



**Moenga v Atebe (Civil Appeal E038 of 2024)
[2025] KEHC 15926 (KLR) (5 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E038 OF 2024
JK NG'ARNG'AR, J
NOVEMBER 5, 2025**

BETWEEN

SAMSON OMBOGO MOENGA APPELLANT

AND

GEOFFREY ONYANGO ATEBE RESPONDENT

*((Being an appeal on from the judgment and decree of Hon. D.O.
Mac'andere (SRM) Dated 19/2/2024 in Kisii CMCC NO. E132 OF 2022))*

JUDGMENT

1. Vide plaint dated 23/2/2022, the respondent filed the suit before the lower court on grounds that on 29/1/2022, he was a lawful passenger onboard motor vehicle registration number KBV 980Y along Kisii-Nyatieko Road at Igege area when motor vehicle registration number KAW 529 (herein the subject motor vehicle) was recklessly driven by the appellant or his authorized agent and it lost control, veered off its lane and knocked motor vehicle KBV 980Y causing an accident and he sustained injuries.
2. The appellant filed a statement of defence dated 7/4/2022 denying liability and blamed the respondent for the accident and sought orders that the suit be dismissed with costs. He averred that the accident was a result of negligence on the plaintiff's part and on the driver of motor vehicle KBV 980Y.
3. The matter proceeded for hearing and both parties called their witnesses. Vide judgment delivered on 19/2/2024, the trial court entered liability at 50% as against the appellant and awarded the respondent Kshs. 7,050/= and Kshs. 200,000/= for quantum.
4. The appellant was dissatisfied with that judgment and filed the memorandum of appeal dated 12/3/2024.



The Appeal

5. The appellants filed the memorandum of appeal on record on the issue of both liability and quantum on grounds that the lower court considered irrelevant matters on those issues having failed to base the decision on the facts and record before it.
6. The appeal proceeded by way of submissions.

Analysis and Determination

7. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424.
8. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR where the court held that: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

Whether the issue of liability was properly determined

9. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as: -

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

10. The scope and extent of the fundamental legal principles on who is to blame for negligence are settled. In the cases of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR the Court held that: -

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff’s favour unless the defendant provides same answer adequate to displace that inference.”

11. From the record, it is undisputed that on 29/1/2022 an accident occurred between the appellant’s subject vehicle and the respondent who was a passenger on motor vehicle registration KAW 529W. The respondent testified that the subject vehicle was ahead of them and was trying to join another road when the accident occurred. PW2, the police officer testified that the subject vehicle was ahead and closely followed by motor vehicle KBV 980Y and when it reached at Igege bridge, it turned on the right without indicating forcing motor vehicle KAW 529W to swerve to the right to avoid hitting the subject vehicle.



12. The appellant called the driver of the subject vehicle, one Brian Moenfa Ombogo who testified that he was driving the said vehicle on the left lane and when at Igege area, he slowed down and indicated to join a feeder road on the right side when all of a sudden the lorry KAW 529W attempted to overtake his vehicle at a high speed and he immediately applied emergency breaks and swerved left but the lorry was too close and it knocked the subject vehicle, lost control and hit a KPLC post and eventually ended up at Igege river. DW2's testimony, an eye witness, bore no weight due to inconsistencies in his testimony.
13. I have considered the entire record. The respondent testified that the subject vehicle suddenly attempted to turn right and join another road and despite all attempts by the driver of the lorry KAW 529W, the lorry hit the subject vehicle. That narration was collaborated by PW2 and though she did not witness the accident, she testified on the basis of investigations conducted by police officers. It would indeed be farfetched to expect a police officer to witness an accident in order to be in a position to testify on the circumstances of the accident. I do also note that the appellant was blamed for the accident.
14. The appellant's witness, DW1 did confirm that he did indeed attempted to turn right and join another road when at the bridge. That testimony collaborated the respondent's allegations as to the circumstances of the accident. Though the appellant blamed the driver of the lorry KAW 529W, he did not take out any third-party proceedings as against that driver to effectively transfer liability to him despite alleging that the said driver was driving too close to the subject vehicle and despite indicating, he attempted to overtake the subject vehicle negligently at a high speed.
15. I do note that the respondent was not in control of the lorry KAW 529W at the time of the accident as he was only a passenger. I do not see how he negligently contributed to the accident. I do find that the lower court finding on liability was indeed erroneous and the respondent cannot carry liability on behalf of the driver and owner of KAW 529W.
16. In the circumstances, I hereby set aside the finding on liability and I do enter liability at 100% in favor of the respondent as against the appellant.
17. In *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR the court in setting out the legal burden of proof in civil cases stated: -

“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 purport 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 desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge 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.”
18. Further in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 Kimaru J (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.”



Whether the award of Kshs. 200,000/= for general damages was inordinately high or low.

19. The issue for consideration is whether the trial court erred in awarding Kshs. 200,000/= for general damages. This Court is called to access whether the award was inordinately high or low. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR where the Court of Appeal held: -

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

20. I take note of the P3 form issued on 29/1/2022, treatment notes from Hecom Healthcare and the medical report dated 4/2/2022 which listed the injuries as; lower abdominal tenderness and left shoulder joint tenderness.

21. In assessing whether the award was inordinately high or low, I rely on the following cases: -

HB (minor suing through mother & next friend DKM) V Jasper Nchonga Magari & another [2021] eKLR where Nyakundi J upheld the lower court award of Kshs. 60,000/= for blunt injury to the head, neck, thorax, abdomen and limbs.

Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 others [2019] eKLR where Majanja J set aside the lower court award of Kshs. 55,000/= for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000/=.

Nyambati Nyaswabu Erick Vs Toyota Kenya Limited & 2 others [2019] eKLR where Majanja J set aside an award of Kshs. 55,000/= for a deep cut on the scalp extending to the maxillary area, blunt injury to the left side of the chest, contusion on the back and contusion on both legs and substituted it with one of Kshs. 90,000/=.

In the case of Godwin Ireri v Franklin Gitonga [2018] eKLR the plaintiff had sustained the following injuries: Contusion on the neck, left midleg and chest, blunt trauma to both shoulders and lower back, bruises on the right knee, left arm and hand and subluxation of left ankle. The plaintiff was awarded Kshs 90,000/=.

Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR where an award of Kshs. 230,000/= was reduced to Kshs. 180,000/= on appeal for multiple bruises on many parts of the body, multiple cut wounds on the right lower limb, cut wounds on the left iliac region, cut wounds on the frontal region, cut wounds on the temporal region and blunt trauma to the abdomen. I however note that the plaintiff therein sustained much more injuries than the case before me.

22. I have considered the evidence on record, the authorities mentioned in the submissions as well as the foregoing in my determination for quantum. I also take into consideration the time-lapse and changing economic circumstances. I therefore enter judgment in favour of the claimant as against the respondents jointly and severally on the following terms:

23. I have also considered the authorities quoted before this Court.



24. From the above and taking into consideration the lapse in time and changing economic circumstances between when the authorities were delivered and now, and further taking into consideration that no amount can reconstitute the claimant to exactly how he was before the accident occurred or even take away his pain and suffering, I find that an award of Kshs. 200,000/= was not inordinately high and was commensurate with the injuries sustained. That award is upheld.
25. In the end, I do set aside the finding on liability at 50:50 and enter liability at 100% in favor of the respondent as against the appellant. The award on special damages and quantum is upheld.
26. The upshot is that the appeal is found to be unmerited and the same is dismissed.
27. Each party to bear its own costs.

JUDGEMENT DELIVERED VIRTUALLY, DATED AND SIGNED THIS 5TH DAY OF NOVEMBER, 2025.

In the presence of Siele Court Assistant and in the absence of the parties having been duly notified.

.....

J.K.NG'ARNG'AR

JUDGE

