



**Danki Adventures Limited v Gitau (Civil Appeal E047 of 2023)
[2025] KEHC 13468 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E047 OF 2023
TW OUYA, J
SEPTEMBER 30, 2025**

BETWEEN

DANKI ADVENTURES LIMITED APPELLANT

AND

EMMAH NYOKABI GITAU RESPONDENT

(Being an appeal from the judgment given by Honourable J Irura on the 29th June 2025 in Kigumo MCCC E167 of 2021 between Emmah Nyokabi Gitau and Danki Ventures Limited)

JUDGMENT

1. The appeal emanates from a road traffic accident claim where the Respondent vide a plaint dated 20th July 2021, alleged that the Appellant was vicariously liable for the negligent acts of his agent or driver leading to the accident between the Respondent and motor vehicle registration number KCK 099C.
2. In urging the claim, the Respondent averred that the Appellant's driver failed to take any precautionary measures or adequate steps to protect the Respondent from harm and injury. As a result, the Respondent sustained the following injuries:
 - a. Deep cut on the left supraorbital area
 - b. Orbital wall and zygomatic fractures
 - c. Fracture of the left radial head displaced
 - d. Soft tissue injuries to the left hip
 - e. Friction burns on the anterior aspect of the left knee
3. The Appellant denied the claim via its Statement of Defence dated 2nd October 2021. While maintaining that its driver, servant and or agent drove motor vehicle KCK 099C carefully and lawfully



- along Thika – Kenol Road, the Appellant alleged that the Respondent failed to keep to the footpath and walked onto the road. Therefore, the Respondent contributed to the said accident by failing to take due care and attention of her own safety.
4. During the trial, PW1, Emma Nyokabi Gitau, testified that on 8th October 2019 she was involved in a road traffic accident. She adopted her witness statement and bundle of documents as evidence in support of her claim against the Appellant. She testified that she was standing by the road side, just about to cross the road, when the subject motor vehicle knocked her right where she was. She sustained injuries but had recovered at the time of giving her testimony in court. She stated that there are people who were working at the place that he had stood, the road had no markings. The vehicle hit her despite making efforts to avoid it.
 5. PW2 No. 91108 PC Rogers Mwiti Mutabari testified that he is a police officer attached to Makuyu police station. He stated that he had a police abstract of a serious traffic accident that occurred on the 8th October 2019 at about 11.10am at Kenol town along Kenol Sagana Road. The said accident involved a pedestrian named Emma Nyokabi Gitau aged 56 years and motor vehicle registration number KCK 099C Toyota Landcruiser pick up being driven from Thika towards Sagana general direction. On reaching Kenol town, the vehicle knocked down PW1 who sustained injuries on the forehead and a fracture on the left hand. PW1 was rushed to Kenol hospital for treatment and the scene was visited by PC Otare and booked vide OB 25/08/10/2019. There was a Zebra crossing along Kenol Makuyu Road at the time of the accident. The place is a busy town and vehicles are expected to slow down. The road was not under construction in the years 2019. He was not aware whether any charges had been instituted against anyone, following the accident. He relied on the police abstract as an exhibit.
 6. By consent the parties adopted the medical report by Dr Wambugu dated 28.02.2022. The Respondent urged the court to award damages at Ksh. 1,500,000.00 for pain and suffering while the appellant urged that the Respondent be awarded Ksh. 600,000.00.
 7. At the end of the trial, judgment was entered for the Respondent against the Appellant. Liability was assessed at 100%. On the issue of quantum, the trial court assessed general damages at Ksh. 900,000.00 for pain, suffering and loss of amenities while special damages were awarded at Ksh. 550.000
 8. The court took into account the injuries sustained by the Respondent, decided cases and also inflation guided by the case of Frankline Chilibasi Spii v Kirangi Liston [2017] eKLR where the Plaintiff was awarded Ksh. 1,800,000.00 as damages for pain and suffering and loss of amenities.
 9. In making the judgment the court found that there was no evidence that the Respondent was careless in any way or that she attempted to cross the road without due care and in a manner that endangered her life. It was the courts finding that it is a requirement for vehicles approaching such a busy area to slow down to allow pedestrians to cross before proceeding.
 10. On damages, the court noted that the Respondent had suffered severe head injury with loss of consciousness for unspecified period of time. She also had a deep cut wound on the left supraorbital region approximately 6cm whereby X-rays showed orbital wall and zygomatic fractures. The Respondent also had an injury on the left forearm with a fracture on the left radial head displaced, soft tissue injuries on the left hip bruises and friction burns 2x2cm on the anterior aspect of the left knee. There was no permanent incapacitation.
 11. No judgement attached to the Record
 12. Aggrieved and dissatisfied with the trial court's finding, the appellant lodged the instant appeal vide a Memorandum of appeal dated 15th May 2023 on grounds that:



- i. The learned magistrate erred in fact and in law by finding that the respondent did not contribute to the accident by her negligence as a road user;
 - ii. The learned trial magistrate erred in fact and in law by finding that the Respondent was negligent thereby disregarded her own safety by walking and or standing at an undesignated walkway thereby contributing to the accident
 - iii. The learned trial magistrate erred in fact and in law by finding the defendant liable, vicariously or otherwise in the absence of cogent evidence pointing to the actions and or omissions on the part pf the driver of KCK 099C as well as the appellant herein;
 - iv. The learned trial magistrate thereby misdirected herself and based her findings on wrong considerations.
 - v. The learned trial magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum;
 - vi. The learned trial magistrate erred in fact and in law in failing to consider conventional awards and established precedent in cases of similar nature in awarding general damages and thereby proceeded to award manifestly excessive and undeserved general damages to the Respondent;
 - vii. The learned trial magistrate's judgment consequently occasioned a miscarriage of justice;
 - viii. The learned trial magistrate erred in law and in fact by failing to appreciate the appellant's contentions, arguments and submissions;
 - ix. The learned magistrate's judgment consequently occasioned a miscarriage of justice.
13. Therefore, the Appellant prayed that the learned trial magistrate's decision be set aside, quashed and or be substituted by this honourable court and enter a just judgment in light of the evidence on record.
 14. By consent of the parties the matter was disposed through written submissions.
 15. It was submitted on behalf of the Appellant that the Respondent failed to discharge its burden of proof to the required standard as there was no cogent evidence pointing to the actions or omissions of the Appellant's driver as being responsible for the accident. Therefore, liability ought to be apportioned at 80:20.
 16. On the issue of quantum, it was submitted that the Chilibasi case *supr*, which the trial court relied on while awarding damages had more severe injuries compared to those sustained by the Respondent. therefore, the general damages awarded by the court failed to appreciate the principle that comparable injuries ought to attract comparable awards. Reliance was placed on the case of *Maina Onesmus v Charles Wanjohi Githome* [2019] eKLR where an award of Ksh. 650,000.00 was substituted with an award of Ksh. 350,000.00 for a plaintiff who had sustained a fracture of the mid shaft humerus, fracture of the condyles; fracture of the shoulder gird and pain and psychological trauma. Also, in *Stanley Kirwa Arusei v John Mkwalaifu Wanjofu* [2020] eKLR, the court substituted an award Ksh. 1,800,000.00 with that of Ksh. 500,000.00 where the plaintiff had suffered blunt injury with bruises to the right-hand fracture of left femur proximal and open segmental fracture of the right tibia fibula. Further reliance was also placed on the case of *Atunga v Mogabi* [2022] KEHC 9854 where Ksh. 550,000.00 was awarded for fractures of the tibia and fibula bones, dislocation of the right hip joint, multiple lacerations on the lower limb; bruises, with multiple cut wounds on the upper limbs, dislocation of the right shoulder, chest trauma and bruises on the frontal part of the head.



17. The Appellant therefore submitted that an award of Ksh. 600,000.00 would be sufficient taking into account inflation and vicissitudes of life.
18. The Respondent submitted that the Appellant failed to call any witness in support of its case was to its own detriment. The Respondent was able to discharge its legal burden of proof and the evidence of both PW1 and PW2 was not controverted in any way. There was therefore no legal basis for the trial court to apportion liability at 80:20.
19. On the issue of quantum, it was submitted that an award of Ksh. 1,500,000.00 would be suitable as the Respondent suffered multiple injuries on various parts of the body. Reliance was placed on the case of Kenya Wildlife Service v Godfrey Kirimi Mwiti [2018] KEHC 3944 (KLR) where the Respondent was awarded Ksh. 2,000,000.00 in general damages for a left zygomatic bone fracture, left ethmoidal bone fracture and maxillary fracture, Nasal septum fracture, lower orbital floor fracture, loss of teeth, 6 on upper, 3 on lower jaw, distal left radius fracture. Also, in BAJ v Roadstar Limited & 2 others [2018] KEHC 9117 (KLR), the plaintiff was awarded general damages of Ksh. 1,500,000 for LT orbital floor and margin fractures with pneumo-orbit, comminuted LT maxillary fractures of the anterior and posterior lateral wall, LT Zygomatic arch fracture, LT mandible angular fracture, RT parasymphyseal mandibular fracture surface of the right hand and bruises to the forehead.
20. I have considered this appeal, submissions by the Appellant and the authorities relied on. I have also considered the record and the impugned judgment. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination.
21. In Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the court stated with regard to the duty of the first appellate court;

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
22. It is trite law that "whoever alleges must prove. Section 107 of the [Evidence Act](#), Chapter 80 Laws of Kenya states as follows:
 - 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
 - 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
23. Further Section 109 in narrowing down to proof of particular facts stipulates:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
24. The foregoing provisions of the law were restated by the Court of Appeal in the case of Kirugi & Another – Vs – Kabiya & 3 Others [1987] KLR 347 where it held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”



25. Liability is an issue of evidence. In this cause the plaintiff testified that she was standing by the road side, just about to cross the road, when the subject motor vehicle knocked her right where she was, despite making efforts to avoid it. This account was also supported by PW2, the police officer who testified that the subject motor vehicle knocked down the plaintiff and in turn causing her serious injuries. PW2 observed that the place of accident was quite busy and therefore vehicles were expected to slow down while approaching the place.
26. Though the Appellant alleged contributory negligence, he has not demonstrated how the plaintiff contributed to the accident. The plaintiff's claim that she was hit while standing beside the road before crossing has not been controverted with evidence. From the circumstantial evidence tendered and taking note that the defendant did not offer any evidence in rebuttal, it is the finding of the court and I concur with the trial court's finding that the appellant is liable at 100% for the accident. In this I find support in the case of Trust Bank limited v Paramount Universal Bank Ltd & 2 others Milimani HCCC no 1243 of 2000 where the court held that failure to adduce evidence means that the evidence adduced by the plaintiff against the defendant is uncontroverted and unchallenged.
27. The Court of Appeal in Butt v Khan [1981] KLR 349 held as per Law, J.A that:
- 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 arrived at a figure which was either inordinately high or low.
28. The difficult nature of the court's task in assessing damages was expressed by the Court of Appeal in George Kirianki Laichena v Michael Mutwiri NRB CA Civil Appeal No. 162 Of 2011 [2011]eKLR where it observed that:
- It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case...
29. However, it is accepted that the court in awarding damages must always bear in mind that money cannot renew a physical frame that has been battered and shattered and that the courts' only concern is to fair and reasonable compensation. In arriving at what is fair and reasonable the court ought to ensure that there is uniformity in the general method of approach and so far as possible comparable injuries should attract similar awards (see generally Rahima Tayab and Another v Anna Mary Kinaru [1987-88]1 KAR 90, Simon Taveta v Mercy Mutitu Njeru NYR CA Civil Appeal No. 26 of 2013 [2014] eKLR and Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR).
30. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards which injure the body politic must be avoided, the court must ensure that awards make sense and result in fair compensation (see Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661).
31. The nature of injurie sustained by the Respondent have not been disputed as the medical report by doctor Wambugu was adopted by consent. The Respondent in this case suffered severe head injury with loss of consciousness for unspecified period of time. She also had a deep cut wound on the left supraorbital region approximately 6cm whereby X-rays showed orbital wall and zygomatic fractures. The Respondent also had an injury on the left forearm with a fracture on the left radial head displaced,



soft tissue injuries on the left hip bruises and friction burns 2x2cm on the anterior aspect of the left knee. There was no permanent incapacitation.

32. Looking at the injuries sustained by the appellant, it would be clear that the authorities cited by both parties would not apply here.
33. The injuries are distinguishable from those in the cases relied on by the appellant. The Respondent herein suffered much more serious injuries including zygomatic fractures. Therefore, they are not comparable injuries to warrant comparable awards to the instant case.
34. Similarly, the cases relied on by the Respondent contain injuries not comparable to those sustained by the Respondent. The injuries in those authorities were of a more serious nature.
35. The injuries sustained by the plaintiff in the Chilibasi case, relied on by the trial court, though similar in nature to those sustained by the Respondent, were more serious than the Respondent's injuries. The Respondent herein has not suffered any fracture on the tibia and fibula and the friction burns are 2x2cm and not 8x3 cm as in the Chilibasi case.
36. The decision, the subject of the instant appeal, was rendered in 2025, and the award it made, on general damages, for severe head injury with loss of consciousness for unspecified period of time, a deep cut wound on the left supraorbital region approximately 6cm whereby X-rays showed orbital wall and zygomatic fractures, injury on the left forearm with a fracture on the left radial head displaced, soft tissue injuries on the left hip bruises and friction burns 2x2cm on the anterior aspect of the left knee with no permanent incapacitation, was reasonable.
37. Consequently, I find no merit in the instant appeal, and I hereby dismiss it. Each party shall bear their own costs.
38. Thirty (30) days stay of execution to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 30TH SEPTEMBER, 2025.

HON. T. W. OUYA

JUDGE

