Kambura & another v DMM alias DM (Minor suing through friend and next kin JMK) (Civil Appeal E019 of 2024) [2025] KEHC 13087 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13087 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E019 OF 2024

JN ONYIEGO, J

SEPTEMBER 24, 2025

BETWEEN

DINAH KAMBURA ..... 1ST APPELLANT

PETER ATUTI ..... 2ND APPELLANT

AND

DMM ALIAS DM (MINOR SUING THROUGH FRIEND AND NEXT KIN JMK) ..... RESPONDENT

(Being an appeal against the judgment of Hon.S. Otuke delivered on 30.06.2023 in Garissa CMCC No. 54 of 2019)

JUDGMENT

1. The appellants herein being the defendants in the lower court filed the instant appeal having been dissatisfied with the judgment by the trial magistrate Hon.Otuke delivered on 30-06-2023.

2. In his plaint dated 17.09.2019, the respondent averred that on or about 09.06.2019, he was lawfully travelling as a fare paying passenger in motor vehicle registration number KCD 769J at Ilibile area along Mwingi – Garissa Road, when either the defendants or their respective employee, servant, agent and/or authorized driver so carelessly and negligently drove, managed and/or controlled motor vehicle registration number KCD 796J that he caused and/or permitted the same to lose control, veer off the road and violently overturn consequences whereof the plaintiff sustained severe personal injuries and has suffered loss and damage.

3. It was averred that at all material times, the 2nd defendant was the beneficial owner of the mv in question while the 1st defendant was the registered owner.

4. The particulars of negligence on the part of the appellants were set out in para 4 as follows:

i. Driving without due care and attention.

ii. Driving at an excessive speed in the circumstances.

iii. Creating circumstances that precipitated and caused the accident.

iv. Failing to keep and/or maintain any or proper look out.

v. Failing to exercise due care and skill reasonably expected of a driver of a motor vehicle in the circumstances.

vi. Failing to brake in time or at all.

vii. Failing to have due regard to the safety of passengers travelling in motor vehicle registration number KCD 769J and in particular the plaintiff.

viii. Failing to keep and/or maintain motor vehicle registration number KCD 769J on the road and hence causing the accident.

ix. Failing to stop, to slow down, to swerve or in any other way so to manage and/or control the said motor vehicle and avoid the accident.

x. Failure to swerve and/or take any evasive action.

xi. Driving a defective motor vehicle.

xii. In so far as is reasonably practicable under the circumstances the plaintiff will rely on the doctrine of res ipsa loquitar.

5. The particulars of injuries were listed as follows:

i. Severe tenderness of the back; posterior trunk.

ii. Very tender hematoma formation over the left knee; giving rise to left knee joint movements limitations.

6. Present complaints were noted as:

i. Back ache.

ii. Pains on the left knee.

7. Particulars of special damages were listed as follows:

i. Medical legal report by Dr. Muli Kes. 5,000/-.

ii. Medical legal report Dr. Wokabi Kes. 2,500/-.

iii. Medical legal report Dr. Okere Kes. 2,000/-.

iv. Copy of records KCD 796J Kes. 550.00

v. Treatment and medical expenses Kes. 1000.00

Total Kes. 11,050.00/-.

8. The plaintiff sought for a judgment against the defendants jointly and severally for:

i. Special damages aforesaid of Kes. 11,050.00/-.

ii. General damages for pain, suffering and loss of amenities.

iii. Costs of the suit.

iv. Interest on (a), (b) and (c) above at court rate and

v. Any other or further relief that the Honourable Court deemed just to grant.

9. The appellants entered appearance and further filed an amended defence on 02.11.2020 wherein it was denied that at all material times the 2nd appellant was the beneficial owner of the motor vehicle registration number KCD 769J and further, that the 2nd appellant was the registered owner nor was the said mv being driven by either of the appellants. The appellants also urged that the respondent's claim was fraudulent and based on misrepresentations. They listed grounds of fraud under paragraph 6 of the amended defence.

10. Allegations of alleged negligence as set out in the plaint were denied and the respondent put to strict proof thereof. The appellants denied the doctrine of res ipsa loquitar and instead pleaded the doctrine of volenti non fit injuira. That without prejudice and in the alternative to the foregoing, the occurrence of the accident was caused solely and/or substantially contributed by the respondent's own negligence.

11. The particulars of the minor's negligence were listed as follows:

i. Failing to take any or adequate precaution for his own safety.

ii. Failing to heed the instructions on safety precautions when travelling.

iii. Failing to heed the traffic rules and regulations when travelling.

12. The particulars of the plaintiff's negligence were listed as follows:

i. Leaving a minor unattended when traveling.

ii. Failing to properly instruct the minor on road safety when traveling.

iii. Failing to take adequate safety of the minor.

13. In a reply to the defence dated 04.11.2019, the respondent denied every allegation of fact in the defence. Further, he denied every allegations of negligence attributed to him and put the appellants to strict proof thereof.

14. The matter proceeded to full hearing and the trial magistrate after considering the law and evidence adduced before him, reached a determination as follows:

i. Liability, 100%

ii. Special Damages Kes. 10,050/-

iii. General Damages Kes. 150,000/-

iv. Total Damages Kes. 160,050/-

v. Costs of the suit

vi. Interest at court rates from the date of judgment.

15. The appellant being dissatisfied with the said judgment, listed the grounds of appeal in the memorandum of appeal dated 07.10.2023 as follows:

i. The learned magistrate misdirected himself on the assessment of quantum on general damages.

ii. The learned trial magistrate erred in law and in fact in his award of general damages at Kes. 150,000/- without any evidence and/or explanation how it was arrived at in his judgement and which amount or figure was not at all relied on in evidence and/or proved at trial by the plaintiff.

iii. The learned magistrate erred in law and in fact in wholly disregarding or failing to accord due and proper consideration to the evidence adduced by DW1 that the treatment notes did not originate from Garissa General Hospital and that outpatient number indicated on the treatment notes did not belong to the minor plaintiff.

iv. The learned magistrate erred in law in finding that the plaintiff has proven that the minor suffered injuries as a result of the subject accident which occurred on 09.06.2019 when the evidence adduced proved that the treatment notes were fraudulent.

v. The learned magistrate erred in law and in fact by relying on the evidence of PW1 and PW2 who were not expert witnesses as proof that the plaintiff sustained injuries as a result of the accident.

vi. The learned magistrate erred in law and in fact in awarding Kes. 150,000/- as general damages which amount was contrary to conventional awards in similar and/or related cases by superior courts.

vii. The learned magistrate erred in law and in fact in failing to consider the defendants' submissions on liability.

viii. The learned magistrate erred in law and in fact by failing to consider conventional awards on general damages in similar and/or related cases by superior courts.

ix. The learned magistrate erred in law and in fact in making an award for a special damage that had not been strictly proved at the trial.

16. Reasons therefore, the appellants urged this court to:

i. Allow the appeal by setting aside the trial court's judgment.

ii. Costs of this appeal be awarded to the appellants.

iii. Any such other order that the court deems fit.

17. The appeal was disposed of by way of written submissions.

18. The appellants sought to rely on their submissions filed before the trial court and further, on their submissions dated 20.05.2025 urging that the respondent failed to prove his case as the appellants were not liable for the accident in question and therefore, the apportionment of liability was thus erroneous. The appellants relied on the case of Mary Wambui Kabugu vs Kenya Bus Services Civil Appeal No. 195 of 1995 cited in the case of Florence Mutheu Musembi and Geoffrey Mutunga Kimiti vs Francis Karenge [2021] eKLR where the court stated that he who alleges must prove. It was urged that the respondent failed to prove its case. That the respondent did not state how the driver of the motor vehicle registration No. KCD 769J could have been negligent at all. It was their case that noting that no evidence was adduced as to the appellant's negligence, the same follows that no liability ought to have attached.

19. On quantum, the appellants urged that Kes. 50,000/- would have been sufficient as reasonable compensation. That the appellant had adopted the revocation stating that the respondent was not treated at the said facility. That the same shows that the treatment notes adduced by the respondent equally were fraudulent and to that extent, relied on the case of Timsales Ltd vs Wilson Libuywa [2008] eKLR where Maraga J. (as he was then) stated that:

> In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examined him much later is of little, if any help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may...have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and the place he claimed he did. The scars observed on such person could very well relate to the injuries suffered in another accident altogether."

20. In the same breadth, reliance was placed on the case of Peter Migiro vs Valley Bakery Limited eKLR [2015] eKLR where Mulwa J. stated that:

> I find that the trial magistrate failed to address his mind to the fact that without production of the initial treatment notes, the fact of an injury, and without any other corroboration by way of witnesses, could not be proved".

21. On costs, the appellants prayed that noting that costs follow the event, as provided for in section 27 of the *Civil Procedure Act*, the appeal herein be allowed and they be awarded costs against the respondent.

22. The respondent on the other hand filed submissions dated 23.05.2025 urging that on quantum, the respondent sought general damages for the injuries sustained and special damages incurred. That it was not entirely true that the trial court failed to consider the appellants" submissions. Additionally, that the injuries sustained by the respondent were not comparable as the respondent sustained more severe injuries. Reliance to support the allegation that the respondent suffered more severe injuries were placed on the case of Catherine Wanjiru King'ori & 3 Others vs Gibson Theuri Gichubi [2005] eKLR where the court stated that:

> " The 3rd plaintiff suffered multiple soft tissues injury on the left elbow joint and injuries on both ankles. The court awarded her Kes. 350,000/- as general damages for pain, suffering and loss of amenities on 01.07.2025".

23. In the end, this court was urged to dismiss the appeal herein with costs.

24. From the evidence before the trial court, PW1, No. 58xxx PC Abdallah Banata Anare stated that on 09.06.2019, a matatu traveling from Mwingi to Garissa of registration No. KCD 769J was involved in aroad accident. That after reaching Labille area, the vehicle hit a pot hole hence overturning on the right side on the road from Mwingi to Garissa. He stated that inside the vehicle, there were 20 passengers including the driver.

25. According to him, in company of other officers, they headed to the scene and some of the people who were passengers in the suit vehicle were found to be Ruth Roba Kakumi as passenger No. 1 and Rose Ndiru Wangala being No. 19 on his list. That the injured were treated and later went for the P3 Forms. He stated that it appeared that the driver was over speeding at the time in question and for that reason, he blamed the driver for the occurrence of the accident.

26. On cross examination, he stated that upon visiting the scene together with other officers, they found all the casualties on the ground. That his colleague took the list of the casualties as some of them could state their names and amongst the names they recorded was for a 17-year-old DMM. On re-exam, he stated that he was the investigating officer and that he blamed the driver for the occurrence of the accident.

27. PW2, DM adopted his statement attached to the plaint and dated 12.09.2019 as his evidence in chief and thereafter produced his documents to wit the medical report by Dr. Wokabi. It was his testimony that on the material day, he was travelling a board mv regn number KCD769J as a fare paying passenger when the driver of the said mv lost control and veered off the road and finally overturned does occasioning him the said injuries. He blamed the driver for negligent driving.

28. He further stated that he suffered injuries on the left shoulder, wrist, hip and right knee which had healed. On cross examination, he stated that he was an adult aged 19 and that while at the scene, he had given his name as DMM and that he was treated at Garissa General Hospital.

29. DW1, Milton Oluoch, HR Record, Garissa General Hospital testified in reference to a revocation letter authored by the former CEO of Garissa County Referral Hospital, Mr. Omar Abdi Mohamed in reference to inter alia the name of DM OP No. 32xxx/xx to whether he was treated at the said hospital upon the occurrence of the alleged accident. He confirmed that there was a RTA on 09.06.2019 and DM visited the hospital after a period of one month after the accident. That the treatment of DM was backdated because he did not appear on 09.06.2019 when the accident happened. On cross examination, he reiterated that the complainant was treated at the hospital but the treatment notes were filled later.

30. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the appellant. This being a first appellate court, it is duty bound to re-evaluate and re-examine afresh the evidence tendered before the trial court and arrive at its own finding and or determination. See Abok James Odera T/A Odera and Associates v John Patrick Machira T/A Machira and Company Advocates(2013)e KLR.

31. This appeal therefore revolves around the following issues: -

    i. Whether the respondent sustained injuries on the material day as alleged.

    ii. What damages ought to be awarded to the respondent if the court finds in affirmative the first issue.

32. Turning to the substantive issues herein, it is trite law that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is always on the balance of probabilities (See Miller vs Minister of Pensions [1947] 2 All ER 372 and Section 107 of the *Evidence Act*). However, there is evidential burden which is captured by sections 109 and 112 of the *Evidence Act*. These two provisions were dealt with in Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi& Another [2005] 1 EA 334, in which the Court of Appeal held that: -

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

In East Produce (K) Limited v Christopher Astiado Osiro In Civil Appeal No. 43 Of 2001 the Court of Appeal held that: -

> It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

33. It follows that the initial burden of proof lay on the plaintiff. The respondent in this appeal was to prove negligence against the appellant.

34. Negligence was defined in the case of Blyth vs Birmingham Waterworks Company (1856) 11 Ex Ch 781 (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done" (See Salmond and Heuston on the Law of Torts 9th Edition).

35. The elements of the tort of negligence which must be proved for an action in negligence to succeed are (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage (See Donoghue vs Stevenson [1932] A.C. 562.)

36. Similarly, the *Traffic Act* Cap 403, Laws of Kenya imposes a duty of care on drivers, to take necessary precautions to avoid accidents. In the event they breach the *Traffic Act* and Highway Code they are liable for penal sanctions in cases of careless or reckless driving or causing death by dangerous driving. The Law on these issues is very clear, and the breach by a driver of any motor vehicle on the Kenyan roads thus attracts the necessary remedy(ies).

37. In reference to the above, the question therefore is whether the respondent in discharging the burden of proof placed on him proved the elements of the tort of negligence (the tort upon which the suit was based)?

38. As I have opined above, there is yet no liability without fault in our legal system and a plaintiff must prove negligence against the defendant where the claim is based on negligence. The plaintiff in my opinion must place sufficient material before court to discharge the burden placed on him.

39. The Court of Appeal in Timsales Limited v Stanley Njihia Macharia [supra] discussing the principles of 'causation' cited with approval the decision by Musinga J (as he then was) in South Nyanza Sugar Co. Ltd v Wilson Ongumo Nyakweba [2008] eKLR quoting Statpack Industries Limited vs James Mbithi Munyao HCCA No. 152 of 2003 (UR) where it was held that:

> " It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence."

40. Similarly, in William Kabogo Gitau vs George Thuo & 2 Others [201011 KLE 526 it was stated that:

> " In ordinary civil cases a case may be determined in favor 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."

41. From the evidence herein, I note that PW2 clearly testified that he was lawfully travelling as a fare passenger in motor vehicle registration number KCD 769J at the time the accident happened. PW1, the investigating officer also stated that he was among the officers who received the accident report and visited the scene. He blamed the driver of the motor vehicle KCD 769J for the accident for the reason that he was over speeding at the time in question and further, that in as much as the road had pot holes, the same could not have made the vehicle roll had the driver observed due careand attention by driving at a reasonable speed hence managed to control the mv.

42. The appellants did not deny that the subject mv belonged to them and that the same was involved in the said accident. It was not disputed that the mv overturned and that it was being driven by their agent. The evidence of the Investigating officer solely blames the driver for over speeding. Obviously, the driver did not testify to controvert the allegation of over speeding. To that extent none of the passengers was responsible for the accident. It is therefore my finding that the appellant's driver was 100% responsible for the occurrence of the accident.

43. The next question is whether the respondent was one of the passengers injured in the subject accident. The appellants urged that the respondent did not prove that indeed he was injured as the documents from DW1 showed that he was not treated on the exact date that the accident allegedly occurred.

44. According to the respondent, he was among the victims. The investigating officer who responded to the accident report and immediately visited the scene, confirmed that the respondent was one of the victims whose name he recorded and booked in the OB and subsequently issued ap3 form and police abstract. Dr. Mukere who prepared the medical report also confirmed that the respondent suffered the alleged injuries. Besides, Dw1 confirmed that the p3 form was filled at Garissa General hospital although backdated.

45. On cross examination, Dw1 stated that the treatment notes produced by the respondent were authentic save that he did not know why records of 9-6-2019 were not captured. The question that begs for an answer is whether the respondent was responsible for failure of the hospital not to have kept their records properly. For the Garissa hospital accepting ownership of the treatment notes, I have no doubt that the respondent was duly treated at that facility on the material day.

46. In my view, the trial magistrate duly considered and analysed the evidence before him in that he considered the evidence of the respondent, PW1 and that of Dr. Okere which seemed to corroborate each other thus pointing towards the fact that the respondent was injured as a result of the accident in question.

47. On quantum, it is trite that the circumstances under which a court can upset such a determination have been previously laid down. The Court of Appeal in the case of Ephantus Mwangi and Another vs Duncan Mwangi Wambugu (1982) – 88) IKAR 278 stated that:

> " A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did".

48. Equally, in the case of Mbaka Nguru and Another vs James George Rakwar [1998] eKLR, the Court of Appeal stated that;

> " The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors, this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

49. In the instant case, the respondent suffered severe tenderness of the back; posterior trunk, very tender hematoma formation over the left knee giving rise to left knee joint movements limitations.

50. In the case of Jyoti Structures Limited & another vs Truphena Chepkoech Too & another [2020] eKLR, the High Court awarded Kshs. 125,000/= to a person who had sustained blunt injuries to the head, neck, chest, back, and both thighs.

51. In Ogaro & another vs Olang' (Civil Appeal 122 of 2019) [2022] KEHC 15465 (KLR), the High Court awarded 150,000/= to a party who had sustained tenderness to the head, neck, thorax, and abdomen as well as swelling in the upper and lower limbs.

52. Also, in Ochola vs Owuor (Civil Appeal E039 of 2022) [2024] KEHC 7689 (KLR), the High Court awarded Kshs. 150,000/= to a party who had sustained soft tissue injuries of the right shoulder joint and both knee joint.

53. I have considered the injuries sustained by the respondent herein and I find that they are largely soft tissue injuries. Taking into account awards in comparable cases, and the rate of inflation, I find an award of Kes. 150,000/- as awarded by the trial magistrate as reasonable for compensation. Noting that special damages, was not contested, it is my view that the same shall remain as determined by the trial magistrate.

54. I hereby opine that the conclusion reached by the learned trial magistrate was founded on sound evidence and I hereby uphold it. The appeal herein is thus dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF SEPTEMBER 2025

.....

J.N.ONYIEGO

JUDGE