



REPUBLIC OF KENYA



KENYA LAW
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**Njenga & another v Gitau & another (Civil Appeal E046 & E052 of 2023
(Consolidated)) [2025] KEHC 16247 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E046 & E052 OF 2023 (CONSOLIDATED)**

TW OUYA, J

NOVEMBER 6, 2025

BETWEEN

PETER KAMAU NJENGA 1ST APPELLANT

PETER KAMAU NJENGA 2ND APPELLANT

AND

MARY NYAMBURA GITAU 1ST RESPONDENT

JOSPHAT MAINA GITAU 2ND RESPONDENT

*(An appeal from the judgment of the Senior Resident Magistrate
Court at Kenol, Before Honourable S.K. Nyaga (SRM) delivered
on the 10th day of July, 2023 in MCCC No. E034 of 2023)*

JUDGMENT

1. The Appellant has moved this court vide a Memorandum of appeal dated 17th July 2023 on grounds that:
 - i. The trial magistrate erred in law and in fact in failing to consider and find that the Appellant had established a prima facie case with a probability of success.
 - ii. The learned magistrate erred in law and fact in failing to consider and find that the Appellant was not blamed for causing the accident by apportioning 100% liability against the appellant.
 - iii. The learned magistrate erred in law and fact in failing to consider and find that there was no concrete evidence placed before court to determine who was to blame for the accident between the Appellant and the Respondent.



- iv. The learned magistrate erred in law and fact in failing to consider and find that the contents of police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made and not that an accident had occurred.
 - v. The learned magistrate erred in law and fact in failing to consider and find that a police abstract is not conclusive proof of liability.
 - vi. The learned magistrate erred in law and fact in failing to consider and find that where there is no concrete evidence to determine how the accident occurred and who is to blame for causing the accident, both parties should be held equally liable.
 - vii. The learned magistrate erred in law and fact by failing to find that there can be no liability without fault.
 - viii. The learned magistrate erred in law and fact in failing to consider and find that the Respondent allegedly sustained blunt soft tissue injuries to the head, neck, chest, back and left leg, fracture of the left 4th and 5th metacarpal bones and fracture of the left ulna styloid process.
 - ix. The learned magistrate erred in law and fact in failing to consider and find that in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike.
 - x. The learned magistrate erred in law and fact in failing to consider and find that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered and not to moulte the tortfeasor for the injury he had caused.
2. Therefore, the Appellant prayed that the appeal be allowed and the judgment of the trial court be set aside.
 3. The appeal emanated from a road accident claim instituted vide a Complaint dated 26th September 2022 where the 1st Respondent averred that on the 20th May 2022, the Appellant was a passenger in motorcycle registration number KMFS 056Q towards Marura direction along Makuyu- Kamahuha road when at Tatu City area the Appellant so negligently drove, managed and controlled motor vehicle registration number KBZ 915M driven from Makuyu towards Marura direction that he caused the said motor vehicle to collide into the motorcycle registration KMFS 056Q and the 1st Respondent from the rear as a result the Respondent sustained injuries.
 4. The injuries sustained by the 1st Respondent following the accident were:
 - i. Blunt soft tissue injuries of the head and neck
 - ii. Blunt soft tissue injury to the chest and back
 - iii. Blunt soft tissue injury on the left leg
 - iv. Fracture of the left 4th and 5th metacarpal bones
 - v. Fracture of the left ulna styloid process
 5. The injuries sustained by the 1st Respondent were assessed as grievous harm. The consultant surgeon Mr. Wokabi formed an opinion that the injuries sustained by the 1st Respondent would heal within a period of 6 to 8 months.



6. The driver of Motor vehicle registration KBZ 915M was held liable for the accident as per the police abstract dated 20th May 2022.
7. The 1st Respondent therefore prayed for general damages and special damages of Kshs. 2,550.00 being cost of the medical report and copy of the records.
8. The Appellant denied the claim vide his statement of defence dated 23rd November 2022 and pleaded contributory negligence in that the 1st Respondent failed to wear any protective gear whilst travelling aboard motor cycle registration number KMFS 056Q thus failing to have any due regard for her own road safety.
9. The appellant further averred that the rider of motor cycle registration number KMES 056Q contributed to the accident by carelessly riding in a zigzag manner without due regard for the safety of other road users.
10. The Appellant produced a medical report by Dr. Waithaka that suggested that the 1st Respondent had sustained degree of residual permanent disability of 2 % following the accident. She had sustained a left distal ulna fracture, multiple bruises and was unable to lift heavy objects with left upper limb.
11. The matter proceeded to trial where PW1 testified by adopting her bundle of documents in evidence. She maintained that she had worn a helmet and a reflector jacket during the accident and that the subject motor vehicle hit the motor cycle from the rear. She affirmed that there was nothing that the rider of the motor cycle would have done to avert the accident.
12. PW2, a police officer attached to Makuyu Traffic base testified that the subject accident occurred on 20th May 2022 involving motor vehicle registration number KBZ 915M and Motor cycle registration number KMFS 056Q. Both the motor cycle and the motor vehicle were travelling to the same direction at the time of the accident. He produced the Police abstract, as Pexh-4. He clarified that he was not the investigating officer. Nevertheless, the driver of KBZ 915 M was liable for the accident.
13. The trial court found the Appellant 100% liable for the accident for failing to keep a careful watch of other road users.
14. The 2nd Respondent was awarded Ksh. 300,000.00 as general damages for pain and suffering; Ksh. 75,000.00 for future medical expenses and Special damages at Ksh. 2,550.00
15. The 2nd Respondent had suffered residual permanent disability at 9.5 % and soft tissue injuries: head injury to the bridge of the nose, loosening 3 lower incisor, blunt soft tissue injury of the left arm and blunt soft tissue injury on the left leg.
16. On quantum, the trial court relied on the case of *Ossman Dhahir Mohammed and Another vs Sauro Bundit Muhumed* [1997] KECA 422 (KLR) and awarded damages of Ksh. 350,000.00 to the 1st Respondent based on the injuries that she had sustained.
17. Special damages were also awarded at Ksh. 2,550.00 being the total amount pleaded and proved.
18. Aggrieved and dissatisfied with the decision of the court, the appellant lodged the instant appeal.
19. By order of the court the appeal was canvassed through written submissions.
20. The Appellants submitted that the 1st Appellant had failed to prove that he was liable for the accident. Citing the case of *ZAO & CAO (Suing as the legal representatives in the estate of SAO (deceased) v Amollo Stephen* [2019] e KLR, the appellant urged that a police abstract is not proof of liability, it is



merely proof that an accident that occurred has been reported. Accordingly, the Appellant urged that liability be apportioned at 50:50 as there was no clarity as to who was responsible for the accident.

21. Regarding the issue of quantum, the Appellant submitted that the award of Ksh. 350,000.00 was exorbitantly high in comparison to the injuries sustained by the 1st Respondent. An award of Ksh, 250,000.00 would have been more appropriate. Reliance was placed on the case of Songole Elam v Pual Kivisi Lunalo [2020] eKLR where the learned judge set aside an award of Ksh. 300,000.00 and substituted it with an award of Ksh. 250,000.00 where the appellant and sustained a fracture of the 4th and 5th metacarpals, bruises on the chest, blunt trauma to the knee, bruises on the right knee, blunt chest trauma and bruises on the right and left leg.
22. The Respondent on the other hand submitted that the 1st Respondent had proved the issue of liability to the required standard therefore, there was no reason to disturb the said finding.
23. Regarding the issue of quantum, the 1st Respondent submitted that the court should not disturb the finding of the trial court on quantum as the same is based on the discretion of the court. She relied on the case of Shah v Mbogo & another to urge the position that the appellate court should not interfere with the exercise of discretion by the court unless it is manifested that the trial court was clearly wrong in the exercise of its discretion and as a result there has been injustice.
24. The Respondent therefore submitted that the finding of the trial court be upheld and the appeal be dismissed with costs.
25. When the matter came for directions, the honourable court directed that the two files be consolidated with E046 of 2023 being the parent file. Following the consolidation, the Respondent in E046 of 2023 was taken as the 1st Respondent while the Respondent in E052 of 2023 was the 2nd Respondent.
26. 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.
27. 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.

28. 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



29. 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.

30. 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.”

31. Liability is an issue of evidence. In this cause the Respondents testified that they were aboard motor cycle registration number KMFS 056Q riding towards Marura direction when the Appellant’s motor vehicle was so negligently driven that it hit them from the rear. The police officer also produced a police abstract that showed that the driver of motor vehicle KBZ 915M was to blame for the accident.

32. Though the Appellant alleged contributory negligence, he has not demonstrated how the Respondents contributed to the accident. The Respondents claim that she had worn a helmet and a reflector jacket has not been challenged or controverted. Also, the Appellant has failed to demonstrate any other step that the Respondent ought to have taken to avert the accident that he did not take. From the circumstantial evidence tendered and taking note that the Appellant 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.

33. Overall, it is my finding that the trial court did not fall into any kind error with regard to the matter of liability. I shall accordingly not disturb its findings on that score.

34. 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.”

35. 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...”

36. 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).

37. 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).
38. The 1st Respondent in this case suffered Blunt soft tissue injuries of the head and neck, Blunt soft tissue injury to the chest and back, Blunt soft tissue injury on the left leg, Fracture of the left 4th and 5th metacarpal bones and Fracture of the left ulna styloid process. The 2nd Respondent on the other hand suffered residual permanent disability at 9.5 % and soft tissue injuries: head injury to the bridge of the nose, loosening 3 lower incisor, blunt soft tissue injury of the left arm and blunt soft tissue injury on the left leg.
39. I have considered the authorities cited by the Appellant and note that in most of them, the injuries did not include fracture of the ulna.
40. I have also considered the authority relied on by the trial court and, it would be clear that the Plaintiff in the said case sustained far more serious injuries than those sustained by the Respondents herein.
41. I do find that the 2015 *Gogni Rajope Construction Company Limited v Francis Ojuok Olewe* [2015] KEHC 8459 (KLR) to be most relevant to the injuries sustained by the 1st Respondent. The Plaintiff had sustained a fracture of the left distal ulna and radius, a fracture and dislocation of the left elbow joint, left arm, left wrist joint, injuries to the left knee, injuries to the left side of the chest, neck injuries, head and back injuries. The trial court's award of Ksh. 800,000.00 was substituted with an award of Ksh. 300,000.00 by the High Court.
42. Similarly, regarding the injuries sustained by the 2nd Respondent, I have considered the case of *Jelle v Kitsao* (Civil Appeal E152 of 2023) [2025] KEHC 3577 (KLR) (14 March 2025) (Judgment) where the High Court confirmed an award of Kshs. 250,0000.00 as damages for pain and suffering for a Plaintiff who had sustained bruises and abrasions to the nose, scalp, left knee and right leg and also lost 2 upper teeth, as the as the injuries therein are comparable to those herein. The Plaintiff had sustained. Nevertheless, I note that the Plaintiff, unlike the 2nd Respondent, did not have any permanent incapacity.
43. Taking into account the element of inflation, the nature of the injuries and guided by the principles for award of damages set out in *Power Lighting Comp. Ltd & another v Zakayo Saitoti Naingola & another* [2008] eKLR, I do find the award of Kshs. 350,000.00 as general damages to the 1st Respondent and Ksh. 300,000.00 as damages to the 2nd Respondent be reasonable compensation.
44. Consequently, I find no merit in the instant appeal. The Appeals no. E046 of 2023 and E052 of 2023 be dismissed with costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 6TH DAY OF NOVEMBER , 2025.

HON. T. W. Ouya

JUDGE

