Khaoya v Nyongesa (Civil Appeal E084 of 2022)
[2025] KEHC 11950 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11950 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E084 OF 2022

MS SHARIFF, J

JULY 23, 2025

BETWEEN

GABRIEL MATERE KHAOYA ..... APPELLANT

AND

FERDINARD JUMA NYONGESA ..... RESPONDENT

(Being an appeal from the judgment and order of the Senior Resident Magistrate Court, Kimilili Senior Principal Law Courts in Civil Case No. 38 of 2019 delivered by Hon. Dennis Ogal (SRM) on 24th August 2022)

JUDGMENT

A. Background

1. By a Plaint dated 21st March 2019, in Kimilili Senior Principal Magistrate's Court No. 38 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 7,550/=, 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 on the material day he had been walking along Kimilili-Kamukuywa when a 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 injuries.

3. The Appellant filed a defence and denied the ownership of the alleged Motor Vehicle Registration Number KCE KBJ 839G-Nissan Saloon and all 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 he 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 then proceeded to make the following awards : -

    i. General damages Kshs. 300, 000/=

    ii. Special damages Kshs. 6,000 /=

        Total Kshs. 306,000/=

    iii. Plus, costs and interest at Court rates

B. Appeal

6. Being aggrieved by the judgment of the trial Court on both liability and quantum, the appellant lodged a memorandum of appeal dated 21st 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.

C. Submissions

7. The Appeal was canvassed by way of written submissions. The Appellant's filed their submissions dated 17th December 2024 while the Respondent did not file any written Submissions.

C.1 Appellant's submissions

8. TheAppellant sets out two issues for determination namely; which motor vehicle caused the accident; was liability on the part of the Appellant proved under law; was the Appellant the registered owner of Motor Vehicle Registration Number KBJ 839G Nissan Sunny any other Vehicle and therefore liable for the accident and whether the Respondent was entitled to the general damages, special damages and costs of the suit in the lower Court.

9. On the first issue, the Appellant submitted that the several Motor Vehicles were on record at the lower Court as having caused the accident. The P3 form records a Saloon Toyota 839G white, the Police Abstract records a Motor Vehicle Registration Number KBJ 839 G Nissan and PW4, CPL Catherine Khaemba, testified that after receiving information about an accident and in the company of Base Commander Inspector Owour and PC Kwameti they proceeded to the scene of the accident at Kimilili

Junction along Kitale-Webuye road and found Motor Vehicle Registration Number KBJ 831 G Toyota Saloon involved in an accident with Motorcycle Registration Number KMED 986Z (Honda) and that the Motor Vehicle had also knocked down several people including the Respondent. PW4 also blamed the driver of the Motor Vehicle Registration Number KBJ 831 G for the accident and recommended that he be charged with the offence of careless driving. He submitted that the Motor Vehicle Search Report from the NTSA was amongst the Appellant's documents used to object to PW4's testimony. He submitted that the trial Court failed to put into consideration that PW4's did not conduct an official search to establish ownership.

10. On the second issue, the Appellant submitted that liability was not proved on the balance of probability as the Respondent failed to offer the trial Court sufficient documentary evidence to prove that the Appellant was indeed liable for the said accident. The Appellant insisted that he was never charged for driving recklessly in Kimilili Traffic Case No. TR 101 OF 2019 and that he was only charged for failing to keep records.

11. On the third issue, the Appellant submitted that he is not the registered owner of the Motorcycle Registration Number KBJ 839 G Nissan Sunny FB 15 nor is he the registered owner of the following Motor Vehicles KBJ 839 G Nissan Toyota, KBJ 839 G Toyota, KNJ 831 Toyota nor was he the registered owner of Motorcycle KMDD 986 Z (Honda) or Motorcycle KMED 986Z (Honda). He submitted that the Respondent confirmed to the trial Court that he lacked the requisite documents to prove that the Appellant is the owner of the alleged Vehicle(s) and he made no effort to carry search out a search on ownership. The Appellant relied on Section 8 of the *Traffic Act*, CAP 403 and further submitted that if the NTSA report bore no name of the Appellant as the registered owner, the Respondent could have carried out enquires to ascertain whether the Appellant was nevertheless the beneficial owner so as to prove the "contrary" or the Appellant could have enjoined the owner of the Motor Vehicle as the co-Defendant. He finally submitted that no buy and sale agreement was availed in Court by the Respondent thus the "contrary" was never proved. Finally, he submitted that the Respondent failed to prove that the Appellant was the owner of the alleged Motor Vehicles as per the dints of Section 107 and 108 of the *Evidence Act* as the same could not be proved with the Insurance Certificate and Court proceedings.

12. On damages, he submitted that the Respondent was not entitled to general, special damages and costs as sought and he had not proved his case on a balance of probability and that the Respondent's evidence was full of inconsistencies and contradictions. He submitted that the Respondent failed to avail official receipts to prove special damages.

13. The Appellant urged this Court to allow his appeal and set aside the lower Court judgement and decree with costs delivered on 24th August 2022 in Kimilili Principal Magistrates Court Civil Case No. 36 of 2019.

D. Analysis and Determination

14. 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.

15. 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?

16. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as;

> " 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."

17. In *Evans Nyakwana v. 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."

18. Further in *William Kabogo Gitau v. 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."

19. 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."

20. 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 15th January 2019, while he was lawfully walking along Kimilili-Kamukuywa road when 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.

21. PW4, No. 88215 CP Catherine Khaemba, testified that she was the investigating officer in this incident and confirmed that the accident occurred and in the company of her colleague they did visit the scene. 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 24 and established that the Motor Vehicle in question was been driven from Kimilili towards Kamukuywa and on reaching Chesamisi T-Junction area he 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 the Respondent herein and others at Kamukuywa area. The victims reported the accident on 16th 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.3 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 15th January 2019. However, other than the Police Abstract, PW1 did not produce any additional evidence to confirm his assertions.

22. 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 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 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.

23. 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.

24. 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."

25. 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.

26. 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.

27. 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. 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.

28. 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.

29. 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%.

Whether the Trial Magistrate misdirected himself in assessment of damages.

31. 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"

32. In *Charles Oriwo Odeyo v. 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"

33. 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* t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727

34. 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."

35. As per the Plaint, the Respondent suffered the following injuries namely left knee injury and bruise on the left big toe. He was rushed attended to at the Kimilili Sub-County Hospital.

36. 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 as PEXH 5 (a). On cross-examination, he told the Court that he carried out the physical examination and issued a medical report.

37. 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 12th February 2019, capturing the Respondents injuries as PEXH1 and PEXH2 respectively.

38. In the case of *Parvin Singh Dhalay v 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."

39. 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 lower Court submissions and in this appeal. 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."

40. 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 by authored by Doctor Wanambisi Caleb Watta (PW3). The Respondent's injuries are described in the treatment and P3 forms as follows: soft tissue injuries and fracture dislocation of the left lower limb near the knee joint.

41. The trial Court had awarded the Respondent general damages of Ksh 300,000/= which is commensurate with the nature of injuries suffered by the Respondent and consistent with other made in similar cases.

42. The trial Court relied on the case of *Carolyn Indasi Mwonyonyo v Kenya Bus Service Ltd* Civil Appeal 17 of 2007 (2012) eKLR substituted the award of the trial Court with an of Kshs. 300,000/= where the Appellant's injuries were like soft tissue and dislocation of knee joint.

43. 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 *Poa Link Services Co. Ltd & another v Sindani Boaz Bonzemo* [2021] eKLR where the plaintiff sustained blunt injury to the chest; bruises to the lower abdomen; bruises of the right hip joint; bruises

of the thigh and bruises on the knee and the High Court affirmed an award of Ksh 350,000/= as general damages.

44. In *Samwel Martin Njoroge Kamunyu v Mildred Okweya Barasa* [2020] eKLR where the Plaintiff sustained: two deep cut wounds on the forehead horizontally; bruises and lacerations on the right cheek; blunt injury to the shoulder and chest; blunt injury to the pelvis; deep cut wounds on right and left legs. The High Court awarded of Ksh 300,000/= as general damages.

45. Upon evaluating the pleadings, the Appellant treatment notes, P3 form, the medical report 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.

46. Having carried out my mandate as a first appellate Court, and in view of the cited comparable authorities, I find no reason to disturb the award on general given by the trial Court as the sum was reasonable and modest.

47. On the issue of special damages, the same were specifically pleaded and proved.

48. Hereinabove, I do not find any fault with the decision of the trial magistrate and I hereby uphold the judgment of the trial Court on both liability and quantum.

49. This appeal is thus devoid of merit and I hereby dismiss it with costs to the Respondent.

50. 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