Gachegwe & another v Gitwara (Civil Appeal E158 of 2022) [2025] KEHC 10739 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10739 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E158 OF 2022

RN NYAKUNDI, J

JULY 23, 2025

BETWEEN

NJUGUNA GACHEGWE .... 1ST APPELLANT

SUMMER AUTOWORLD LIMITED .... 2ND APPELLANT

AND

GODWIN GITWARA .... RESPONDENT

(Being an Appeal from the Judgement/Decree of Hon. Tabitha W. Mbugua delivered on 14/10/2022 in Eldoret SCCC No. E104 of 2022)

JUDGMENT

Background

1. The brief facts of this case are that the Respondent had sued the Appellants as a result of the accident that occurred on 28th March 2022. The plaintiff was a pedestrian along Kitale-Eldoret road when the defendants their agents, drivers and/or employees so negligently drove motor vehicle registration No. KDC 141J causing it to lose control, veering off the road and causing an accident and as a result of which the Plaintiff/Respondent suffered severe injuries.

2. The Appellants denied being the owners of the motor vehicle in question and invited the Respondent to strict proof thereof. They also denied occurrence of the accident in the manner alleged at paragraph 4 of the Statement of Claim and invited the Respondent to strict proof thereof. In the alternative, they faulted the Respondent for the accident and enumerated the particulars of negligence under paragraph 3 of the response at page 34 of the Record of Appeal and invoked the doctrine of volenti non-fit injuria. The Respondent also testified on his own account and adopted his statement as his evidence in chief while the Appellants called one witness in support of their case.

3. After hearing, the trial court found the Respondent 20% liable for the accident while the Appellants were found 80% liable. The Respondent was also awarded Kshs. 800,000/= as general damages subject to liability and Kshs. 9,600/= as special damages plus costs of the suit and interest.

4. Being aggrieved with the said Judgement, the Appellants filed a Memorandum of Appeal dated 26th October 2022 raising 5 grounds of Appeal summarized as follows;

   a. That the Learned Trial Adjudicator erred in law in holding the Appellants partially liable for the accident which was contrary to the pleadings and evidence on record.

   b. That the Learned Trial Adjudicator erred in law in failing to appreciate glaring disparity between the pleadings and evidence tendered by the Respondent hence coming to the wrong conclusion.

   c. That the Learned Trial Adjudicator erred in law in disregarding evidence tendered by the Appellants hence coming to the wrong conclusion.

   d. That the Learned Trial Adjudicator erred in law in awarding general damages that were inordinately high and not commensurate to the injuries sustained by the Respondent.

   e. That the Learned Trial Adjudicator erred in law when she awarded special damages that were not specifically pleaded and strictly proved.

5. The Appellants sought the following orders from the Memorandum of Appeal;

   a. This Appeal be allowed and the lower Court's Judgement to be set aside in its entirety and the same be replaced with the findings of this Honorable Court dismissing the Respondent's claim.

   b. Costs in the Small Claim and this Court be awarded to the Appellants.

6. The Appeal was canvassed by way of written submissions

Appellant's Submissions

7. The Appellants filed written submissions dated 17th March 2025 in support of the Appeal. The Appellants were represented by Learned Counsel Mr. JM Kimani who listed 3 issues all for consideration in the Appellants' view as follows;

   a. Whether the Respondent proved his case on the balance of probabilities?

   b. What is the appropriate quantum of damages?

   c. Which relief is available in the premises?

Whether the Respondent proved his case on the balance of probabilities?

8. The Learned Counsel for the Appellants Mr. JM Kimani submitted that from the pleadings as captured in paragraph 3 of their submissions, the Respondent pleaded that the vehicle veered off the road and caused the accident in question and that from the witness statement contained at paragraph 6 of the record of appeal and which was adopted as evidence in chief, the Respondent states that KDC 141J veered off the road and knocked him down.

9. Moreover, the learned Counsel submitted that during cross examination, hearing of the Appellants witness and electronic evidence in terms of video produced together with certificate of electronic records, it became abundantly clear that in fact the Respondent was not off the road and he was

knocked in the middle of the road while running across the road and this was a complete departure from his pleadings and evidence in chief that he was knocked while off the road.

10. The Learned Counsel also submitted that it is trite law that parties are bound by their pleadings and evidence that is not in tandem with the parties goes to no issue. Reliance was placed on the decision of the Court of Appeal in the case of David Sironga Ole Tukai Vs Francis Arap Muge & 2 Others (2014) eKLR where the Court held as follows; In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded.

11. The learned counsel also submitted that the Respondent conceded in cross examination that he was crossing the road at page 72 of the record of appeal and this was a complete departure from the pleadings and his evidence in chief that the vehicle veered off the road and hit him. Counsel stated that it therefore follows that the Learned Trial Adjudicator fell in error of law by failing to appreciate the glaring disparity between pleadings and the evidence tendered by the Respondent hence coming to the wrong conclusion. It was noted that since the respondent pleaded that the vehicle veered off the road and knocked him whereas the evidence point to the fact that he was actually running across the road allegedly to pick a passenger which is a complete departure from paragraph 4 of the statement of claim and on this ground the appeal should succeed with the result that the Respondent case in the small claims court should be dismissed.

12. The leaned counsel made reference to Rule 5 of the Highway Code on how to cross a road by a pedestrian which provides that; "Look right, look left, look right again then listen before crossing the road. DO NOT run." Moreover, reference was made to Rule 11 of the Highway Code which provides that; "If you have to cross between parked vehicles, use outer side edges as if they were a kerb. Stop there and make sure you can see all around and that the traffic can see you." The Learned counsel stated that at page 72 of the record of appeal, on cross examination, the Respondent readily admitted that; "…I could not see the motor vehicle KDC 141J from the point at which I was crossing the road." Counsel noted that clearly the Respondent was the author of his own misfortune because he dashed across the road without ascertaining whether it was safe to do so.

13. The learned Counsel stated that from the video evidence produced by the Appellants together with the Certificate of electronic records, the Respondent is not visible as motor vehicle registration number KDC 141J is approaching the stationary vehicle, then the Respondent abruptly dashes across the road. It was submitted that if the Respondent had adhered to rule 5 and 11 of the Highway Code the accident could not have occurred at all since he could not have been visible and that had he also not dashed across the road in total disregard of his safety, the accident could not have occurred at all.

14. It was the Learned Counsel's submission that the Respondent was the author of his misfortune and the Judgement of the Small Claims Court should be set aside on liability as none can attach to the Appellants owing to the circumstances of the case. Reference was made to the decision of the Court of Appeal in the case of Patrick Mutie Kamau & Another Vs Judy Wambui Ndurumo (1997) eKLR, where while dealing in more or similar facts the court faulted the pedestrian while holding that; "The respondent, it would seem did not take extra care near the stationary bus before starting to cross the three lanes Racecourse Road in front of the said bus as was necessary under the relevant provisions of the aforesaid clause. Sympathetic as we may be to her plight, the circumstances of the accident in question leads to the conclusion that she was responsible for it."

15. The learned counsel submitted that this Honourable Court come to a similar finding by allowing the appeal and dismissing the Respondent's case with costs to the Appellants.

Quantum of damages

16. It was the learned counsel's submission on this issue that in the unlikely event that the court finds for the Respondent, they pray that no damages should be awarded since none were sought in the claim and the court was in error in award that which was not sought. He further stated that if the court is inclined to award any damages, then the same should be reduced to kshs. 350,000/= based on the facts of the case of Gogni Rajope Construction Company Limited Vs Francis Ojuok Olewe (2015) eKLR where the Claimant therein was awarded Kshs. 350,000/= for fracture of distal radius and ulna which injuries are similar to those sustained by the Respondent herein.

17. It was the leaned counsel's submissions that the Appellants reiterate their submissions before the small claim court at page 49-53 of the record of appeal and pray that the appeal be allowed and the lower court's judgement be set aside in its entirety and the same be replaced with the finding of this Honourable Court dismissing the Respondent's claim with costs to the Appellants.

Respondent's Written Submissions

18. The Respondent filed written submissions dated 16th May 2025. The Respondent was represented by the Learned Counsel Mr. Morgan Omusundi who listed 3 issues for determination as follows:

    a. Whether the Trial Court erred in finding the Appellants 80% liable for the accident.

    b. Whether the trial court erred in awarding general damages of kshs. 800,00/=

    c. Who should bear costs

Whether the trial court erred in finding the Appellants 80% liable for the accident

19. The Respondent's learned counsel Mr. Morgan Omusundi submitted that the trial court correctly found the Appellants 80% liable for the accident and that the evidence on record established that the 1st Appellant was overtaking at an unreasonable speed while masked by a stationary vehicle, a clear breach of the *Traffic Act* and the duty of care imposed on drivers which constituted negligence. He also submitted that the Respondent was found contributory negligence for crossing the road while masked by a stationary vehicle, and a 20% liability was justly apportioned against him and the ratio of 80:20 is a fair reflection of the respective culpability.

20. The learned Counsel further submitted that the apportionment of liability 80:20 was fair and just considering the Respondent was partially negligent by crossing the road while masked by a stationary vehicle and that a further perusal of the judgement reveals that the Learned Magistrate considered all the evidence on record, testimonies of the witnesses in apportioning liability. He noted that the trial court was at liberty to evaluate the credibility and weight of each witnesses and hence the allegation of disparity between pleadings and evidence is unfounded, as no material inconsistencies were established.

Whether the trial Court erred in awarding general damages of kshs. 800,000/=

21. The learned counsel submitted that the trial court considered the nature of injuries and comparative awards for similar injuries and that it is settled in principle of the law that apportionment of liability is a matter of judicial discretion based on the trial court's evaluation of evidence and that an appellate court will not interfere unless it is shown that the trial court acted on the wrong principles or misapprehended the evidence as this Honourable Court correctly held in Ratemo Vs Ogaro (Civil Appeal E098 of 2021)

2024 KEHC 14539 (KLR) (18 November 2024) (Judgement). Counsel also made reference to the case of Gitau Peris Vs Gerald Njoroge Chege (2020) eKLR, where the court upheld an award of kshs. 850,000/= was almost comparable injuries. It was his final submission on this issue that the award is well within acceptable range and cannot be said to be excessive.

Who should bear costs?

22. It was submitted that costs should follow the event as encapsulated in section 27of the *Civil Procedure Act* (Cap 21) and that a successful party should ordinarily be awarded costs of an action unless the court, for good reason directs otherwise. Reference was made to the case of Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & Another (2016) eKLR where Justice John M. Mativo explained thus: "The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course"

23. It was the learned counsel's final submission that the trial court properly exercised its discretion in determining liability and assessing damages and that the Appellants have not demonstrated that the trial court misdirected itself in law of fact, nor that the award was excessive.

Analysis and Determination

24. A first appellate court has the mandate to conduct a comprehensive review of both the evidence presented at trial and the lower court's judgment, ultimately rendering its own independent decision on the appeal. This appellate court possesses the authority to undertake a thorough reexamination of all evidence and draw its own conclusions, while acknowledging the inherent limitation that it lacks the advantage of directly observing witness testimony and demeanor that the trial court enjoyed.

25. The appeal is on both quantum and liability. I shall deal with the two limbs in turn. The appellant has argued that the trial court erred in apportioning liability against the Appellant at 80:20% contrary to the evidence on record and/or adduced during trial.

26. The question of negligence is on a duty of care which has been breached by the Defendant while in control of his or her motor vehicle or authorized Agent. Where there is evidence from both sides to a claim for damages for reason of negligence involving a collusion on the road way and this evidence is as nearly always the case seeks to put the claim squarely on the defendant, there is need to scrutinize the available physical evidence, like point of impact, skid marks, or debris, which may have been broken because of the accident. In my assessment on an appeal, the totality of the evidence in this case would be examined to establish whether the respondent established the case of negligence against Appellant in a balance of probabilities. There is no dispute on the evidence that both parties were road users on the material day. It is settled law therefore, that they would owe a duty of care to each other to drive with due diligence to avoid loss and damage.

27. On the question of liability, let me start with highlighting the decision in Stapley v Gypsum Mines Limited (2) (1953) A.C 663 where the court stated that determination of liability in a road traffic case is not a scientific affair. Lord Reid reasoned as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant

> in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

28. As Dennis in his BOOK law of evidence 2nd edition reprinted 2004 observes

> "when a party has discharged an evidential burden and raised an issue for the court to consider, there arises a tactical onus on the other party to respond with some rebutting evidence. There is no legal obligation to adduce(further) evidence on the issue, but the party against whom the evidence has been adduced increases the risk of losing on the issue if nothing is done to challenge the evidence when a judge is deciding whether an evidential burden has been discharged, he looks only at the evidence favouring the party who bears the evidential burden. The question for decision is whether the favourable evidence is sufficient by itself to raise for the court to consider; the fact that there may be substantial other evidence contradicting the favourable evidence is immaterial at this stage. When a fact-finder (judge, jury or bench of magistrates) is deciding whether a legal burden has been discharged, the fact-finder looks at all the evidence adduced in the case. Thus the fact-finder evidential burden plus any other evidence which tends to confirm or rebut it. The discharge of an evidential burden does not involve a decision that any fact has been proved. All it signifies is that a question has been validly raised about the possible existence of a material fact; the decision is only that enough evidence has been adduced to justify a possible finding in favour of the party bearing the burden. The discharge of the legal burden occurs at a later stage in the trial, when the fact-finder is required to decide on the existence or non-existence of facts whose possible existence is in issue."

29. The conceptualization of the above principles lies at the heart of the contestation on liability between the Appellants and the Respondent. The Appellants are aggrieved by what they perceive as the Respondent's failure to discharge the burden of proof on a balance of probabilities regarding the accident as alleged in his pleadings versus his actual evidence. The fundamental disagreement between the parties centers on whether the accident was caused by the vehicle veering off the road to strike the Respondent (as pleaded) or by the Respondent dashing across the road into the path of the vehicle (as evidenced). The Appellants contend that this material discrepancy between pleadings and evidence fatally undermines the Respondent's case.

30. For purposes of this appeal, the main characteristic that differentiates the burden of proof on liability is the evidential disparity found between the Respondent's pleadings, his witness statement, and his testimony under cross-examination, particularly when considered against the video evidence and electronic records produced by the Appellants. The trial court, having reflected on both parties' cases in the impugned judgment, appears to have placed greater confidence in the Respondent's version despite the acknowledged inconsistencies. However, in such proceedings where there is dispute about the facts of an earlier event, the trial court can never acquire unassailable knowledge of what happened, only a belief about what probably happened based on credible and consistent evidence.

31. In the case at bar, I do not share the view of legal counsel for the Appellant that there exist in consistencies and discrepancies that go to the root of the case to persuade this court to interfere with the findings on contributory negligence as arrived at by the learned trial magistrate. If contributory negligence is established the court will apportion liability between the parties based on the extent to which each parties negligence contributed to the accident on loss of damage. Contributory negligence in Kenya is a significant factor in personal injury cases. The trial courts in the 1st instance carefully consider the specific circumstances of each case including the actions of both the plaintiff and the defendant to determine liability and apportion damages accordingly. This will play out prominently in this appeal.

32. The Appellants argue that beyond the Respondent's testimony, there was insufficient probative evidence to establish their liability, particularly given the Respondent's admission that he could not see the approaching vehicle and his concession that he was crossing the road contrary to his pleadings. The video evidence and the Respondent's failure to observe basic road safety rules as prescribed in the Highway Code fundamentally altered the balance of probabilities. The Appellants contend that the trial magistrate erred in exercising discretion to apportion liability 80:20 in favor of the Respondent without adequately considering these material inconsistencies and the doctrine of volenti non fit injuria. Within the trial court's discretion to evaluate evidence, the Appellants submit that the magistrate failed to properly weigh the contradictory evidence and the Respondent's contributory negligence, thus arriving at a judgment that does not reflect the true facts of the case as established by the totality of evidence adduced.

33. The Court of Appeal in Michaeal Hubert Kloss & Another vs. David Seroney & 5 others (2009) eKLR addressed the issue of liability and the guidelines to be followed when exercising judicial discretion to apportion negligence in Road traffic accident claims thus:

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as properly instructed and reasonable jury would decide it… The question must be determined by applying common sense to the facts of each particular case. One may find that a matter of history several people have been at fault and that of any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally…"

34. In the present case, upon a re-evaluation of all the evidence adduced, it is clear that an accident occurred on 28th March 2022 along the Kitale-Eldoret road involving motor vehicle registration number KDC 141J and the Respondent as a pedestrian. However, the critical issue is the material inconsistency between the Respondent's pleadings and the evidence actually presented at trial. The Respondent pleaded in paragraph 4 of his Statement of Claim that the vehicle veered off the road and struck him, yet the evidence, including his own testimony under cross-examination and the video evidence, clearly established that he was crossing the road when the accident occurred.

35. The Respondent testified and adopted his witness statement as evidence in chief, maintaining that the vehicle veered off the road and knocked him down. However, under cross-examination, he made crucial admissions that fundamentally altered his case. He conceded that he was crossing the road and

significantly admitted that he could not see the motor vehicle KDC 141J from the point at which I was crossing the road. These admissions directly contradict his pleaded case and establish that he was not stationary off the road as claimed, but was actively crossing into the path of traffic.

36. The Appellants' evidence included video footage together with a certificate of electronic records which demonstrated that the Respondent was not visible as the vehicle approached the stationary vehicle, and that he "abruptly dashes across the road." This electronic evidence corroborated the Appellants' version of events and exposed the fundamental flaw in the Respondent's case.

37. The trial magistrate, despite acknowledging these material inconsistencies, proceeded to apportion liability at 80:20 against the Appellants. However, this apportionment failed to give adequate weight to the Respondent's clear violations of the Highway Code, particularly Rules 5 and 11 which require pedestrians to look right, left, and right again before crossing, and specifically prohibit running across roads. The Respondent's own admission that he could not see the approaching vehicle demonstrates a clear breach of his duty of care as a pedestrian.

38. While the Appellants' driver bore some responsibility for maintaining proper lookout and speed control, the Respondent's conduct was the primary contributing factor to this accident. The case of Patrick Mutie Kamau & Another Vs Judy Wambui Ndurumo demonstrates that pedestrians who fail to exercise proper care when crossing roads, particularly near stationary vehicles, bear substantial responsibility for resulting accidents. Given the Respondent's reckless conduct in running across the road while masked by a stationary vehicle without ensuring his safety, the appropriate apportionment should be 70:30 in favor of the Appellants, reflecting the Respondent's predominant fault while acknowledging the driver's duty of care.

39. As to the question of quantum, the trial court awarded a sum of Kshs. 800,000/= as compensation to the injuries sustained by the Respondent. According to the record, the Respondent sustained the following injuries: head injury with loss of consciousness; chest injury with haemothorax; blunt injury to the abdomen with lacerations of the spleen with haemoperitonium; fracture right radius distal; fracture right ulna; fracture left radius (distal), bruises on both elbows and bruises on the left foot.

40. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards".

41. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] Kneller. J.A, stated:

> "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. See Ilango V. Manyoka [1961] E.a. 705, 709, 713; Lukenya Ranching And Farming Co-operatives Society Ltd V. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles."

42. The central question is whether this appellate court should disturb the quantum of damages determined by the trial court. The trial court's discretionary power in quantifying general damages will only be overturned where it is shown that irrelevant considerations influenced the decision, relevant factors were ignored, or the award was so disproportionately high or low as to represent a completely erroneous evaluation of the damages.

43. It worth pointing out that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.

44. In George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi [2016] eKLR the respondent had two loose teeth, blunt trauma to the neck and chest, fracture to the left clavicle, fractures on the 4th and 5th ribs, blunt trauma to the spinal column and right scapula area, and dislocation of the left shoulder joint the court awarded Kshs. 450,000.

45. In Gabriel Kariuki Kigathi & Anor –vs- Monica Wangui Wangechi (2016) eKLR where the plaintiff suffered a fracture of the neck, bilateral rib fractures, bilateral lung contusion, injuries to both hands, injuries to both legs, fracture C2, fractured cervical spine and fracture of right ankle. An award of Kshs. 800, 000/= was reduced to Kshs. 400,000/= on appeal.

46. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that an award of Kshs. 450,000/= is sufficient.

47. The award of Kshs. 800,000/= is therefore substituted with an award of Kshs. 450,000/=.

48. Turning to special damages, Kshs. 9,600/= was pleaded and strictly proved as was held in the case of Hahn vs. *Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows;

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

49. In the end the court the award on damages and liability is entered in the following terms;

    i. General Damages.................. Kshs. 450,000/=

    ii. Special Damages...................... Kshs. 9,600/=

    iii. Total ....Kshs. 459,600/=

    iv. Less 30% .... Kshs. 137,880/=

    v. Sub-total .... Kshs. 321,720/=

    vi. Plus, costs and interest being special damages from the date of filing suit whereas general damages shall accrue interest from the date of judgement of the trial court.

50. It is ordered so.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 23RD DAY OF JULY 2025.

..

R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Kinyanjui Advocate