



**Cell Tours and Travel Limited & another v Aluoch (Civil Appeal  
E1445 of 2023) [2025] KEHC 12919 (KLR) (Civ) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1445 OF 2023**

**DKN MAGARE, J**

**SEPTEMBER 18, 2025**

**BETWEEN**

**CELL TOURS AND TRAVEL LIMITED ..... 1<sup>ST</sup> APPELLANT**

**ANTHONY MURITHI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARENE AUMA ALUOCH ..... RESPONDENT**

**RULING**

1. This is an appeal from the judgment of Hon. L.A. Mumassabba (PM) delivered on 22.11.2023 in Nairobi CMCC No. 5753 of 2022. The Appellant was the defendant in the lower court. The court found the appellant liable and awarded Ksh. 500,000/= for the accident. The case number is not indicated in the memorandum of appeal.
2. The Appellant was aggrieved by the finding and filed the Memorandum of Appeal dated 20.12.2024 setting forth the following grounds:
  - a. That the learned magistrate in law and in fact in find (sic) the appellants wholly liable for the accident.
  - b. That the learned magistrate erred in law and in fact in failing to find the respondent had a duty to cross the road by use of foot bridge provided.
  - c. That the learned magistrate erred in law and in fact in failing to find that the appellants would not have reasonably expected to come across the pedestrian crossing the road below the foot bridge.



- d. That the learned magistrate erred in law and in fact in awarding general damages of Ksh. 500,000/=.
  - e. That the learned magistrate erred in law and in fact in failing to consider Appellant's submissions.
3. In short, the appellant faults the learned magistrate for holding them wholly liable for the accident as she failed to appreciate that the respondent had a duty to cross the road using the footbridge provided. They raised issue that the court erred in not finding that the appellants could not reasonably have expected a pedestrian to cross the road beneath the footbridge. Finally, they challenged the award of excessive general damages of Ksh. 500,000/=.
  4. Thus, the appellant raised the following two issues; that is liability and quantum of general damages.

### **Pleadings**

5. The respondent filed a suit via a plaint dated 7.11.2022. She sought damages for an accident of 23.09.2022 involving motor vehicle registration number KCB 639 J. The said accident occurred at Outering Road. the Respondent pleaded the following injuries:
  - a. Right pelvic fracture
  - b. Blunt head injury to the lower back
  - c. Chest pains
  - d. Headaches, tenderness on the lower back
  - e. Recurrent headaches
  - f. Backaches
  - g. Pain on the right pelvic region
  - h. Lumbo-Sacro region is tender on flexion
  - i. Right side of the pelvis is tender on palpation.
6. The Respondent pleaded special damages which are not of any relevance to this case. The Appellant filed defence dated 9.12.2023. They blamed the respondent for the accident, in particular for failing to have regard to her own security, failing to follow the Kerb drill rule whilst crossing the highway. They also relied on doctrines of maximum volenti non fit injuria and res ipsa loquitur.

### **Evidence**

7. The record of appeal does not contain the evidence tendered by parties.

### **Analysis**

8. In this matter, the Appellant decided, that the court is not entitled to proceedings from the lower court. Parties however filed extensive submissions. The court notes that the duty to file a record containing evidence of the court is set out in Order 42 Rule 4(c) of the Civil Procedure Rules. The same provides as follows:



Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- (a) ...
- (b) ...
- (c) the notes of the trial magistrate made at the hearing
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing.

9. Parties have also filed substantial submissions. They rely on evidence that is not on the record. However, submissions are not evidence. In *Nancy Wambui Gatheru v. Peter W. Wanjere Ngugi*, Nairobi HCCC No. 36 of 1993, Mwera J. had occasion to state the role of submissions in litigation. The learned Judge observed:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

10. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in *Ngang’a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, where the court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

11. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence, when they addressed the question in the case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

“Submissions cannot take the place of evidence. The 1<sup>st</sup> 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.”



12. It is unnecessary to analyse submissions in the absence of evidence or proceedings, which are crucial for determination of the appeal. In the absence of proceedings the court cannot deal with the appeal. With hind sight it is noted the appeal had not been admitted. The same is removed from the hearing list and returned to the appellate division. The appellant shall file a supplementary record containing proceedings to enable the court therein to give directions. The matter shall be mentioned before the Deputy Registrar to fix the matter for admission before the presiding judge.
13. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
  - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
14. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
15. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
16. In the circumstances costs shall abide in the appeal.



## **Determination**

17. In the upshot, I make the following orders:-

- a. The judgment date is hereby vacated. This appeal is removed from the hearing list and returned to the appellate division.
- b. The appellant shall file a supplementary record containing proceedings within 45 days to enable the court therein to give directions.
- c. The matter shall be mentioned before the Deputy Registrar to fix the matter for admission before the presiding judge.
- d. Costs shall abide in the appeal.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

Represented by:-

C. W. Githae & Co. Advocates for the Appellant

Musili Mbiti & Co. Advocates for the Respondent

Court Assistant – Michael

**M. D. KIZITO, J.**

