



REPUBLIC OF KENYA



Openda v Excel Group of Schools Limited & another (Civil Case E374 of 2023) [2025] KEMC 217 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEMC 217 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE E374 OF 2023
PA NDEGE, SPM
SEPTEMBER 18, 2025**

BETWEEN

ZACHARY KENYANYA OPENDA PLAINTIFF

AND

EXCEL GROUP OF SCHOOLS LIMITED 1ST DEFENDANT

GEORGE NJUGUNA MUREITHI 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case, Zachary Kenyanya Openda, is praying for judgment against the Defendants, Excel Group of Schools Limited, and George Njuguna Mureithi, for special and general damages emanating from a road traffic accident that occurred on or about 14.04.2023, as a consequence of which he sustained serious injuries and suffered loss and damage. He brought this suit vide a Plaint dated 29.06.2023 and filed on 10.07.2023.
2. It is the plaintiff's case that the accident was solely caused by the defendants, when the 2nd defendant so recklessly and negligently drove, managed and/or controlled motor vehicle registration KBJ 670E that caused it to veer off the road and to knock him down while he was lawfully walking as a pedestrian along Oginga Odinga Road near Free Area Chief's camp.
3. The plaintiff particularized his claim of negligence on the part of the 2nd defendant at Paragraph 6 of his plaint as follows: -
 - a. Driving motor vehicle registration KBJ 670E in an excessive speed in the circumstances
 - b. Failing to stop, swerve, slow down and/or control motor vehicle reg KBJ 670E in any way or manner in order to avert the accident.
 - c. Driving a defective motor vehicle.



- d. Overtaking on the pavement of the road.
 - e. Driving on without due care of other road users more so to the plaintiff
 - f. Driving under the influence of alcohol and/or drugs
 - g. Failing the Highway Code
 - h. Causing the accident.
4. The 1st Defendant has been sued in its capacity as registered owner of the motor vehicle herein, while the 2nd Defendant as its authorized driver, employee and/or servant. They entered appearance and filed their defence, respectively vide a Memorandum of Appearance dated 15.08.2023 and filed on the same date; and a Statement of Defense dated and filed on similar dates, filed by the firm of Messrs. Mukite Musangi & Co. Advocates, wherein they mainly disavowed the alleged negligence attributed on them and/or their agent while in control of the motor vehicle. Furthermore, the defendants attributed the accident to the negligence of the plaintiff; and particularized the same in Paragraph 6 of his Statement of Defense, as follows:
- a. Failing to have due regard for his own safety
 - b. Failing to heed warning signs from the motor vehicle registration number KBJ 670E
 - c. Failing to have due regard to other road users especially the driver of motor vehicle registration number KBJ 670E
 - d. Failing to take any necessary action to avoid the alleged accident
 - e. Carelessly crossing the road without proper lookout for oncoming traffic.
 - f. Engaging in frolics of his own while on the wrong side of the road.
 - g. Walking and/or jogging in a risky and/or zigzag manner.
 - h. Failing to walk on the designated footpath meant for pedestrian and instead encroaching on the rightful path of motor vehicle registration number KBJ 670E.
 - i. Walking on the road while making a cell phone call.
 - j. Carelessly failing to stop and/or otherwise prevent the occurrence of the alleged accident.
 - k. Being on the road and in the way of the motor vehicle registration number KBJ 670E.
 - l. Distracting the driver of motor vehicle registration number KBJ 670E.
 - m. Being generally negligent or careless.
 - n. Disregarding the provisions of the Highway Code and the [Traffic Act](#).
5. The plaintiff and the 2nd defendant were the only witnesses herein. Parties then filed and, I believe, exchanged their written submissions. At the close of the hearing and submissions, the accident and injuries have not been majorly challenged. The remaining issues for determination are mainly as captured by the learned counsel's written submissions, as follows: -
- a. Who is to blame for the accident?
 - b. Whether the plaintiff is entitled to the reliefs sought?



Basically, it is a Determination on Liability and Quantum.

6. On liability, the plaintiff testified and adopted his statement that was filed in court on 10.07.2023 that on the material day at around 5.00pm, he was lawfully walking along Oginga Odinga road within Nakuru County near Free Area, when the 2nd Defendant herein, who was driving the motor vehicle herein recklessly and negligently caused the accident herein by veering off the road and knocking him down hence causing the accident herein. That fortunately, a good Samaritan rescued him and rushed him to Nairobi Women's Hospital where he was treated and then discharged. That he sustained the injuries as pleaded. That he then went and made a report at Free Area Police Patrol Base and was issued with a P3 form and a police abstract. He blames the 2nd defendant for solely causing the accident. He produced the documents which he filed herein as Pexh. Nos 2 to 8. In cross-examination, he confirmed that at the time of the accident, he had stopped while speaking to a *boda boda*. That he saw the vehicle headed towards him, but that he cannot remember what happened next.
7. According to the 2nd Defendant, he was dropping school pupils home and that he had just dropped one pupil at Free Area along Oginga Odinga road while on his rightful lane, when someone suddenly claimed that he was hit by the left side bars of the school bus that he was driving. That he alighted and tried to inquire from the person, but that the person sped off on a motor cycle and that he has never met him again. He therefore denied that no accident whatsoever occurred on the material day as alleged. He produced the defendants' documents filed herein as Dexh. Nos 2 to 4.
8. In a bid to determine and or apportion liability herein, I have gone through the impressive submissions by the two learned counsel for the respective parties herein. I do agree that in an action for negligence, the burden of proof falls on the plaintiff alleging to establish each element of the tort, hence it is for the plaintiff herein to adduce evidence of facts on which he bases his claim. It must be established that there was a duty of care which was breached resulting to loss and damage to the plaintiff. The plaintiff herein therefore has a duty to prove his case on a balance of probabilities that the defendant was so negligent so as to occasion the accident that led to the plaintiff's injuries. However, once the legal burden of proof is discharged by the plaintiff, the evidential burden might shift to the defendant to prove his claim of plaintiff's sole or contributory negligence as pleaded.
9. Learned counsel for the defendant has referred me to the provisions of sections 107 and 108 of the [Evidence Act](#) which are as follows:
 107.
 - (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.
 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
10. In the case of [Muruingu Kanoru Jeremiah vrs Stephen Ungu M'mwarabua](#) [2015] eKLR the superior court held as follows with regard to the burden of proof:

....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove



that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.

11. I also refer to the *Halsbury's Laws of England*, 4th Edition, volume 17, at paras 13 and 14: which describes it thus:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to act; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?

12. In this case, both the plaintiff and the defendant were using the road herein, and more specifically at the time of the accident herein. Both therefore owed a duty of care to each other. The plaintiff was speaking to *boda boda* cyclist at the time when he claims the defendants' motor vehicle veered off road and hit him; while according to the defendant, the vehicle did not veer off road as claimed and that the 2nd defendant was on his rightful lane when someone, possibly the plaintiff herein, claimed that he had been hit. It is thus the plaintiff's word against the defendant's as there were no sketch maps or plans properly presented herein to show the exact point of impact, etc. I, however, from the evidence of the plaintiff and the contradiction therein, as to whether he was walking or speaking to a *boda boda* at the time of the accident, and the sketch maps presented by the defendant as Dexh No. 4, do find that the point of impact of the accident alleged herein is not clear.
15. I have however already found both parties herein to have held a duty of care against each other. The plaintiff however went further to confirm that he saw the defendants' vehicle approach him and he therefore had a duty to take mitigatory measure by attempting to avoid the accident. Regardless of where the accident would have happened, the plaintiff certainly failed to have regard for his own safety and, thus, I do find both parties herein to blame for the accident herein. Both had no proper lookout or any regard for each other; and the plaintiff, for his own safety.
16. From the evidence it is clear that each party was to some extent to blame. As aforesaid, the burden of proof is always on the plaintiff, but such proof may shift to the defendant when circumstances demand, like in this case where both parties blame each other. Each has a duty to prove its case against the other on a balance of probability.
17. In the Court of Appeal decision in Civil Appeal No. 739 of 2003 *Caroline Anne Njoki Mwangi vrs Paul Ndungu Mwangi*, faced with similar circumstances, the Honorable Judges rendered that: 'I



would in the absence of an official police sketch map and on knowing who exactly is to blame on this matter and on a balance of probability hold that the parties are indeed equally to blame at the ratio 50% each’.

18. Having found that it is not reasonably possible for this court to decide upon the evidence tendered herein as to who was to blame for the accident, in the premises, it would be prudent and in line with judicial precedent, to come to the findings and conclusion that where there is no concrete evidence to determine who in a motor vehicle accident is to blame between two parties both should be held equally to blame. See Civil Appeal No. 521 of 2007 in *Commercial Transporters Ltd vrs Registered Trustees of the Catholic Archdiocese Of Mombasa* (2015) eKLR.
19. Accordingly, I conclude that both parties shall be held equally to blame at 50% basis. Having so decided, it therefore follows that the consequential damages arising from the accident, and the plaintiffs damages from the injuries, but subject to the proof herein, shall likewise be apportioned in the manner stated above, on a 50:50 basis.
20. On quantum, both parties herein agree that the plaintiff was injured in the manner as pleaded. The medical evidence adduced by both sides herein prove so. There is however no one best formula of assessing damages in injures claims. Such assessment is an act of art rather than science. In HCCC No. 752/1993 *Mutinda Matheka vs Gulam Yusuf* that was cited by Warsame, Ag. J (as he then was) in *Jenipher Milay O. Okuku vrs Kenya Bus Services Ltd* (Kisumu HC Misc. Civil Appl. 172/2001), it was held that the court will essentially take into account the nature of the injuries suffered, the period of recuperation etc.
23. I am also aware of the other guiding principles in awarding general damages such as: - damages should be within the limits set out by decided cases, within my pecuniary jurisdiction, within the limits that the Kenyan economy can afford and must be commensurate to the kind of injury, and extent of pain and suffering. Justice Ngugi in *Ndungu Dennis vrs Ann Wangari Ndirangu*, [2018] eKLR, stated that the policy goal of Courts is to try to compensate comparable injuries as far as possible by comparable awards.
24. I find the authority of *Ephraim Wagura Muthui & 2 Others vrs Toyota Kenya Limited & 2 Others* (2019) eKLR, cited by the learned counsel for the Defendant, to be the more relevant herein. The injuries sustained by the victim therein are almost similar or comparable to the ones sustained by the plaintiff herein. I therefore rely on the same, and factoring inflation, to find Kshs. 200,000/= to be sufficient compensation for the pain and suffering that the plaintiff underwent.
25. As to special damages, it is trite, and as correctly submitted by the learned counsel for the defence, that the plaintiff is only entitled to special damages pleaded and proved by way of evidence (usually receipts). The plaintiff pleaded the following special damages:
 - a. Medical Report receipt: Kshs. 10,000/=
 - b. Police abstract: Kshs. 200/=
 - c. Medical expenses: Kshs. 2,300/=
 - d. Official search: Kshs. 550/=Total: Kshs. 13,050/=
24. I have gone through the exhibits produced by the plaintiff herein. I do find that only Kshs. 550/- cost of official search, Kshs. 10,000/- costs for the medical report and Kshs. 2,300/= medical expenses, have been proved vide Pexh Nos. 4A, 5A and 8, respectively. I do therefore assess the special damages to



that extent only, i.e. Kshs 12,850/=. The issue of stamp duty is an unnecessary distraction herein as the Pexh. No. 5A, has been duly stamped. Furthermore, the authority cited by the learned counsel for the defendants, *Wycliffe Lubanga Kefa vrs Debnnis Ochola & another* [2020] eKLR, clarified that it is not the duty of the buyer, such as the plaintiff herein, but the issuer of the receipts to affix the stamp. Thus, the plaintiff may not be faulted for relying on an unstamped receipt.

Conclusion and Disposal Orders

25. Judgment is therefore hereby entered against the defendant herein, and in favour of the plaintiff herein for Kshs. 212,850/00- being general and special damages, less 50% contribution as per the finding on liability entered into herein, thereby giving a net of Kshs. 106,425.00 The plaintiff to also get the costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 18TH DAY OF SEPTEMBER, 2025

ALOYCE PETER NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Keboga

Defence counsel: Obiero

Plaintiff: N/A

2nd Defendant: N/A

Obiero: Praying for 30 days stay of execution as well as a copy of the JD.

Keboga: No objection

CT: 30 days stay granted. Counsel for the defence be supplied with a certified copy of the Judgment upon payment of the requisite fee.

