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**Khaoya v Mukhwana (Civil Appeal E082 of 2022)**
**[2025] KEHC 11458 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11458 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CIVIL APPEAL E082 OF 2022**

**MS SHARIFF, J**

**JULY 23, 2025**

**BETWEEN**

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

**AND**

**ANTHONY NGICHABE MUKHWANA ......................................... RESPONDENT**

***(Being an appeal from the judgment of the Hon Dennis Ogal Senior Resident Magistrate delivered on 24th August 2022 in Kimilili Senior Principal Law Courts Civil Case No. 35 of 2019)***

**JUDGMENT**

**A. Background**

1. By a Plaint dated 1st April 2019, in Kimilili Senior Principal Magistrate's Court No. 35 of 2019, the Respondent herein (Plaintiff in the trial Court) sued the Appellant herein (Defendant in the trial Court) 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 15th January 2019, along Kimilili-Kamukuywa near Kamukuywa junction.

2. The Respondent pleaded that he was lawfully cycling his bicycle which was loaded with crates of soda along Kimilili-Kamukuywa and when he was about to reach Kanukuywa junction, a Motor Vehicle Registration Number 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 injuries.

3. The Appellant filed a defence wherein he denied the ownership of the alleged Motor Vehicle Registration Number KCE KBJ 839G-Nissan Saloon and the particulars of negligence attributed to him and stated that if the accident occurred the same was wholly caused by the negligence of the Respondent and urged the trial Court to dismiss the suit.

4. During the hearing, the Respondent called three witnesses, while the Appellant testified, but did not call any witness.

5. 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 make an award on quantum as set out hereunder: -

   i. General damages Kshs. 180, 000/=

   ii. Special damages Kshs. 6,000 /=

   Total Kshs. 186,000/=

   iii. Plus, costs and interest at Court rates.

**B. The Appeal**

6. The appellant was dissatisfied with the judgment of the trial court and filed a memorandum of appeal dated 21st September 2022 which he based on the following grounds appeal which I shall reproduce in the verbatim: -

   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.

7. Parties were directed to canvass this Appeal by way of written submissions. Both parties did not comply with the Court's directive.

**C. Analysis and Determination**

8. This being a first appeal, this Court is under a duty to re-evaluate, re-analyze and re-scrutinize the evidence adduced before the trial Court and make its own conclusions while taking into account the fact that, unlike the trial Court, it did not have the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly enunciated 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.

9. 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 it's assessment of the quantum of general damages?

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

10. While the Respondent called three witnesses to support his case, the Appellant testified and closed his case; he blamed the Respondent for the accident.

11. The burden of proof in the case before the trial Court rested on the shoulders of the respondent, as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya. Section 107 of the said Act provides 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."

12. 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 preposition 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."

13. 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."

14. 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."

15. In this instance, the only evidence placed before the trial Court on how the causation of accident is that of the Respondent who testified that on 15th January 2019, while he was lawfully cycling along Kimilili-Kamukuywa road, off the road, a Motor Vehicle Number KBJ 839G Nissan Saloon veered off the road thereby knocking him from behind. On cross-examination, he stated that he was pushing his bicycle which was loaded with crates of soda along Kamkuyuwa-Kaptama road on his way towards

Kitale-Webuye road when he was hit and that the Appellant's said motor vehicle also ran down other pedestrians.

16. PW4, No. 88215 CP Catherine Khaemba, testified that she was the investigating officer in the road traffic accident and confirmed that the accident occurred at the time and place as pleaded by the respondent. Further that she visited the scene while in the company of another officer. She further testified that they did not find the driver of the Appellant's motor vehicle and members of the public informed them that the driver had escaped from the scene immediately after the accident. It was the evidence of PW4 that they found the motor vehicle registration NO KBJ 839G and a motorcycle registration number KMED 986Z-Honda at the scene of the accident, a few meters from the point of impact. That they established that the Motor Vehicle in question was being 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 said motor vehicle and while the driver was in the process of attempting to escape he hit the Respondent herein. The victims reported the accident on 16th January 2019 at Kimilili Police Station, recorded their statements and Police Abstracts were filled. She produced the Police Abstract issued to the Respondent herein in Court as PEXH3, 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 had hit the Respondent herein on 15th January 2019. Other than the Police Abstract, this witness did not produce the sketch maps nor the police file.

17. While testifying in his defence, the Appellant told the Court that on 12th 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 that he was to pay Patrick Manyonge Juma the purchase price on 20th January 2019. It was the Appellant's evidence that on 16th 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 Kimilili Police Station, 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 and he was then 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.

18. 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

19. 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."

20. 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.

21. The Appellant did not offer any explanation as to why he took it upon himself to insure the said motor vehicle prior to the 20th 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. 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 and was liable for any tortious claims that arose due to the negligent driving and or control of the said motor vehicle registration No KBJ 839G.

22. Having found that the Appellant was the owner of the said motor vehicle, I now wish to delve into the issue of liability. It was the Respondent's testimony that he had been pushing his bicycle that had been loaded with crates of soda off the road while heading towards Webuye-Kitale and as he was about to reach the junction, specifically along Kamkuyuwa-Kaptama road, the Appellant's motor vehicle lost control, veered off the road and hit him from behind. He blamed the Appellant for the accident. 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. On the other hand, the evidence of P.C Catherine Khaemba (PW4), was that the driver of the said motor vehicle had been involved in a series of ran downs as he attempted to escape from the first 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 it's assessment of the quantum of general damages?**

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

24. As per the Plaint, the Respondent suffered the following injuries namely bruises on the swollen right thigh and cut wound on the same thigh. He was rushed to Kamukuywa Dispensary where he was stitched and the following day he went to Kimilili Sub-County Hospital.

25. 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. He produced in Court a medical report as PEXH 4(b). On cross-examination, he told the Court that any treatment and issuance of prescriptions are done by a medical doctor.

26. PW3, Doctor Wanambisi Caleb Watta, a medical superintendent at Kimilili Sub-County Hospital, produced the Respondent's treatment notes and P3 form, filled on 11th February 2019, as PEXH1 and PEXH2 respectively.

27. 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."

28. It is crucial for this Court to note that production of the medical examination report prepared by Maundu Jackson Wafula (PW3) was not objected to by the Appellant. The said report was only been challenged by the Appellant vide his submissions in the lower court and in this appeal. I take the view that submissions cannot take the place of evidence and this was as well posited by the Court of Appeal Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR:

> " 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."

29. PW2 was not a doctor but a physiotherapist. He lacked the professional competence to author the medical report produced as PEXH 4(b). The incompetency of PW2 notwithstanding, the Respondent had also produced his treatment notes and P3 that were authored by Doctor Wanambisi Caleb Watta (PW3). The injuries are described in the treatment notes and P3 forms as follows: swollen right thigh and cut wound on the right thigh.

30. The trial Court in its judgment awarded general damages of Ksh 180,000/=. It relied on the case of Daniel Gatana Ndungu & Another vs Harrison Angore Katana (2020) eKLR where the Plaintiff stained injuries to the head, right knee and upper limbs and was awarded Kshs. 350,000/= as general damages. On appeal, the award was reduced to Kshs. 180,000/=. The trial Court also relied on the cases of Barasa Matayo vs Channan Agricultural Contractors (2013) eKLR where the Court reviewed downwards an award of Kshs. 250, 000/= to Kshs. 150,000/= to moderate soft tissue injuries that were expected to heal in eight months and Leah Nyaguthii Kamunya vs Kenya Broadcasting Corporation (2009) eKLR where an award of Kshs. 200,000/= was awarded to a Plaintiff who had sustained a cut wound to the scalp, left calf region, multiple hand bruises and blunt trauma to the shin.

31. The case of Barasa Matayo vs Channan Agricultural Contractors (2013) eKLR where the Court reviewed downwards an award of Kshs. 250, 000/= to Kshs. 150,000/= for moderate soft tissue injuries that were expected to heal in eight months fits this instant appeal.

32. Upon evaluating the pleadings, the Appellant's treatment notes, the P3 form and the evidence of the respondent as tendered before the trial Court, I am satisfied that an award of Ksh 180,000 by way of general damages is reasonable and commensurate to the nature to injuries sustained by the Respondent herein. I do find that the trial Court exercised it's discretion within the applicable principles in the assessment of damages as highlighted in the above cited authorities and I do not find any fault in it's award on quantum.

**D. Disposition**

33. On the balance I do find that this appeal is devoid of merit and I hereby dismiss it with costs to the Respondent.

34. This file is hereby marked as closed.

Orders accordingly.

**DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 23RD 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