



**Musyoki v Kirubai (Civil Appeal E010 of 2025)  
[2025] KEHC 12890 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12890 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E010 OF 2025  
AN ONGERI, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**AMBROSE NDOLO MUSYOKI ..... APPELLANT**

**AND**

**JULIUS MASHOMBO KIRUBAI ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. A. M. Obura (Mrs.)  
(CM) in Voi CMCC No. E054 of 2023 delivered on 24th January 2025)*

**JUDGMENT**

1. The Respondent in this appeal, Julius Mashombo Kirubai filed Voi CMCC No. E054 of 2023 against the Appellant seeking general damages for pain and suffering, special damages together with costs of the suit.
2. The cause of action arose out of an accident that occurred on 17<sup>th</sup> July 2022 at around 10a.m when the Respondent was crossing Nairobi – Mombasa road at Canaan area.
3. The Respondent alleged that the Appellant and/or his driver and agent so negligently managed and controlled the Appellant’s motor vehicle registration No. KCW 075M thereby causing it to veer off the road and knock down the Respondent.
4. The Appellant filed a statement of defence dated 10<sup>th</sup> March 2023 denying the Respondent’s claim.
5. The Respondent’s evidence in summary was that the driver of motor vehicle registration number KCW 075M veered off the road and knocked him down.
6. The Respondent said that he fell down and he did not see the motor vehicle which knocked him.
7. The Appellant who testified as DW1 in the trial court the Respondent was trying to cross the road and he dashed into his path.



8. The trial court found that the Respondent contributed to the accident and apportioned liability as 90:10% in favour of the Respondent against the Appellant.
9. The Respondent sustained the following injuries:-
  - a. Compound fracture mid shaft right tibia.
  - b. Proximal fracture left tibia fibula.
  - c. Head injury with loss of consciousness.
  - d. Cut on the head right temporal region.
10. The trial court assessed the award of damages as follows:-
  - i. General damages for pain and suffering Kshs. 1,500,000/=
  - ii. Special damages Kshs. 193,090/=Total Kshs. 1,193,090/=
- Less 10% contributory negligence the amount payable was Kshs. 1,573,781/=
11. The Appellant has appealed against the said judgment and decree on the following grounds:-
  - i. That the learned trial Magistrate erred in law and in fact in holding that the Plaintiff proved his case on liability against the Defendant.
  - ii. That the learned trial Magistrate erred in law and in fact in failing to hold that parties are bound by their pleadings and any evidence which does not support the averments in the pleadings should be disregarded.
  - iii. That the learned trial Magistrate erred in law and in fact in entering judgement on liability against the Defendant at the ration of 90% and 10% against the Plaintiff.
  - iv. That the learned trial Magistrate erred in law and in fact in awarding excessive amount of Kshs. 1,500,000/= as general damages which is not commensurate to the injuries sustained by the Respondent and is inordinate high and the Magistrate erred in principle in taking into account factors she ought not to have considered and in disregarding factors she should have considered.
  - v. That the learned trial Magistrate erred in law and in fact in holding that special damages were proved as prayed.
  - vi. That the learned trial Magistrate erred in law and in fact in disregarding the Defendant's submission to the issue of liability and quantum.
  - vii. That the learned trial Magistrate erred in law and in fact in failing to hold that liability was not proved to the required standard.
12. The parties filed written submissions as follows:
13. The Appellant submitted that the core argument is that the Respondent failed to meet the required legal and evidential burden of proof to establish negligence against the Appellant. The Appellant contends that the trial magistrate erred in both finding liability and in the quantum of damages awarded.
14. Further, that the Respondent's case was fundamentally flawed because it relied on evidence from witnesses who did not actually perceive the accident.



15. That the Respondent himself (PW2) testified that he did not witness the vehicle hitting him and lost consciousness. The police officer (PW1) also admitted he did not witness the accident and failed to produce crucial evidence, such as a sketch map, which would have been vital to reconstruct the scene.
16. That this indirect and hearsay evidence, which was also inconsistent with the Respondent's own pleadings, carries no probative value. The mere fact that the Appellant's driver fled the scene does not automatically imply negligence and was not even pleaded as a particular of negligence.
17. Furthermore, that the trial court incorrectly relied on the contents of a police abstract to establish liability. A police abstract only confirms that an accident was reported, not how it occurred or who was to blame.
18. That the Appellant's evidence, which was consistent with his pleadings, demonstrated that the Respondent was crossing a highway at night without due care, failing to keep a proper lookout, and suddenly dashing into the road.
19. That established case law places a duty on pedestrians to exercise care for their own safety and that of other road users. The trial court's own finding that the Respondent was 10% contributorily negligent for crossing in the face of danger implicitly acknowledges the Appellant's case theory, yet it still wrongly apportioned 90% liability to the Appellant.
20. Regarding quantum, the Appellant argued that the award of Kshs. 1,500,000 in general damages was excessive and not based on comparable authorities. The injuries sustained, while serious, were less severe than those in the case cited by the Respondent to justify a higher award.
21. The Appellant proposed a reassessment to a more reasonable figure of Kshs. 750,000, which is in line with awards given for similar injuries in other cases. The ground of appeal on special damages has been abandoned.
22. In conclusion, the Appellant prays for the appeal to be allowed, the judgment of the lower court set aside, and the Respondent's suit dismissed with costs, or in the alternative, for the award of general damages to be substantially reduced.
23. The respondent on their part urged the High Court to dismiss the appellant's appeal and uphold the judgment of the trial court in its entirety.
24. The respondent submitted that the trial magistrate's findings on both liability and quantum of damages were sound and based on a correct application of the law and evidence.
25. On the issue of liability, the respondent contended that they successfully discharged their legal burden of proof as required by the *Evidence Act*. They presented compelling evidence, including testimony from a doctor who confirmed the injuries and a traffic police officer who stated the appellant was at fault for the accident and even fled the scene. This evidence, they argue, established a prima facie case of negligence against the appellant, which was not adequately displaced, thus justifying the trial court's finding.
26. Regarding general damages, the respondent submitted that an appellate court should be extremely cautious to interfere with a trial court's award unless it was based on a wrong legal principle or was so inordinately high or low as to be a wholly erroneous estimate.
27. The respondent further asserted that the trial court's award was neither too high nor too low. That the court was guided by established principles that damages should be commensurate with the injuries, which in this case were severe, including compound fractures to both legs.



28. That the award was a proper exercise of judicial discretion that took into account both the objective nature of the injuries and the subjective suffering of the respondent, and it should not be disturbed.
29. The duty of this court, as a first appellate court, is to re-evaluate and re-assess the evidence adduced before the trial court and draw its own conclusions, while bearing in mind that it did not have the opportunity to see or hear the witnesses testify. This principle was aptly stated by the Court of Appeal in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
30. The issues for determination in this appeal are as follows:-
  - i. Whether the trial court was right in apportioning liability at 90:10% in favour of the Respondent against the Appellant.
  - ii. Whether the award of damages was excessive.
  - iii. Who pays the costs of this appeal?
31. This appeal arises from a road traffic accident that occurred on the 17th of July 2022 along the Nairobi-Mombasa road at the Canaan area. The Respondent, Julius Mashombo Kirubai, was a pedestrian who was struck by motor vehicle registration number KCW 075M, owned by the Appellant, Ambrose Ndolo Musyoki.
32. The trial magistrate found the Appellant 90% liable and the Respondent 10% contributorily negligent. She then awarded general damages of Kshs. 1,500,000 and special damages of Kshs. 193,090, which after the 10% deduction amounted to Kshs. 1,573,781.
33. The Appellant is aggrieved by both the finding on liability and the quantum of general damages.
34. On the first issue of liability, the Appellant contends that the Respondent failed to discharge the legal burden of proving negligence. It is trite law, as stated in Sections 107 and 109 of the *Evidence Act*, Cap 80, that he who alleges must prove.
35. The Respondent pleaded that the accident was caused by the negligent manner in which the Appellant's driver managed and controlled the motor vehicle, causing it to veer off the road and knock him down.
36. The Appellant, in his defence, pleaded that the Respondent suddenly dashed onto the road.
37. The trial court, after hearing the evidence, believed the Respondent's case. The Respondent (PW2) testified that he was crossing the road when the Appellant's vehicle veered off and hit him.
38. While he stated that he fell and did not see the vehicle, this is not uncommon for a victim of a traumatic accident and does not necessarily invalidate his claim.
39. Crucially, the evidence of the police officer (PW1), though based on his investigations and not direct observation, was that the driver of the Appellant's vehicle was at fault and indeed fled the scene.
40. The trial magistrate, as the primary trier of fact, was best placed to assess the credibility of these witnesses.
41. An appellate court will be slow to interfere with such a finding of fact unless it is based on no evidence or on a misapprehension of the evidence.
42. The act of a driver fleeing the scene of an accident, while not conclusive proof of negligence, is a relevant factor that a court can consider in inferring culpability, as it demonstrates a consciousness of guilt.



43. Furthermore, the trial magistrate's finding of 10% contributory negligence against the Respondent was a clear acknowledgment that pedestrians also have a duty to exercise care for their own safety.
44. The appellate court will not normally disturb a finding on apportionment of liability unless the trial judge applied a wrong principle of law or the apportionment was so plainly erroneous that it must be set aside.
45. I find that the Appellant has not demonstrated that the 90:10 apportionment was so erroneous as to warrant this court's interference. I therefore find no reason to disturb the trial magistrate's finding on liability.
46. On the second issue, the Appellant challenges the award of Kshs. 1,500,000 as general damages for pain and suffering, terming it excessive.
47. The injuries sustained by the Respondent, as per the medical report, were indeed serious: a compound fracture of the mid-shaft right tibia, a proximal fracture of the left tibia and fibula, a head injury with loss of consciousness, and a cut on the head.
48. The principles upon which an appellate court can interfere with an award of damages are well settled.
49. An appellate court will only interfere with an award of damages when the trial judge has taken into account an irrelevant factor, failed to consider a relevant one, or where the award is so inordinately high or low as to be an entirely erroneous estimate of the damage suffered.
50. The Respondent cited the case of David Muthoka Nthenge v Kenya Power & Lighting Co. Ltd [2020] eKLR where an award of Kshs. 1,500,000 was upheld for a comminuted fracture of the right tibia and fibula.
51. The Appellant, on the other hand, proposed an award of Kshs. 750,000, citing Daniel Muchemi M'rimberia v Julius Murungi M'Mbuiado [2018] eKLR where Kshs. 600,000 was awarded for a fractured tibia and fibula.
52. However, awards in previous cases are merely guides. The key is to ensure comparability. The injuries in the present case were more severe than those in the case cited by the Appellant, as they involved multiple fractures to both legs and a head injury.
53. I find that an award of Kshs. 1,500,000 is not on the higher side, considering the nature of the injuries and the current trend of awards, I cannot say that it is so inordinately high as to constitute an entirely erroneous estimate.
54. I find that the trial magistrate exercised her discretion judiciously, and I find no basis to justify appellate intervention on this ground.
55. The ground of appeal on special damages was abandoned and is therefore dismissed.
56. Consequently, the appeal is found to be without merit and is hereby dismissed. The judgment and decree of the lower court delivered on the 24th of January 2025 are affirmed. The Appellant shall bear the costs of this appeal.
57. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025 IN OPEN COURT  
AT VOI HIGH COURT.**

**ASENATH ONGERI**



**JUDGE**

In the presence of:-

Court Assistant: Millicent

