submissions dated 11.12.2024. It was submitted that the Respondent proved his case both on quantum and liability.
14. It was submitted as regards quantum that the award of Ksh. 200,000/= was justifiable. Reliance was placed inter alia on *Poa Link Services Co. Ltd & Another v Sindani Boaz Bonzemo* (2021) eKLR where Ksh. 300,000/= was awarded for blunt injury to the chest, bruises to the lower abdomen, right hip joint, thighs, knee.

Analysis

15. 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. In the case of *Mbogo and Another v. Shah* [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

16. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, where the Judges in their usual gusto, held by as follows;-

“.. 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

17. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”



18. It is a strong thing for an appellate court to differ from the findings on a question of fact, of the magistrate who had the advantage of seeing and hearing the witnesses. In the case of *Peters v 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...”

19. The burden was on the Respondent to prove his case. On this subject, Section 107-109 of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:

“ 107.

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. 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.”

20. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in [William Kabogo Gitau v. George Thuo & 2 Others](#) [2010] 1 KLR 526 as follows:

“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.”

21. This was further enunciated in the case of [Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions](#) [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in [Miller – v- 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 the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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’ explanations are



equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

22. The appeal is on quantum only. On quantum the court awarded Ksh. 200,000/=. The court did not cite any authorities as basis for the finding. Notwithstanding, circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of *Kenya Bus Services Limited v. Jane Karambu Gituma* Civil Appeal Case No. 241 of 2000 as follows:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

23. The principles guiding this court as the first appellate court have crystalized. This is in recognition that the award of damages is discretionary. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another* (No 2) [1985] eKLR 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 of 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 the damage.

24. In this case the Respondent pleaded the following as particulars of injuries:
- a. Blunt injury on both lower limbs
 - b. Blunt injury to the right upper limb
 - c. Bruises on the right knee
25. The Respondent produced the medical report dated 10.8.2021 by Dr. Elizabeth Kimunguyi to support the injuries. The Appellant did not produce any medical report. This court has no doubt that the injuries pleaded are the injuries that the Respondent suffered.
26. In case of *Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa* [2020] eKLR the court awarded the sum of Kshs. 150,000/= for blunt object injury to the lower lip, blunt object injury to the chest, and blunt object injury to the left wrist.
27. In *Mulwa & Another v Nzai* (Civil Appeal E072 of 2023) [2024] KEHC 6898 (KLR) (10 June 2024) (Judgment). The court awarded Kshs. 250,000/= in general damages, reducing the lower court’s award of Kshs. 400,000/= for injuries sustained by the Plaintiff. The Plaintiff had suffered a small bruise on the right ankle, soft tissue injuries to the lower back and right lower limb, a blunt object injury to the lower and right limb, and bruises on the right lower limb.
28. Bearing in mind the inflation and passage of time, I do not think Ksh. 200,000/= was inordinately high as to be reduced by this court. The appeal on this limb is consequently dismissed.



29. Since there was no appeal on the issue of special damages, and the pleadings and evidence clearly show that the Appellant both pleaded and proved a sum of Ksh. 5,530/-, which the lower court rightly awarded, I find no reason to interfere with that finding and I accordingly uphold it.
30. The next issue is costs. Costs are governed by Section 27 of the Civil Procedure Act, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.
31. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:
- It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
32. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
33. The appellant has lost the appeal and the Respondent is entitled to the costs of the appeal.



Determination

34. In the upshot, I make the following orders:

- a. The appeal is dismissed.
- b. The Respondent shall have costs of the appeal assessed at Ksh. 65,000/=.
- c. 30 days stay of execution.
- d. The file is closed.

DELIVERED, DATED and SIGNED at NYERI ON THIS 24TH DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ombati for the Appellant

Ms. Machira for Sagwa for the Respondent

Court Assistant – Michael

