



REPUBLIC OF KENYA



**KENYA LAW**  
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**Khaoya v Makokha (Civil Appeal E085 of 2022)  
[2025] KEHC 11949 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E085 OF 2022**

**MS SHARIFF, J  
JULY 23, 2025**

**BETWEEN**

**GABRIEL MATERE KHAOYA ..... APPELLANT**

**AND**

**MARTIN WAMALWA MAKOKHA ..... RESPONDENT**

*(Being an appeal from the judgment and order of the Senior Resident Magistrate Court, Kimilili Senior Principal Law Courts in Civil Case No. 36 of 2019 delivered by Hon. Dennis Ogal (SRM) on 24th August 2022.)*

**JUDGMENT**

**A. Background**

1. This is an Appeal seeking to set aside the decision of the trial Court on liability and quantum. The Appellant craves that the appeal be allowed and judgment of the lower Court be set aside in its entirety, the costs of the appeal and of the Court below.
2. By a Plaint dated 21<sup>st</sup> March 2019, in Kimilili Senior Principal Magistrate's Court No. 36 of 2019, the Respondent herein filed a tortious negligence claim against the appellant herein and claimed for general damages, special damages of Kshs 7,110/=, costs of the suit, and interest for bodily injuries sustained out of a road accident that occurred on 15<sup>th</sup> January 2019, along Kimilili-Kamukuywa near Kamukuywa junction.
3. The Respondent pleaded that he was a pedestrian walking along Kimilili-Kamukuywa when Motor Vehicle Registration Number KCE KBJ 839G-Nissan Saloon, which was driven by the Appellant himself, his servant, agent or driver lost control, veering off the road and hit him causing him to sustain serious bodily injuries.



4. The Appellant filed a defence and denied ownership of the alleged Motor Vehicle Registration Number KCE KBJ 839G-Nissan Saloon and all the particulars of negligence attributed to him and he pleaded that if the accident occurred, then the same was wholly caused by the negligence of the Respondent and urged the trial Court to dismiss the suit.
5. During the hearing, the Respondent called three witnesses, while the Appellant testified but did not call any witness.
6. After hearing and an in-depth analysis of the evidence before Court, the trial Court found the Appellant wholly liable for the said accident. The trial Court proceeded to award the following: -
  - i. General damages Kshs. 500, 000/=
  - ii. Special damages Kshs. 6,000 /=  
Total Kshs.506,000/=
  - iii. Plus, costs and interest at Court rates

## **B. Appeal**

7. Being aggrieved by the judgment of the trial Court on both liability and quantum, the appellant lodged a memorandum of appeal dated 21<sup>st</sup> September 2022, which is premised upon four (4) grounds of appeal as set out hereunder:
  - a. That the Learned Trial Magistrate erred in law and fact by relying on the Respondent's false information of hearsay to reach his informed decision.
  - b. That the Learned Trial Magistrate misdirected himself in law and fact by allowing himself to rely on the reports filed by unauthorized medical practitioners in total disregard of the Appellant documentary evidence as demands Order 11 of the *Civil Procedure Rules*.
  - c. That the Learned Trial Magistrate erred in law and fact by not considering and ignoring the evidence produced by the Appellant against the Respondent who relied on or based on wrong identification of the Motor Vehicle that got involved in the accident.
  - d. That the Learned Trial Magistrate misdirected himself by allowing himself to agree that the owner of the vehicle can be identified by insurance certificate and Court proceedings and not the logbook as demands statutory law.
8. The Appeal was to be canvassed by way of written submissions. Both parties failed to comply with the Court's directive.

## **C. Analysis and Determination**

9. 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 demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424.
10. I have duly re-evaluated the record of appeal in an exercise akin to a retrial and I have moreover considered the rival submissions of parties and the following issues arise for determination
  - a. Who was liable for causing the accident?



- b. Did the trial Court err in its assessment of the quantum of general damages?

**Who was liable for causing the said accident?**

11. While the Respondent called three witnesses to support his case, the Appellant testified and closed his case. He blamed the Respondent for the accident.
12. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlined as hereunder;
- “Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
13. In *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR the Court in setting out the legal burden of proof in civil cases stated;
- “As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
14. Further in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 Kimaru J as he then was) stated that:
- “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.”
15. The scope and extent of the fundamental legal principles on who is to blame for negligence are well settled. In the cases of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR the Court held that:
- “In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff’s favour unless the defendant provides same answer adequate to displace that inference.”
16. In this instance, the only evidence placed before Court on how the accident occurred is that of the Respondent who in his witness statement states that on 15<sup>th</sup> January 2019, while he was lawfully walking along Kimilili-Kamukuywa road headed to the Junction, when a Motor Vehicle Number KBJ 839G Saloon car came from behind and veered off the road thereby knocking him together with some other people. On cross-examination he stated that he was walking towards Kitale road junction and



did not see the car approach. He told the Court that the Motor Vehicle hit him from behind and that he blamed the Appellant for the accident.

17. PW4, No. 88215 CP Catherine Khaemba, testified that she was the investigating officer in this incident and confirmed that the accident occurred and she visited the scene while in the company of another police officer. She further testified that there was no driver present and they were informed that he had escaped from the scene immediately after the accident. She confirmed that they found meters away from the Motor Vehicle, a Motorcycle Registration Number KMED 986Z-Honda and established that the Motor Vehicle in question was been driven from Kimilili towards Kamukuywa and on reaching Chesamisi T-Junction area, it hit four pedestrians and made a u-turn towards Webuye direction where a pedal-cyclists was also hit. She told the Court that boda boda riders chased the Motor Vehicle driver and in the process of him attempting to escape he hit other pedestrians at Kamukuywa area. This witness stated that the victims reported the accident on 16<sup>th</sup> January 2019 at Kimilili Police Station, recorded their statements and Police Abstracts were filled. She availed the Police Abstract issued to the Respondent herein in Court as PEXH. 4 wherein she noted that Motor Vehicle Registration Number KBJ 839 G belonged to the Appellant herein as per the details availed by Xplico Insurance Co. Limited and that it did hit the Respondent herein on 15<sup>th</sup> January 2019. However, other than the Police Abstract, PW4 did not produce any sketch map nor the police file.
18. While testifying in his defence, the Appellant told the Court that on 12<sup>th</sup> January 2019 he encountered two of his friends namely Samuel Lusweti and Patrick Manyonge Juma who were in possession of the motor vehicle registration number KBJ 839G and Patrick Manyonge Juma wished to dispose off the same. The Appellant stated that he had expressed his interest in purchasing the said motor vehicle. Further that, he was to collect it from a garage situated near Korry Family Hospital after 3 days and he was to pay Patrick Manyonge Juma the purchase price on 20<sup>th</sup> January 2019. It was the Appellant's evidence that on 16<sup>th</sup> January 2019, he received a call from Samuel Lusweti informing him that the said Motor Vehicle had been seen being towed along Misikhu-Matili-Kimilili road the previous night and on visiting the base commander he was informed that the said Motor Vehicle was involved in an accident along Kitale-Webuye road with a Motorcycle registration number KMDD 986Z whose rider was a minor. He told the Court that he was asked to produce the person who was driving his Motor Vehicle at the time of the accident, but he failed to do so which led to him being charged for the offence of failing to keep records. He claimed that at the time of the accident he was not the registered owner of the Motor Vehicle Registration Number KBJ 839G. On cross-examination, he told the Court that he was the one who insured the Motor Vehicle Registration Number KBJ 839G and therefore had beneficial interest in the same.
19. In view of the above, the burden of proof at all times lay with the Plaintiff/Claimant to prove the case and not the Defendant. In the instant appeal, ownership of motor vehicle Registration Number KBJ 839G was in issue before the trial Court; specifically, whether the Appellant owned the vehicle. The Respondent had the burden of proving that the Appellant owned the said vehicle at the time of the accident. The record shows that the Respondent relied on the contents of the Police Abstract which he produced (PEXH.3) to prove ownership of the suit motor vehicle.
20. Various Courts have found that a Police Abstract when produced as evidence can be sufficient proof of ownership unless it is successfully challenged. In the case of *Joel Muga Opija v East African Sea Foods Ltd* [2013] eKLR the Court in affirming this position held:

“In our view an exhibit is evidence and in this case the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously



rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned Judge in failing to consider in depth the legal position of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the Abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

21. Based on the foregoing it is clear that proof of ownership is not only by registration by the Registrar of motor vehicles, but it can also be proved by way of other documents which include Police Abstract unless there is sufficient evidence to challenge the same and each case has to be considered on its own peculiar facts. Exclusive control of a motor vehicle compounded with the taking out of an insurance cover confers on the person in such control beneficial ownership and such a person is thus estopped from denying ownership when tortious claims arise. The Appellant herein fell in the latter category.
22. It is worth noting that in civil cases, the standard of proof is that of balance of probabilities unlike criminal cases where proof is beyond reasonable doubt. The Court is required to weigh evidence adduced by both parties and decide on a balance of probabilities and not beyond reasonable doubt, whether the vehicle belonged to the Appellant or not.
23. The Appellant did not offer any explanation as to why he took it upon himself to insure the said motor vehicle prior to the 20<sup>th</sup> January 2019, when he allegedly intended to purchase the said motor vehicle. It was not practical for the Appellant to insure a motor vehicle which he had no insurable interest in given that per his own evidence he was yet to purchase it. The appellant had testified that his was to pick the motor vehicle from a certain garage, 3 days after it had been serviced. The appellant does not explain why he was the one who was to pick the said motor vehicle and why his friend called him when he saw it being towed if the vehicle did not belong to him. Despite the fact that the appellant vehemently denied ownership of the subject motor vehicle, he admitted during cross examination that he had a beneficial interest in the said vehicle. The particulars of the motor vehicle were clearly captured in the police abstract and any contradictions in the testimonies of the respondent’s witnesses as to the make of the said motor vehicle do not negate the general evidence of causation of the said accident. The appellant was approbating and reprobating simultaneously. I find that Appellant was not a credible witness and his testimony was out rightly contradictory and self-defeating. Further, I do find that the Appellant was the beneficial owner of motor vehicle registration No KBJ 839G, had control over it and was liable for any tortious claims that arose due to the negligent driving and or control of the said motor vehicle.
24. Having found that the Appellant was the beneficial owner of the said motor vehicle, I now wish to delve into the issue of causation of the said road traffic accident. It was the Respondent’s testimony that on 15.1.2019, he had been walking had almost reached Kamkuywa Junction, the Appellant’s motor vehicle lost control, veered off the road and hit him from behind. He blamed the Appellant for the accident. I do note that the evidence of the respondent is corroborated by the evidence of the other Respondents in Appeal cases No E082, E083 and E)84 of 2022.
25. It is noteworthy that the evidence adduced by the Appellant did not disclose any evasive action that the driver of motor vehicle registration No KBJ 839G may have taken to avoid the accident. The said driver of had a greater responsibility to take control of the vehicle and ensure the safety of other road users be it on or off the road. I do find that the causation of the accident that occasioned bodily injuries to the Respondent was due to gross negligence on the part of the Appellant in the manner that his vehicle was being driven and controlled on the material day either by himself or his servant and/or agent. I thus find the Appellant liable for causing the said accident at 100%.



### **Did the Trial Court err in assessment of damages.**

26. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”

27. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the Court of Appeal stated the parameters which guide a court in assessment of damages, thus :-

“The assessment of damages in personal injury case by a court is guided by the following principles:

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are a mere guide but each case be treated on its own facts.
- 4) Previous awards to be considered to maintain the stability of awards, factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high”

28. The principles upon which an appellate court can disturb a judgement of a trial court were enunciated in the case of *Butt v. Khan* Civil Appeal No. 40 of 1997 thus: -

“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 arrive at a figure which was either inordinately high or low.” See also *Kemfro Africa Ltd 'a Meru Express Services Gathogo Kanini v. A.M. Lubia* C.A. 21 of 1984 (1882-1988)1 KAR 727

29. In the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 the court underscored the principle that the assessment of damages is a discretion of the trial court and stated that :-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

30. As per the Plaintiff, the Respondent suffered the following injuries namely bruises on the fracture distal radio-ulna, left elbow dislocation and bruises on the left arm. He was rushed to Kimilili Sub-County Hospital and was later transferred to Lugulu Mission Hospital.



31. PW2, Maundu Jackson Wafula, testified that he is a Physiotherapist at Kimilili Sub-County Hospital and that he is the one who examined the Respondent herein, but he is not a doctor. He availed in Court a medical report he prepared under the instructions of Dr Wanambisi Caleb Watta as PEXH 5(a). On cross-examination, he told the Court that any treatment prescriptions are done by a medical doctor.
32. PW3, Doctor Wanambisi Caleb Watta, a medical superintendent at Kimilili Sub-County Hospital, produced in Court the Respondent's treatment notes and P3 form, filled on 11<sup>th</sup> February 2019, capturing the Respondent's injuries as PEXH1 (b) and PEXH3 respectively. This witness testified that he had authorized PW2 to prepare the Respondent's medical report.
33. In the case of *Parvin Singh Dhalay vs Republic* [1997] eKLR; [1995-1998] 1EA 29, it was held that:
 

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”
34. Whereas, I agree with the Appellant that PW2 may have lacked the professional competence to author the medical report on record, I do note that PW2 signed the said report on behalf of the Medical Superintendent Kimilili Sub-County Hospital wherefore the said report was properly produced in evidence and it cannot be challenged vide the appellant's submissions. In any event the Respondent had also produced his treatment notes and P3 form in Court, authored by Doctor Wanambisi Caleb Watta. The injuries sustained by the Respondent are described in the treatment notes, medical report and P3 forms as follows: fracture of the distal radio-ulna, left elbow dislocation and bruises on the left arm.
35. The Court of Appeal *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR rendered itself on the place of submissions as hereunder:
 

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
36. The trial Court awarded the Respondent general damages of Ksh 500,000/= which is commensurate with the nature of injuries suffered by the Respondent and consistent with other made in similar cases.
37. The trial Court relied on the case of *Gogni Rajope Construction Company Limited vs Francis Ojuok Olewe* Civil Appeal No. 1 of 2014, Majanja J. reduced the award of Kshs. 800,000/= to 350,000/= for the following injuries: Fracture of radius and ulna and dislocation of the elbow joint; *Mary Akinyi Atella vs Omondi Beatrice Monica* (2021) eKLR the Plaintiff sustained fracture of the right ulnar shaft, and dislocation of the left elbow the trial Court awarded the Plaintiff Kshs. 150,000/= as general damages. On appeal, the award was substituted with an award of Kshs. 500,000/=.
38. I have referred to the abovementioned judgments by trial Court wherein the injuries in issue were similar to the ones sustained by the Respondent in the instant suit before arriving at my finding; the case of *Mary Akinyi Atella vs Omondi Beatrice Monica* (2021) eKLR where the Court reviewed upwards



an award of Kshs. 150, 000/= to Kshs. 500,000/= to fracture of the right ulnar shaft, and dislocation of the left elbow fits this instant appeal.

39. Upon evaluating the pleadings, the Appellant treatment notes, the medical report P3 form and the trial Court's judgment, I am satisfied that the trial Court exercised its discretion within the applicable principles in the assessment of damages as highlighted in the above authorities. I therefore, find no reason to disturb the award given by the trial Court as the award was commensurate to the nature of injuries sustained by the respondent.
40. As pertains to special damages, I do find that the same were specifically pleaded and duly proved.

#### **D. Disposition**

41. This appeal is thus devoid of merit and I hereby dismiss it with costs to the Respondent.
42. This file is hereby marked as closed.

Orders accordingly.

**DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 23<sup>RD</sup> DAY OF JULY 2025.**

**MWANAISHA .S. SHARIFF**

**JUDGE**

In the presence of:

Gabriel Mateka Khaoya - Appellant

Respondent

N/A by Ndinyo Omollo for the Respondent

Peter Machoni – Court Assistant

