



REPUBLIC OF KENYA



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**Mugwe v Gitonga (Civil Appeal E073 of 2021)
[2025] KEHC 14164 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E073 OF 2021
MA ODERO, J
OCTOBER 9, 2025**

BETWEEN

PATRICK GICHOHI MUGWE APPELLANT

AND

PHILIP KIAMA GITONGA RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 18th November 2021 by which the Appellant Patrick Gichohi Mugwe seeks the following orders:-
 - “(a) The Appeal herein be allowed and the judgement of the Lower Court be set aside.
 - (b) The costs of the Appeal be granted to the Appellant.”
2. The Respondent PHILIP KIAMA GITONGA opposed the appeal. The matter was canvassed by way of written submissions.
3. The Appellant filed the written submissions dated 30th January 2025 whilst the Respondent relied upon his written submissions dated 23rd June 2025.

Background

4. This appeal emanates from the decision of the Lower Court in Karatina PMCC No. 102 of 2016. The case arose from an accident which occurred on 27th March 2015 along the Nyeri-Karatina Road. The Respondent Phillip Kiama Gitonga (who was the plaintiff in the lower court case) stated that on 27th March 2015 he was driving a motor vehicle Registration Number KAT 918 B from Nyeri towards Karatina. Another vehicle Registration KBQ 957Y being driven by the Appellant was being driven in the opposite direction. The Plaintiff told the court that the KBY 957Y left its lane swerved into the



lane of oncoming vehicles and hit the plaintiff's vehicle on the right driver's door which impact pushed the plaintiff's vehicle off the road.

5. The Plaintiff stated that as a result of the accident he suffered serious injuries. That he was then working as a driver, and could not continue to work and as such he claims for less of earning capacity.

6. The plaintiff also made a claim for special damages as follows:-

Particulars Of Special Damages

(a) Treatment fees Kshs. 2,229,097.25

(b) Taxi fees Kshs. 112,000.00

c. Police Abstract Kshs. 200.00

d. Medical Report Kshs. 4,500.00

e. Copy of Records Kshs. 2,346,347.25

Total Kshs. 2,346,347.25

7. The Plaintiff told the court that as a result of the accident one passenger who was in his vehicle lost his life. That the police investigated the accident and thereafter charged the driver of the KBY 957Y with the offence of causing 'Death by Dangerous Driving'.

8. The Plaintiff then filed the plaint dated 9th October 2017 by which he sought the following prayers:-

“ 1. Special damages as particularized at paragraph (5) hereinabove.

1. Future medical expenses.

2. Loss of Earnings, loss of future earnings and loss of earning capacity.

3. General damages.

4. Costs of this suit.

5. Interest on (a), (c) (d) and (e) above; and

6. Any other relief that the Honourable court may deem fit.”

9. The Appellant who was the Defendant in the lower court case denied having caused the accident by reckless, careless and or negligent driving. In his defence the Appellant told the court that on the material day he left Nairobi at about 5.30pm heading to his home in Nyeri driving a Toyota Corolla Saloon Registration KBQ 957Y. At about 8. 00pm the Appellant reached Karatina. That the Mukurweini junction the Appellant indicated that he wished to overtake an oncoming matatu when another vehicle Registration KAT 918B being driven by the Respondent coming from the opposite direction veered into his lane and the two vehicles collided. Both vehicles were extensively damaged and the injured persons were rushed to Tumu Tumu Mission Hospital.

10. The Appellant blamed the Respondent for driving his vehicle in a reckless and negligent manner thereby causing the accident to occur.



11. The suit was heard in the Lower Court and vide the judgement delivered on 12th November 2021 by Hon. A Mwangi Principal Magistrate, the court entered judgement in favour of the Plaintiff against the Respondent in the following terms:-

- “(a) Liability 50:50
 - (b) General Damages - Kshs. 3,300,000
 - (c) Future Medical Expenses - Kshs. 430,000
 - (d) Loss of Earning Capacity - Kshs. 541,392
 - (e) Special Damages - Kshs. 2,346,347
- Total - Kshs. 6,617,739
- Less 50% Plaintiff Contribution
- Kshs. 3,308,869.50
- Amount Payable - Kshs. 3,308,869.50
- Costs of the suit plus interest were awarded to the Plaintiff.”

12. Being aggrieved by this judgment the Appellant filed this Memorandum of appeal which is premised upon the following grounds:-

1. That the Learned Magistrate erred in law in awarding General Damages for pain and suffering at Kshs. 3,300,000/= which amount is manifestly excessive and high considering the injuries sustained by the Respondent.
2. That the learned Magistrate erred and misdirected herself when she awarded to the respondent special damages of Kshs. 2,346,347.25/= even when the said damages were not specifically proved in evidence.
3. That the learned Magistrate erred and misdirected herself when she awarded to the respondent future medical expenses of Kshs. 430,000/= and loss of earning capacity of Kshs. 541,392 which amount is manifestly excessive and high.
4. That the learned Magistrate totally misdirected herself into applying wrong principles of law in arriving at her decision which influenced her into arriving at an erroneous and unreasonably high award.
5. That the learned magistrate misdirected herself by using wrong principles and failing to consider other conventional awards in the assessment of damages payable.
6. That the learned Magistrate erred in law and fact in awarding Special damages based on invoices.
7. That the learned Magistrate erred in law and fact in failing to consider the appellant’s submissions and authorities while considering her judgment.
8. That the Learned Magistrate erred in law and in fact by failing to follow rules of precedence in awarding general damages.



Analysis And Determination

13. I have carefully considered this memorandum of appeal as well as the record of Appeal filed in this matter.
14. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday post limited [1958] E. A. 424]
15. In SELLE and Another -vs- Associated Motor Boat Company Ltd & Others [1968] 1 E.A 123 it was stated that

“An appeal to this court from the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”
16. Likewise in Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR, the Court of Appeal stated as follows:-

“An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
17. Therefore the appropriate standard of review in cases of appeal can be summarized in the following principles;-
 - (1) On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.
 - (2) In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.
 - (3) It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.
18. The first issue to be determined in this appeal is the question of liability.

Each party blamed the other for having caused the accident. In a Civil case such as this one the Plaintiff (Respondent) had the legal burden to prove his claim on a balance of Probabilities.
19. The standard proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace



Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

“Denning J. in *Miller -vs- Minister of Pensions* [1947] 2. All ER 372 discussing the burden of proof had this to say;-

“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 a tribunal can say we think it more probable than not; the burden is discharged but, if the probabilities are equal it is not.

This burden 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 are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

20. In *Re H and Others (Minors)* [1996] AC 563, 586 Lord Nicholas of Birsthead held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

21. Finally in the case of *William Kabogo Gitau -vs- George Thuo & 2 others* [2010] 1 KLE 526 Justice Luka Kimaru (as he then was) stated that:

“In ordinary civil cases a case may be determined in favour 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.”

22. It is not in dispute that an accident did occur on 27th March 2015 at about 8.30pm which accident involved two motor vehicles Registration KAT 918 B and KBQ 957 Y.

23. The Respondent’s evidence was that it was the Appellant who caused the accident by veering off his lane into the Respondent’s lane thereby causing the collision between the two vehicles.

24. On the other hand the Appellant insists that the accident was caused by the Respondent who whilst driving his vehicle left his lane and swerved into the lane of oncoming traffic hitting the Appellant’s vehicle.

25. There is no evidence from any independent witness to clarify exactly how the accident occurred. No sketch map showing a point of impact was produced in court. Without any tangible independent evidence the court is not in a position to determine exactly how the accident occurred.

26. The Respondent urged the Lower court to hold the Appellant 100% liable due to the fact that the Appellant was charged with the offence of causing Death by Dangerous Driving. Indeed a copy of the charge sheet appears at Page 14 of the Record of Appeal filed on 7th November 2024.

27. The question is whether the fact that the Appellant was charged in a criminal case arising from the accident amounts to proof that the Appellant was liable for causing the accident? I do not think so.



No evidence was tendered to show that the Appellant was ever convicted of the offence with which he was charged. In any event even if the Appellant had been so convicted a plea of contributory negligence still remained available to the Respondent.

28. I am in agreement with the finding by the trial magistrate the facts that one party may have been charged (or even convicted) of a criminal offence arising from an accident does not mean he is to be deemed as 100% liable for said accident as there remains room for a claim of contributory negligence.

29. I further note that the Appellant in his evidence appeared to blame a third unidentified vehicle for causing the accident. In his written statement which appears at Page 109 of the record of Appeal the Appellant claimed that a third vehicle had overtaken him and slightly pushed him off the road and that the Respondent swerved to avoid colliding with this third unidentified vehicle. The Appellant even goes on to say that

“The other two 14 seater matatus headed to my direction did not stop despite being the culprits.....” [own emphasis]

30. The Appellants appears to blame this unidentified 14 seater matatus for causing the accident. In this case there is no independent evidence to support the allegations of negligence made by the two parties. In the case of Hussein Omar Farah -vs- Lento Agencies 2006 eKLR, Nairobi Civil Appeal No. 34 of 2005 the Court held thus

“In our View it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been in our jurisdiction and also in other jurisdictions that if there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame....” [Own emphasis]

31. I therefore uphold the finding by the trial court of 50:50 liability as there was no proof of contributory negligence.

Quantum

32. In determining quantum the question is not whether the appellate court would have been minded to award a different figure. In Henry Hidaya Ilanga - Manyema Manyoka -VS- [1961] EALR the court stated as follows;-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.....”

33. In assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered, but not to punish the tortfeasor for the injury he has caused. The court in Ramadhan Kamora Dhadho v John Kariuki & another Civil Appeal No. 27 of 2015 [2017] eKLR opined follows:-

“There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavor to be



moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.”

34. The damages which the Respondent claimed to have suffered were particularized as follows in Paragraph 5 of the Plaint dated 9th October 2017.

- (i) Fracture of the midshaft right femur
- (ii) Fracture of the left radius
- (iii) Multiple fractures of the right leg
- (iv) Compound fracture of the right tibia and fibula
- (v) Intertrochanteric fracture of the right hip
- (vi) Chronic osteosis
- (vii) Compound mid tibia deformed thigh with external rotation.
- (viii) Multiple fracture of the left arm.
- (ix) Below knee amputation 70% disability
- (x) Above knee amputation 70% disability
- (xi) Abdominal wound
- (xi) Chronic wound on anterior of the leg
- (xiii) Foot ulcers

35. These injuries were not disputed and indeed were proved by the medical report dated 20th February 2017 prepared by DR WOKABI Consultant Surgeon.

36. On the question of quantum of damages, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 2 KLR 55 set out the circumstances under which an appellate court may interfere with an award of damages as follows:

“assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

37. The Court of Appeal further postulated in the case of Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 as follows:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect.... A member of an appellate court when naturally and reasonably says to himself “what figure would I



have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own. The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and is to be avoided for the sake of everyone in the country.”

38. Under the Limb of General damages the trial court made an award of Ksh. 3,300,000.
39. In *Nderi v Matunda* [2025] KEHC 2162 (KLR) the Lower court awarded Ksh. 2,000,000/= in general damages which was upheld on appeal for a Plaintiff who suffered the following injuries:
 - Fracture of the lower 1/3 right femur
 - Fracture of the distal end of the right tibia and fibula.
 - Above the knee amputation of the right leg.
40. In *Crown Bus Services Ltd & 2 others vs. BM* (minor suing through his mother & next friend SMA) [2020] eKLR the High Court upheld an award of Kshs. 2,500,000/= for loss of the right leg above the knee amputation.
41. In *Akhwaba Olubulieva vs. Dickson Shikuku* [2020] eKLR the High Court awarded Kshs. 2,000,000/= for an amputation of the right leg.
42. In *Monyoro Mong'are Shem & another vs. Timothy Nyagaka Nyagaka* [2021] eKLR where there was an amputation of the right leg above the knee, together with multiple soft tissue injuries, an award of Kshs. 3,500,000/= was made.
43. In *Abdi Werdi Abdullahi vs. James Royo Mungatia & another* [2019] eKLR a case involving the amputation of the right lower limb was accompanied by other serious injuries, such as multiple fractures of the right lower and upper limbs, multiple fractures and bruises on the upper right limb leading to affixation of 2 metal plates and multiple soft tissue injuries to various parts of the body, and an award of Kshs. 3,500,000/= was made.
44. From the review of the decisions above, it is quite obvious that an award in the region of Kshs. 2,000,000/= to Kshs. 3,500,000/= would be reasonable and commensurate, taking into account the effect of inflation on the Kenya shilling.
45. An award of damages must be commensurate suffered to ensure consistency in the injuries for consistence in the judicial awards. Similar injuries should attract relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards.”
46. Based on the above principles and similar fact cases, it is my view that the award of Kshs. 3,300,000 for general damages in this case cannot be said to be inordinately high. It was commensurate to the injuries that the Respondent suffered. I therefore uphold this award of Kshs. 3,300,000 for general damages.
47. In *Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003*, Kimaru, J (as he then was) held that:-

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically



pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred..... Thus in personal injury claims, ‘special damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities....Special damage is in the nature of past pecuniary loss or expenses while general damage is futuristic pecuniary loss or expenses.....”

48. Under the limb of Special damages it is trite law that special damages must be specifically pleaded and proved. The Respondent did during the trial award several receipts for treatment at outspan Hospital, PCCA Rehabilitation Centre, Pharmacies and other medical facilities. These totaled to an amount of Kshs. 2,346,347 as awarded by the trial court.
49. Future Medical Expenses constitute Special damages which must be pleaded and proved. The plaintiff did in paragraph 6 of his plaint make a claim for future medical expenses. The two (2) medical reports produced in court concurred that the Respondent would require future medical attention.
50. Dr. Wokabi for the Respondent indicated that an amount of Kshs. 450,000 would be required for future medical expenses whilst Dr. Wambugu for the Appellant proposed a figure of Kshs. 210,000. Both doctors concurred that a prosthesis leg once fitted would have to be replaced periodically at least every 8-10 years. The trial magistrate took this into account and factored in his award the cost for two prosthesis limbs. This in my view was reasonable in the circumstances. I find no valid reason to impugn the exercise of discretion by the trial court in making an award of Kshs. 430,000 under this heading and as such I am not inclined to interfere with said award.

Loss of Earning Capacity

51. The principles to be considered in making an award for loss of earning capacity were clearly set out in the case of *Buttler -vs- Butter* [1984] KLR 225 as follows
 - a. A person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;
 - b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;
 - c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;
 - d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;
 - e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own headings; and
 - f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they



include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”

52. For loss of earning capacity the trial court award a sum of Ksh. 541,392. The court based this on the minimum wage in the year 2015 and adopted a multiplicand of Kshs. 11,279 and a multiplier of four (4) years. The Appellant argued that there was no proof of earning and stated that the trial court ought to have adopted a multiplier of one (1) year.
53. The evidence of the Respondent that he worked as a matatu driver from which he made a living was not rebutted by the Appellant. As such the trial court was quite correct in concluding that the Respondent was an income earner.
54. The Respondent was aged 59 years when he was injured. The Lower court reasoned that he would have worked until the age of 65 years which due to vicissitudes of life the court reduced to 63 years. The Appellants submit that the trial Court ought to have applied a multiplier of only one (1) year. They argue that given that the retirement age in Kenya is sixty (60) years the Respondent had only one (1) more year to work.
55. However the Respondent herein was not a public servant, who would have been subject to the retirement age of sixty (60) years. The Respondents worked in the informal sector as a matatu driver where there is no set retirement age. I find that the multiplier of four (4) applied by the trial court was in the circumstances appropriate.
56. Accordingly I uphold the award of Kshs. 541,392 made under this heading by the trial court.
57. As a general rule, an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low. This is not the case here. In the cases of *Butt v Khan* (1981) KLR 470 and *Kitavi v Coastal Bottlers Ltd* (1985) KLR 470 the court held thus:

“ Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on these areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low.”

58. Finally this appeal fails. The judgement delivered by the lower court on 12th November 2021 is confirmed and upheld. Costs of this appeal will be met by the Appellant.

DATED IN NYERI THIS 9TH DAY OF OCTOBER 2025.

.....

MAUREEN A. ODERO

JUDGE

