Abdi & another v Ibrahim (Civil Appeal E001 of 2025)
[2025] KEHC 13602 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E001 OF 2025

JN ONYIEGO, J

SEPTEMBER 30, 2025

BETWEEN

AHMED HUSSEIN ABDI ..... 1ST APPELLANT

GOLDEN COACH LIMITED ..... 2ND APPELLANT

AND

ZAKARIA ABDIRIZAK IBRAHIM ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon. Aganyo delivered on 23.01.2025 in Civil Suit No. E011 of 2021 at PM's Court Wajir)

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.

2. Vide his amended plaint amended on 23.03.2022, the respondent averred that on or about 21.11.2021 in Leheley, along Wajir – Garissa Road while lawfully using the road, the 2nd appellant, his servant and/ agents negligently and/ carelessly drove, managed and/ controlled motor vehicle registration number KCL 968S that he caused the same to violently hit the plaintiff thus occasioning him serious bodily injuries.

3. The particulars of negligence and or recklessness of the 2nd appellant were set out at para 5 of the plaint as follows:

    i. Failing to brake, slow down, swerve or in any other way failed to manage the said motor vehicle so as to avoid the accident.

    ii. Failing to exercise the requisite care, skill, ability and competence required of a motor vehicle driver.

iii. Driving at an excessive speed in the circumstances.

iv. Failing to keep any proper look out or have any sufficient regard to other road users resulting in violently hitting the plaintiff.

v. Failing to exercise and/or maintain any sufficient or adequate control of the said motor vehicle.

vi. Driving without due care and attention.

vii. Causing the accident.

4. The particulars of injuries were also listed in para 5 of the plaint as follows:

i. Left sub trochanteric grade 3 fracture.

ii. Right grade 1 ankle supination external rotation injury.

iii. Mandible body and bicondylar fracture.

iv. Ankle and neck fracture.

5. Particulars of special damages were listed as follows:

i. Hospital and related expenses Kes. 1,022,541/-.

ii. Food & accommodation expenses Kes. 165,400/-.

iii. Medical report Kes. 6,000/-.

iv. Motor vehicle search Kes. 550/-.

Total Kes. 1,194,491/-

6. The plaintiff sought for a judgment against the 2nd appellant for:

i. Special damages of Kes. 1,194,491/-

ii. Costs of surgery to remove metal plates and screws at Kes. 165,400/-.

iii. Future medical expenses

iv. General damages for pain suffering, loss of amenity, loss of earning capacity and loss of earnings.

v. Costs of the suit.

vi. Interest on (a), (b), (c), (d) & (e) at court rates.

vii. Any other relief that the Honourable Court may deem just and fit to grant.

7. Despite the 2nd appellant being served the pleadings, it neither filed defence nor enter appearance within the stipulated period as provided by the law and therefore, on 30.07.2021, an interlocutory judgment was entered in favour of the respondent against the 2nd appellant.

8. Upon filing an application to set aside the interlocutory judgment and upon the court considering the said application, it set aside the interlocutory judgment thus directing the appellants to file their pleadings. The appellants thus filed an amended statement of defence dated 20th February, 2024 wherein the appellants denied the allegations of negligence, injuries and damages suffered by the respondent as pleaded in the plaint.

9. It was contended that the accident was solely caused or substantially contributed to by the respondent who was established to have mental challenges after he ran towards the road thus throwing himself onto the road. That the driver could not swerve or take any other measure to avoid the accident without endangering the lives of the passengers on board and occupants of the nearby houses. The appellants pleaded the doctrine of volenti non-fit injuria on the respondent's part. The 1st and 2nd appellants listed particulars of negligence of the respondent in para 6 of the amended statement of defence and further blamed the respondent for the occurrence of the accident. In the end, the court was urged to dismiss the respondent's suit with costs.

10. The respondent filed a reply to the appellants' amended defence wherein it was prayed that the amended statement of defence be struck out or dismissed with costs to the respondent and judgment be entered in favour of the respondent.

11. The matter proceeded to full hearing and the trial magistrate after considering the law and evidence entered a judgment against the defendants in the following terms:

    i. Special damages (777,541.00 + 13,000) being the medical expenses at Kijabe Hospital and the Doctor's expenses receipts for medical report and court attendance totaling to Kes. 790,541/-.

    ii. Costs of surgery to remove metal plates and screws. Nil awarded as no future need was demonstrated.

    iii. Future medical expenses. Nil was awarded as the need was not demonstrated.

    iv. General damages for pain, suffering, loss of amenity, loss of earning capacity and loss of earnings.

        General damages for pain and suffering - Kes. 1,500,000/-.

        Loss of amenities - Kes. 300,000/-.

        Loss of earning capacity and loss of earning, no award was

        Made as there were no submissions on the same.

    v. Cost of the suit and interest at court rates.

12. The appellant being dissatisfied with the said judgment, listed twelve (12) grounds of appeal in the memorandum of appeal dated 05.02.2025 as follows:

    i. That the learned magistrate erred in law and in fact in failing to consider adequately or at all the evidence of the police officer in that the respondent was not wholly to blame for causing the accident thereby arriving at a wrong decision.

    ii. That the learned magistrate erred in law and in fact in failing to consider that the evidence of an existing road block ahead on the road hence blaming the respondent 100% for causing the accident and thereby arriving at a wrong decision.

    iii. That the learned magistrate erred in law and in fact in failing to consider that the appellant's driver tried his best efforts to avoid the accident but unfortunately it could not be avoided in view of the fact and evidence that the respondent abruptly started crossing the road thereby arriving at a wrong decision.

    iv. The learned magistrate erred in law and fact in failing to consider that the accident occurred early in the morning wherein visibility is limited but instead blamed the appellants fully hence arriving at a wrong decision.

v. That the learned magistrate erred in law and in fact in failing to consider that there were no bumps at the accident spot as per the evidence adduced wherein a vehicle would completely slow down thereby arriving at a wrong decision.

vi. That that the learned magistrate erred in law and in fact in failing to consider that the respondent through the police officer failed to produce any sketch maps of the accident scene therein unfairly blaming the 1st and 2nd appellants thereby arriving at a wrong decision.

vii. That the learned magistrate erred in law and in fact in failing to consider that no abstract was produced blaming the 1st and 2nd appellants for the accident and thereby arriving at a wrong decision.

viii. The learned magistrate erred in law and in fact by failing to consider the circumstances of the case and thereby arriving at a wrong decision.

ix. That the learned magistrate erred in law and in fact by disregarding the arguments raised by the appellants therein.

x. That the learned magistrate erred in law and fact by conferring undue weight to the arguments advanced by the respondent.

xi. That the learned magistrate erred in law and in fact in failing to consider judicial precedent and/or the relevant law in determining the suit.

xii. That the learned magistrate erred in law and in fact by apportioning general damages exorbitantly hence arriving at a wrong decision.

13. Reasons wherefore, the appellants prayed for orders:

i. That the appeal be allowed.

ii. That the judgment delivered by the Honourable Principal Magistrate A. Aganyo on 23.01.2025 be set aside.

iii. That the costs of this appeal be awarded to the appellants.

14. The appeal was disposed off by way of written submissions.

15. The appellant via submissions dated 16.05.2025 urged in support of the appeal citing the issues for determination as follows:

i. Whether the trial magistrate erred in holding the appellant 100% liable for the accident.

ii. Whether the respondent contributed to the occurrence of the accident and to what extent?

16. It was contended that liability in negligence cases must be apportioned where there is evidence of contributory negligence. In support of the foregoing, the appellants urged that the accident was caused by the respondent while crossing the road at 5.00 a.m. knowing that visibility was limited. That he did so in an area with no zebra crossing, no bumps and no signage indicating pedestrian use. According to counsel, the trial court ought to have taken the foregoing in consideration of the same when coming up with her finding.

17. It was contended that the respondent failed to exercise reasonable care as he attempted to cross the road in the early morning hours when there was poor visibility, a place outside designated pedestrian crossing area and therefore, he ought to have been found to have contributed towards the occurrence of the accident herein. It was contended that noting that the investigating officer did not testify, the evidence

of the officer who testified on his behalf ought to be treated as hearsay. Counsel decried the fact that the police abstract did not blame any party for the occurrence of the accident as the same was simply indicated as still pending and therefore, it could not conclusively be suggested that the appellants fully caused the accident. That no sketch maps or photos were produced to indicate the particular section of the road where the accident occurred.

18. To that end, counsel for the appellants urged that further, the set of facts applied to a different cause of action which occurred on 21.11.2020 and as such, the appellants were not liable for the cause of action that arose on 21.11.2021. That in view of the same, the issue of liability was not proved and the appellants cannot therefore be found liable for the accident that occurred on 21.11.2021. To that end, this court was urged to allow the appeal as prayed.

19. The respondent in opposing the appeal filed submissions dated 26.05.2025 citing the following issues for determination:

    i. Whether the learned magistrate erred in holding the appellants 100% liable for the accident?

    ii. What are the appropriate remedies in the circumstances?

20. The respondent urged that the question whether the accident happened on 21.11.2020 had been answered in the affirmative and the same is not contested by either party. In response to the allegation that the respondent attempted to cross the road at 5.00 a.m. in the morning, counsel urged that there is no law that prohibits persons from crossing roads at 5.00 a.m. in the morning or any time thereof.

21. Counsel submitted that the respondent was hit as he was crossing the road and the appellants' earlier claim urging that the respondent threw himself on the road like a mad man was contracted by their subsequent change of story thereby claiming that the respondent was in fact crossing the road at a place not designated as pedestrian crossing. That the foregoing notwithstanding, it was not in doubt that the accident occurred at the police road block and that the speedometer could not have been past zero in terms of speed. To that end, reliance was placed on the case of Mary Njeri Murigi vs Peter Macharia & Another [2016] eKLR where the court held that:

    'A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof.'

22. Additionally, that the injuries of the respondent were categorized as grievous harm and that the degree of permanent incapacity was settled at 50%. Further, that the respondent still complains of recurrent pains and that he is not able to exert himself.

23. That the argument in regards to the fact that the police abstract did not apportion blame on any party for causing the accident is not a basis for blaming the respondent to have contributed to the happening of the accident. That a police abstract is not conclusive evidence of liability. In support of the foregoing, Counsel relied on the case of Peter Kanithi Kimunya vs Aden Guyo Haro [2014] eKLR where the court held that:

    > 'A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station.'

24. Further reliance was placed in the case of Kennedy Nyangoya vs Bash Hauliers [2016] eKLR 2016 KEHC 2616 KLR where the court held that:

> 'Even if the police abstract indicated that DW1 was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it.'

25. That in as much as the appellants have alleged that the respondent contributed towards the occurrence of the accident, no evidence was produced to support such an allegation. To that end, this court was called upon to uphold the finding of the trial court by dismissing the appeal herein with costs.

26. This court is duty bound to reconsider a fresh the evidence tendered before the trial court and arrive at its own independent determination [See Peters vs Sunday Post 1958 (EA) 424].

27. PW1, Zacharia Abdirizak Ibrahim relied on his statement and further produced his list of documents. He further narrated that on the material date, he was from the mosque after attending the morning prayer when he was hit by the suit motor vehicle. That he did not see the motor vehicle approach as he felt the same was over speeding at the time it hit him. He stated that he was taken to Garissa and then later to Kijabe hospital where he was admitted for two months. He testified that the accident affected him as he could no longer walk for a long period of time or work for long hours.

28. On cross examination, he stated that he was hit by the vehicle when he was crossing the road from the mosque. That he was alone at the time of the accident and further, that he did not see the vehicle that hit him. It was his case that the mosque and the road are near each other. Additionally, that he had not fully recovered from his injuries in as much as the plates were removed.

29. PW2, Dr. Supriamis Okoth Okere, a private medical practitioner testified that he examined PW1, a 25-year-old male and confirmed that he sustained fracture of the left femur mandible and a deep cut wound on the fore head, fracture of the left upper leg and mandible fracture of the corner joint, fracture of the ankle and bruises on both hands. He categorized the injuries as grievous harm. He thus produced the report as exhibit in court.

30. On cross examination, he stated that he examined PW1 four years after the accident and that the right leg had been fractured but the fracture had already healed but it would not function the way it used to by 50% incapacity. That the implants had been removed and the incapacity will never reduce with time.

31. PW3, Inspector Ibrahim Gedi stated that he was aware of the police abstract as the accident happened on 21.11.2020 along Wajir – Garissa road at Leheley shopping centre. He produced the abstract as evidence in court and on cross examination, he stated that he was not the investigating officer. It was his case that the driver of the suit vehicle was neither blamed nor charged before any court for the said accident.

32. The appellants on the other hand called 3 witnesses in support of its case as follows:

33. DW1, Dr. Washington Wokabi produced a medical report dated 22.01.2024 wherein he stated that the respondent suffered a permanent disability at 16% thus urging that the 50% indicated by the respondent's doctor was overstated as the respondent could walk and clinically, the fractures were solid. That in as much as the fractured leg cannot heal perfectly and revert to its old vitality, there would be some disability associated with it. He stated that he thought the complaints by the respondent were genuine considering the nature of the injuries that he suffered and that for each leg, he gave a minimum allowable disability of 8% thus each adding to 16%.

34. On cross examination, he stated that the injuries in the medical report which mentioned that there was a fracture of left femur, the same referred to the fracture of the thigh born area which and the same was fixed with a metal implant and then removed. That the part of tibia on the right, meant the right leg was broken at two places but at the time that he reviewed the respondent, he was relatively in good form as he was not limping hence the reason why he assessed his disability to 8%.

35. DW2, Ahmed Hussein Abdi, a driver with the Golden Coach Limited adopted his statement and thereafter produced his filed documents. He stated that he was the driver when the accident herein happened but he was not charged in court over the same. He reiterated that he did not drive the vehicle at a high speed noting that there was a police road block and several people were walking around as it was prayer time and further, children were also walking going to school. He stated that at no point did he see the respondent. That people including the respondent's relatives, the public at large and the police told him to leave the respondent alone as he had a mental illness. That in good faith, he decided to wait until the Wajir traffic police arrived at the scene to assess the situation. He blamed the respondent for the occurrence of the incident alleging that he threw himself on the bus.

36. On cross examination, he stated that he did not over speed as he was approaching a police barrier. That the respondent positioned himself on the road thus he was hurt by the shaft of the motor vehicle.

37. DW3, Elias Abdullahi Mohamed, the conductor of the Golden Coach Limited Bus Reg. No. KCL 968S adopted his statement and then proceeded to state that on the material day, he was seated at the front of the vehicle together with the driver when he saw a black item on the ground and later upon checking, found that it was a human being. That the bus was moving at a slow pace and that the vehicle did not harm the respondent as the driver avoided running over him. He averred that the respondent was a person suffering a mental illness and that he was tied up during the time in question.

38. From the memorandum of appeal herein, the court discerns that the issues for determination are; whether an accident occurred involving mv regn. Number KCL 968S and the deceased; whether the appellants were liable for the occurrence of the accident; whether taking into account the nature of the alleged injuries sustained by the respondent, comparable awards and inflation or passage of time the award of damages by the trial magistrate was inordinately excessive as to warrant this court to interfere; and whether the special damages ought to be subjected to the apportionment on liability.

39. 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".

40. On the issue whether mv registration No.KCL 968S was involved in the subject accident, the appellants denied the same. Dw3 the mv conductor said that they noticed something black on the road and when the driver slowed down, they realized that it was a human being whom people gathered there referred to as a mad man. However, contrary to his testimony, Dw2 the driver stated that the respondent was a mad man who threw himself into the bus. Further, the police abstract confirmed that the said mv was involved in a road accident with the respondent. With these kind of evidence, there is no doubt that the mv in question owned by the 2nd appellant and being driven by the 1st appellant on the material day (21st November 2021) was involved in the said road accident with the respondent.

41. The second issue is in regard as to who was to blame for the occurrence of the accident and therefore liable. According to the respondent, he was crossing the road when a speeding mv approached suddenly and knocked him down. He blamed the driver of the mv 100%. On the other hand, the appellants blamed the respondent 100% for the accident occurrence alleging that the respondent who was said to be a madman deliberately threw himself into the road hence was hit by the mv. They pleaded the doctrine of volenti non fit injuria.

42. The court having considering circumstances under which the accident occurred and the evidence of both parties, found the driver of the motor vehicle liable. The appellant however, proposed that, the best the court should have done was to apportion contributory negligence at 50%:50%.

43. It is trite law that the burden of proof always lies on he who alleges. See Sections 107, 108 and 109. This position was articulately espoused by Lord Denning J., in Miller v Minister Of Pensions [1947]2 All ER 372 where he discussed the burden of proof and stated as follows:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

44. According to the appellants, the respondent was not keen while crossing the road at 5.00am as visibility was not clear and that the place was not designated for crossing. Further, that the driver could not have driven at a high speed at appoint where there was a police barrier. It is unfortunate that the investigating officer did not draw nor submit a sketch plan of the scene to give a glimpse of the terrain and how straight that point was. I will only take judicial notice of the fact that a road block is not ordinarily placed at a corner of the road hence in this case the road must have been straight.

45. Having inferred the straightness of the road, it implies that the driver was expected to see somebody attempting to cross the road using full lights. This is on the assumption that the mv was serviceable with clear full lights. Secondly, DW2 and Dw3 having claimed that there were bumps at the point of the accident, it implies that the mv must have slowed down hence making it possible to brake or swerve off the road to avoid hitting a pedestrian.

46. In view of the alleged prevailing circumstances, the driver ought to have properly managed the mv to avoid the accident or cause minimal injury. From the degree of injuries sustained, the mv must have been on a higher speed. The claim that the respondent was a mad man who desired to die is a self-defeatist approach especially when the appellants admits that the respondent was crossing the road when visibility was poor. To that extent, the doctrine of volenti non fit injuria is misplaced

47. Taking into account the fact that the accident occurred on a straight road and at a road block with bumps in place, the driver of the mv was expected to have slowed down hence avoid the accident or mitigate on the effect or degree of the injuries. Although no eye witness testified on the side of the respondent, the evidence of the appellants by inference is proof enough of the 1st appellant's acts of negligence which is driving at a high speed hence unable to control or manage the mv to avoid the accident.

48. On the other hand, the respondent cannot be said to be blameless. At 5.00am, the mv full lights were on. That is proof that he must have noticed the mv coming or approaching hence take precautions to cross when it was safe. To that extent, he must have contributed by crossing the road without due care and attention. For that reason, I find that the court erred by condemning the 1st appellant 100%. In my view, the extent of contributory negligence ought to have been apportioned in the ratio of 80: 20 in favour of the respondent.

49. The allegation that the 1st appellant was not charged hence not liable is not a principle in law. The degree of proof in a traffic case and civil are different hence the police had the power to charge or not to charge and the omission to prefer traffic charges does not vitiate civil liability. See Mwangi & another v Nyambura (2024) KEHC 2868(KLR) where the court held that the absence of criminal liability does not absolve of civil liability.

50. Further, the allegation that the police abstract was not produced hence no proof of the alleged accident, the same is misplaced. There are several other ways of proving an accident including eye witnesses' evidence other than through a police abstract. See Kennedy Nyangoya v Bash Hauliers (2016) KEHC 2616 where the court held that a police abstract is not conclusive proof of liability.

51. On the aspect of quantum, the court found that the respondent had proved 1,500,000/= as general damages for pain and suffering and 300,000/= as loss of amenities. In their memorandum of appeal, the appellants did not challenge the specific amount awarded. In their submissions, the same was not challenged. From the evidence tendered and the case law cited by the trial court, I have no reason to interfere with the amount awarded considering that the same has not been challenged.

52. In a nutshell, am satisfied that the appeal herein is merited and the same succeeds to the extent that liability of 100% against the appellant is substituted with a finding that liability is shared in the ratio 80:20 contributory negligence in favour of the respondent.

53. Accordingly, Judgment is entered as follows;

    1. Special damages 790,541
    2. General damages for pain and suffering 1,500,000
    3. Loss of amenities at 300,000/=
    4. Total amount awarded 2,590,541/=
    5. Contributory negligence awarded in the ratio of 80:20 in favour of the respondent
    6. Amount payable to the respondent 2,331,587 plus costs before the lower court
    7. No order as to costs for proceedings before the high court.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 30TH DAY OF SEPTEMBER 2025

J. N. ONYIEGO

JUDGE