



**Onwong'a v Mucugu (Civil Appeal E905 of 2024)
[2025] KEHC 14447 (KLR) (Civ) (14 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E905 OF 2024

FR OLEL, J

OCTOBER 14, 2025

BETWEEN

HAPPINESS MORAA ONWONG'A APPELLANT

AND

SIMON KABIRU MUCUGU RESPONDENT

JUDGMENT

A. Introduction

1. The Appellant was the Plaintiff in the primary suit, where she sued for compensation based on a tort of negligence arising from a Road Traffic Accident which occurred on 30.06.2021. She averred that on the material day, she was a fair paying passenger aboard motor vehicle registration number KCA 671E Isuzu Bus (hereinafter referred to as the suit Motor vehicle), when it was carelessly and negligently driven, without due care, regard and/or attention by its driver, that he allowed the said motor vehicle to loss control and to overturn along Waiyaki Way near Waruku , whereby she sustained serious injuries.
2. At the trial, PW1 testified, reiterating the contents of her pleadings, and adopted her witness statement as her evidence. She also produced into evidence all her claim supporting documents. Under cross-examination, she stated that she sustained back injuries and was treated at Eagle Hospital.
3. The Respondent elected not to call any witness and closed their case. In her judgment, the learned trial magistrate did find that the respondent was 100% liable for the accident, but failed to award the Appellant any general damages as the injuries pleaded was at variance with the injuries stated in court during her evidence in chief and cross-examination
4. The Appellant, being dissatisfied with the decree issued, filed her memorandum of Appeal on 8th August, 2024, raising five (5) grounds of appeal, namely: -



- a. That the learned trial magistrate erred in law and fact in failing to analyze all the relevant evidence availed at the trial and award the Plaintiff/Appellant the relief sought in the plaint.
 - b. That the learned magistrate erred both in law and fact by failing to consider the plaintiffs/Appellants' submissions and legal authorities tendered before the court and thereby arrived at an award that was manifestly low.
 - c. That the learned trial Magistrate erred in law and in fact by failing to find that the plaintiff had proved his case on a balance of probabilities on matters of general damages.
 - d. That the learned trial Magistrate erred in law and in fact by failing to take into consideration the nature of injuries the plaintiff sustained and failed to award general damages at all, and went ahead and awarded special damages partially only at Kshs 550/=.
 - e. That the learned trial Magistrate erred in law and in fact by failing to take into consideration the evidence on record and failed to award the plaintiff/Appellant any amount on general damages.
5. The Appellant thus prayed that the judgment/decree of the trial court be set aside and she be awarded general damages and the costs of this Appeal.

B. Analysis and Determination

6. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123) & *Peters Vs Sunday Post Limited* (1968) EA 123 .
7. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Ouseph* AIR 1969 Kerala 316
8. The central issue for determination is whether the Appellant discharged the burden of proof cast upon her and thus was entitled to an award of damages for the injuries suffered. Section 107(1) of the *Evidence Act* provides that;

“ 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.”

Section 108 of the *Evidence Act* further provides that;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side.”

1. In the case of *Evans Nyakwana Vs Cleophas Rwana Ong'aro* (2015) eKLR it was held that

“ As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80, laws of Kenya.



Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

10. I also refer to *Palace Investments Ltd Vs Geoffrey Kariuki Mwnedwa & Another (2015) Eklr*, where the judges of Appeal referred to “*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 the tribunal can say, we think it is more probable than not, the burden is discharged, but if the probability are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained.”

11. I have carefully considered all the pleadings filed and evidence tendered in court, especially on the issue of injuries sustained by the appellant. The Appellant did submit into evidence the P3 form issued on the date of the accident, which confirmed that she sustained soft tissue injury to the lower limbs and blunt injury to her abdomen, and the medical report by Dr Titus Ndeti Nzina, which basically affirmed the said injuries.
12. In her testimony, the appellant did rely on these medical documents and further testified that she had only injured her back. Based on the discrepancy between the pleaded evidence and oral evidence, the trial court did find that she did not prove her case and proceeded not to award her damages.
13. In a civil case, slight inconsistencies in evidence may not automatically lead to a claim's dismissal if the court finds they do not affect the main substance of the case or suggest deliberate untruthfulness. However, significant contradictions, especially if they are material to the core of the claim or defense, can be used to challenge a case. The court will assess whether the inconsistencies are minor or fundamental and weigh them against the evidence as a whole to determine the credibility and overall strength of the evidence. See Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* where the Court of Appeal stated that:-

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts, while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

14. Having reviewed the evidence adduced, I do find that even though there were discrepancies in the evidence tendered, it did not point to deliberate untruthfulness on the part of the Appellant, as the said back injury could have been a residual injury arising from the said accident.
15. The trial magistrate thus erred in principle, in only placing weight on the appellant's oral evidence, without considering the uncontested medical evidence adduced, and thus arrived at a wrong



determination that the Appellant had not proved her case on a balance of probability. That finding justifies an interference by the appellate court.

16. In assessing damages, the injured person is only entitled to what is in the circumstances, is a fair compensation for both the plaintiff and the defendant. The Appellant suffered soft tissue injuries to her legs and blunt injuries to the abdominal wall. Considering similar injury awards, and inflationary trends am inclined to award her a sum of Kshs 120,000/=. See *Oyaro V Morris* (Civil Appeal E054 of 2024), (2025)KEHC 5361 (KLR) & *Eastern Produce Ltd vs Mamboleo Khamadi* 2015 eKLR.

C. Disposition

17. The award on general damages by the trial court is thus set aside and substituted with an award of Ksh 120,000/=.
18. Each party will bear its own costs of this Appeal, but the Appellant will have the costs of the primary suit plus interest thereon.
19. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 14TH DAY OF OCTOBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 14th day of October, 2025.

In the presence of: -

N/AAppellant

N/A Respondent

Mr. JarsoCourt Assistant

