Kirero v Kariuki (Civil Appeal 179 of 2022)
[2025] KEHC 11099 (KLR) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11099 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 179 OF 2022

PN GICHOHI, J

JULY 28, 2025

BETWEEN

JAMES KIRERO ..... APPELLANT

AND

RAPHAEL KIMANI KARIUKI ..... RESPONDENT

(Being an appeal from judgement and decree of the Hon. R. Ombata in Nakuru CMCC No. 1240 of 2019 delivered on 15th November, 2022)

JUDGMENT

1. The background of this Appeal is that the Appellant herein had sued the Respondent vide a plaint dated 2nd December, 2019 seeking judgement for;-
    a. General damages and costs for future operation.
    b. Special damages of Kshs. 10,950, plus 16% VAT.
    c. cost of suit.
    d. interest in (a) and (c) above at court rates
    e. Any other relief that this Honourable Court shall find fit and just to grant.
2. The Appellant stated that, on 23rd September, 2019, while he was standing off the road along Geoffrey Kamau Road, he was negligently hit by motor vehicle registration number KBR 896S. He contended that the vehicle was driven by the defendant or an authorised agent, and he attributed the accident to various acts of negligence on the defendant's part.
3. The particulars of negligence included driving without due care, driving at excessive speed, failure to control or brake the vehicle, failure to stop after the accident, general carelessness, driving under the

influence of alcohol, operating a defective vehicle, and driving while sleepy. The Appellant invoked the legal doctrine of Res Ipsa Loquitor.

4. He therefore claimed that as a result of the accident, he sustained severe injuries, specifically; a fractured right tibia and fibula, significant soft tissue injuries to his right leg, a blunt injury to his right forearm, soft tissue injuries to his head, and bruises on his left leg.

5. In his defence filed on 16th January, 2020, the Respondent denied the alleged negligence and asserted that, if an accident did indeed occur, it was entirely or predominantly caused by the Appellant's negligent actions.

6. He specifically refuted being the registered owner, beneficial owner, or the driver of motor vehicle KBR 896 S at the time of the alleged incident. Furthermore, he denied that the Appellant sustained the injuries claimed.

7. Upon hearing both parties, the trial Court dismissed the case with costs to the Respondent herein on the basis that the Appellant had failed to prove its case on both liability and quantum.

8. Dissatisfied with that decision, the Appellant lodged this Appeal vide the Memorandum of Appeal dated 9th December, 2022,on the grounds that :-

    1. The learned trial magistrate erred in law and fact in failing to appropriately consider the evidence adduced by the appellant, leading to a wrong conclusion that the appellant did not prove his case to the required standards.

    2. The learned trial magistrate completely failed to appreciate and consider the circumstances surrounding the accident, instead taking into account irrelevant ones, thus reaching a wrong conclusion.

    3. The learned trial magistrate grossly misdirected herself by treating the evidence and submissions on liability superficially, consequently arriving at a wrong conclusion on the same.

    4. The learned trial magistrate grossly erred in law and in fact by dismissing the appellant's case in its entirety and against the weight of the evidence adduced during trial.

    5. The learned trial magistrate misdirected herself by ignoring the written submissions presented and filed by the Appellant in their entirety and failing to take into account the evidence presented before her in totality, particularly the evidence presented on behalf of the Appellant.

    6. The learned trial magistrate erred in law and in fact by subjecting the appellant's case to a standard of proof beyond reasonable doubt and dismissing the appellant's case with costs on the basis that he had not proved liability against the respondent on a balance of probabilities.

    7. The learned trial magistrate misdirected herself by failing to appreciate the evidence placed before her and by taking into account extraneous issues, thereby arriving at an erroneous decision against the evidence presented.

    8. The learned trial magistrate grossly erred in law and in fact by dismissing the appellant's case contrary to the evidence on record and without adequately assessing the number of damages that could have been awarded.

    9. The learned trial Magistrate erred in law and in fact by failing to consider pertinent factors that should have been considered while making awards on both liability and quantum.

9. The Appellant therefore urged this Court to set aside the trial magistrate's decision on both liability and quantum and substitute with a judgment of this Court. He also prayed for award of costs of this Appeal.

Appellant Submission

10. He submitted that the trial court was duty-bound to thoroughly consider the evidence presented on record and issue a definitive determination. In support of this argument, reliance is placed upon the case of Eunice Wayua Munyao v Mutilu Beatrice & 3 Others [2017] eKLR.

11. His further contention is that the trial court's dismissal of the case on the grounds that the case was not proven on a balance of probabilities, was erroneous. In support of that, the Appellant cites the case of Teresia Wambui & Another vs Joseph Gitonga Muriuki [2013] eKLR, that states that:-

> " It is not in doubt that negligence is to be proved on a balance of probabilities, and it is in our view that the Respondent had by virtue of his submissions and evidence discharged that burden of proof required of him."

12. He maintains that there was undisputed evidence of an accident involving the appellant and motor vehicle Registration Number KBR 896 Sand therefore, the trial magistrate erred by not assessing damages, even in the event of a dismissal.

13. In support of his case, reliance is placed on the case of Mordekai Mwangi Nandwa vs Bhogals Garage Ltd *CA No. 124 of 1993* [1993] KLR 448, where the Court held that:- "the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment."

14. Further reliance is placed in the case of Matiya Byabaloma & Others vs Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138, that reinforced this principle and held that:- "...the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim."

15. Regarding quantum, the Appellant had previously quantified in the lower Court submissions and now maintains a claim of Kshs. 1,500,000/= as general damages for pain and suffering.

16. He emphasises that their submissions to the lower court, particularly concerning liability, were clear and that the magistrate failed to adequately analyse them.

17. In conclusion, the Appellant prays that this Court allows the appeal, by setting aside the trial magistrate's judgment and substituting it with a judgment of this Court.

Respondent's submissions

18. The Respondent equally submitted on two issues, that is; whether the learned trial magistrate erred by not finding that the appellant had proven their case on a balance of probabilities, leading to its dismissal and whether the trial magistrate erred by failing to assess damages (quantum) even after dismissing the appellant's case.

19. On liability and proof on a balance of probabilities, the Respondent contends that the appellant failed to establish his case as required by law. He emphasize that the onus of proof rests squarely with the plaintiff. To underscore this point, the respondent cites I.G. vs D.A.M. [2013] eKLR, which states:-

> " The plaintiff must establish negligence against the defendant and it is not enough to simply prove that an accident took place. The mere happening of an accident is not prima facie evidence of negligence."

20. In further reinforcing this position, the respondent refers to Statpack Industries vs James Mbithi Munyao [2005] eKLR, where the court stated that:-

> " On the evidence the learned judge came to the conclusion that the respondent had failed to prove the particulars of negligence given in the plaint. It is trite law that the onus of proving negligence on the part of the defendant lies with the plaintiff and in this the plaintiff must prove that the defendant owed him a duty of care, the defendant breached that duty of care and as a result of that breach the plaintiff suffered injury."

21. The respondent highlights the trial magistrate's finding that there was no clear evidence to apportion blame. In support of the necessity for a decision based solely on evidence, the respondent cites Wairimu Mureithi Vs Consolidated Bank of Kenya Limited (2014) eKLR, that asserted; -

> " The court's decision in a civil case must be based on evidence on record and not on conjectures or speculation."

22. Regarding the assessment of Quantum, the respondent argues that the trial magistrate was entirely justified in not assessing damage after dismissing the case on liability. Their reasoning is that the assessment of quantum is fundamentally dependent on a prior finding of liability, rendering an assessment futile if liability has not been established. In support of this, the Respondent cited the case of Hellen Waruguru Waweru (suing as the legal representative of Benson Waweru (Deceased)) vs The Attorney General & Another (2015) eKLR, which held: -

> " It is trite law that quantum of damages is dependent on the finding on liability. Once a court finds that the plaintiff has not proved his case on liability, then it has no business assessing quantum of damages, as it would be an exercise in futility, and would amount to writing an alternative judgment which is not the function of the court."

23. The respondent concluded that the trial magistrate acted correctly by not proceeding to assess quantum, given the failure of the plaintiff to prove his case on liability.

24. In summation, the respondent asserted that the learned trial magistrate meticulously considered the facts presented and the weight of the evidence tendered by the appellant, and was thus justified in concluding that the appellant failed to prove his case on a balance of probabilities, particularly given the lack of clarity regarding who was at fault.

25. Accordingly, the respondent urged this Court to dismiss the appeal with costs.

Analysis and determination

26. This being a first Appeal, this court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity

of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others[1968]EA, 123.

27. Having considered the Memorandum of Appeal together with the record, the rival submissions and the cited authorities, the issues for determination are on Liability and quantum.

28. On liability, sections 107, 108 and 109 of the *Evidence Act* places the burden of prove in he who alleged. Whereas section 10 provide for burden of prove thus; -

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he assets 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."

29. Section 108 states that; -

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

30. Section 109 on the other hand provides for proof of particular fact thus; -

> " 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."

31. According, it was the appellant's duty to place before the trial Court sufficient evidence to support his case.

32. During hearing, the Appellant testifying as PW1. His case was that on 23rd September, 2019 he was carrying a customer's load opposite Uchumi Bus centre, off-road, when he was knock off by the Respondent motor vehicle registration Number KBR 896S. upon cross-examination he confirmed that he is a "beba," and was carrying a customer's load along Geoffrey Kamau road on the left side, when the Respondent vehicle knocked him.

33. PW2 P.C Samson Okello, states he is not the investigating officer, does not have the police file or sketch maps, cannot confirm a bus stop or zebra crossing. He however, confirmed that the case is still under investigation, and no one has been blamed or charged.

34. The Respondent on the other hand called one witness, Simon Muiruri Kamande (DW1) who confirms being the driver of KBR 896 S, at the material time and stated that when he approached KFA roundabout, he saw someone crossing the road while carrying a load, he slowed down but ended up hitting him. He blames the Appellant for running while crossing the road where there was no zebra crossing.

35. During cross-examination, he states he was driving on the highway at 30km/h, has more than 10 years of driving experience, and saw the plaintiff 10m before the accident. He reiterates that the point of impact was on the left side and the plaintiff was crossing from left to right.

36. It is noted that the only reason for dismissing the case herein was that there was no independent eye witness that could give an account of how the accident occurred to enable the court determined who was to blame.

37. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J (as he then was) in William Kabogo Gitau vs. 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."

38. Further, in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), 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 –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
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> "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."

39. It is therefore clear from the evidence on record that in the absence of independent eyewitnesses to this accident, the trial court faced the challenge of analysing the conflicting testimonies of the two parties to determine the more plausible account , with the Appellant claiming that he was hit while off the road, while the Respondent maintained that the Appellant was running across the road when the accident occurred.

40. The trial court record shows the Appellant's consistent assertion that he was hit while walking off the road, suggesting the vehicle veered off course.

41. Conversely, the Respondent argued the impact occurred on the left side of the road. He stated he was driving at 30 KPH and clearly saw the Appellant, who was carrying a heavy load and running across the road, approximately 10 meters away.

42. Although he admitted that he should have been able to brake easily at that speed, he also claimed the accident happened before he could react. Considering that the accident occurred near a roundabout, the Respondent was expected to have slowed down, which he claimed he did.

43. However, his admission that he saw the Appellant running across the road from 10 meters away suggests he should have seen the pedestrian and avoided the accident. Furthermore, the Respondent's assertion that the Appellant was carrying a heavy load yet still running across the road appears inconsistent.

44. In those circumstances and considering that the matter was still pending under investigation, the trial magistrate should have apportioned liability equally between both parties. Indeed, the Court of Appeal

in the case of Hussein Omar Farah v Lento Agencies [2006] KECA 388 (KLR) had this to say in such circumstances:-

> "In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

45. Accordingly, therefore, the trial court decision dismissing the suit is set aside and parties herein are found to be equally liable for the accident in the ratio of 50:50.

46. On quantum, the injuries, which the Appellant herein sustained are not dispute, they include; a fractured right tibia and fibula, significant soft tissue injuries to his right leg, a blunt injury to his right forearm, soft tissue injuries to his head, and bruises on his left leg.

47. In the discharge summary issued by PGH Nakuru, the injuries captured therein are broken right tibia and fibula. Similar injuries are indicated in the medical examination report issued by Dr. Patrick Mokaya on 31st October, 2019 from the same Hospital, PGH Nakuru. Dr. Obed Omuyoma in his Medico-Legal report dated 11th November, 2019 captured the injuries as fracture of the right tibia and fibula, together with soft tissue injuries to the right leg and blunt injury to the right forearm.

48. The Injuries were thus confirmed as fracture of the right tibia and fibula together with several soft tissue injuries to the right leg, arm and head.

49. The claim for damages is on both special and general damages and in the case of Hahn V Singh [1985] KECA 129 (KLR),the Court of Appeal held as follows in regards to special damages:-

> "special damages which must be not only claimed specially but proved strictly 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 the nature of the acts themselves."

50. In this case, the Appellant pleaded for special damages of Kshs 10,950 and in support, he tendered a receipt issue by Dr. Obed Omuyoma in procurement of the medico-legal report of Kshs.7,000/= , treatment receipt from PGH of Kshs. 200/= and search receipt of Kshs 550/= only. The special damages specifically pleaded and strictly proved is thus the sum of Kshs 7,750/=.

51. As regards assessment of general damages, comparable injuries should as far as possible be compensated by comparable awards being in mind that no two cases are usually similar in terms of the nature and extent of the injuries sustained.

52. Indeed, the Court of Appeal in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR, stated as follows;-

> "... It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

53. Flowing from above principle, this Court notes that in Kiama *v Mutiso (Civil Appeal 40 of 2023)* [2024] KEHC 5135 KLR), D.S Majanja J reduced an award of Kshs. 700,000 to Kshs. 400,000/= for

a party that had suffered a fracture of the left tibia bone (upper 1/3) and a blunt injury to the left leg and thigh.

54. In Wabomba v Wanyama (Civil Appeal No. E007 of 2021) [2024] KEHC 2191 (KLR) the Respondent sustained soft tissue injuries, psychological trauma and fractures of the right tibia and fibula and was awarded Kshs. 800,000/= general damages, which on appeal, R.E. Ougo J found the trial court's award excessive and substituted it with an award of Kshs. 500,000/=. Based on the above case law, this Court finds an award of Kshs 500,000/= sufficient for the injuries the Appellant sustained in this case.

55. In conclusion, the trial Court's judgement delivered on 1st November, 2022 be and is hereby set aside in its entirety and substituted with judgment in favour of the Appellant as against the Respondent in the following terms:-

    1. Liability 50:50
    2. Special damages of Kshs. 7,750.
    3. General damages of Kshs 500,000.
    5. Less 50 % contributory negligence
    6. Grant total.....Kshs. 253,875/=.
    7. Costs and interest of the Appeal awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Obura for Appellant

Ms. Karanja h/b for Mr. Matiri for Respondent

Ruto, Court Assistant