



Urandu v Kenya National Highways Authority & another (Civil Appeal E114 of 2024) [2025] KEHC 16209 (KLR) (6 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E114 OF 2024**

AC BETT, J

NOVEMBER 6, 2025

BETWEEN

MAUREEN MUTORO URANDU APPELLANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

JIMROSE BUILDING CONTRACTORS LTD 2ND RESPONDENT

(Being an appeal against the judgment and decree of Hon. M.A. Onyango in Mumias SPMCC No. 62 of 2022 delivered on 30th May 2024)

JUDGMENT

Background of the Appeal

1. In a plaint amended on 18th May 2023, the appellant sued the respondents seeking general damages, special damages amounting to Kshs. 11,700 -, costs of the suit, and interest.
2. The appellant's case was that on the night of 24th October 2021, she was a bonafide passenger travelling in motor vehicle registration number KCK 615Y, a Nissan AD, which was being lawfully and carefully driven along the Mumias-Bungoma Road towards Bungoma. Upon reaching the Soweto area, the motor vehicle suddenly encountered a heap of murrum dumped across the entire left lane of the road, without any signage or warning of its presence. Consequently, it rammed into the heap of murrum, causing the vehicle to lose control and roll several times. As a result, the appellant sustained injuries.
3. The 1st respondent, in an amended statement of defence dated 16th May 2023, averred that pursuant to section 3 of the *akn ke act 2007 2 Kenya Roads Act* No. 2 of 2007, which mandates it to manage, develop, rehabilitate, and maintain national roads under section 4(1) of the Act, it had awarded the 2nd respondent a performance-based contract for the maintenance of the Mayoni-Bungoma road. The 1st respondent stated that the contract required all accidents to be recorded in an accident and incident



form, and that no such record existed for an accident on 24th October 2021. It further averred that the 2nd respondent was responsible for ensuring the safety of all road users during the contract period, which covered the date of the alleged accident. The 1st respondent denied the allegation that it had contracted an incompetent contractor (the 2nd respondent) and appeared to attribute blame, if any, to the 2nd respondent.

4. The 2nd respondent, in a statement of defence dated 4th August 2023, denied the averments in the plaint and the allegations of negligence on its part. It asserted that all materials used during the contract period were properly stored away from the road and that adequate signage was placed during the road repair works.
5. In a judgment delivered on 30th May 2024, the trial court found that the appellant had failed to discharge her burden of proof on a balance of probabilities to establish that the respondents were liable for the accident. The court accordingly dismissed the suit with costs to the respondents.
6. Aggrieved by the said decision, the appellant preferred the present appeal through a memorandum of appeal dated 12th June 2024 and filed on 18th June 2024 seeking for orders that the finding of the trial court be set aside and that the appeal be allowed with costs. The appeal is anchored on the following grounds
 - a. The learned trial magistrate erred in law and in fact in dismissing the appellant's case in the face of overwhelming evidence tendered by the appellant and her witnesses.
 - b. The learned trial magistrate erred in holding that the appellant had not proved its case, which finding was against the material and evidence on record, which proved the appellant's case on a balance of probability as required in civil cases.
 - c. The learned trial magistrate erred in law and in fact by failing to find that while in the course of maintenance of the Mumias- Bungoma road, the respondents had not put up road signage warning road users on the ongoing works and that the respondents and in particular the 2nd respondent's workers and agents had left a heap of murrum on the road which exposed road users to foreseeable risk which indeed occurred.
 - d. The learned trial magistrate erred in law and in fact in holding that the failure by the investigating officer to take and avail photographs of the scene and a sketch map was fatal to the appellant's case, which was not the case, and she further erred by raising the standard of proof beyond that set by the law, which led her into error.
 - e. The learned trial magistrate failed to take note and or take into account the cogent evidence of the investigating officer who went to the scene of the accident immediately after the accident and personally witnessed the presence of the heap of murrum on the road and also noted the absence of road signage by the respondents, which corroborated the appellant's evidence.
 - f. The learned trial magistrate erred in law and or fact by failing to note that the respondent's defenses were a sham and a mere denial, and they failed to tender any evidence of the existence of road signage and the location of the sites where the allegedly stored the materials and she erred by disbelieving the appellant's evidence and believing that the respondents without any proper basis and contrary to the material on record.
 - g. The learned trial magistrate's findings were arrived at in a cursory manner and were erroneous, unmerited and indefensible and have occasioned a miscarriage of justice.
7. Parties have canvassed the appeal by way of written submissions which may be summarized as below;



Appellant's Submissions

8. In her submissions, the appellant reiterates the averments in her pleadings and maintains that her account of the events, as presented both in the pleadings and during trial, was corroborated by the investigating officer (PW3). PW3 testified that, upon receiving instructions from the Base Commander, Mumias Traffic Base, he visited the scene and observed a heap of murrum on the road, which the appellant's vehicle had rammed into.
9. The appellant contends that the failure by PW3 to produce photographic evidence in support of her testimony should not be used to discredit her claim. She further challenges the 2nd respondent's assertion that the road had been cleared of all materials and that adequate signage or warning signs had been erected, arguing that no photographs were produced to substantiate her claim. She also notes that the 2nd respondent failed to adduce evidence showing that it had leased portions of land for storing construction materials, as alleged.
10. The appellant submits that her evidence was corroborated by that of her husband and the investigating officer, both of whom confirmed the presence of murrum on the road. She attributes the cause of the accident to the 2nd respondent's negligence and holds the 1st respondent vicariously liable.
11. The appellant relies on the decision in *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR for the principle that the burden of proof lies upon the party who invokes the aid of the law, and on *Miller v Minister of Pensions* [1947] 2 All ER 372 for the proposition that the standard of proof in civil cases is on a balance of probabilities. He asserts that he successfully discharged this burden to the required standard.
12. Regarding the injuries sustained, namely blunt injuries to the neck and bruises to the right shoulder, the appellant prays for an award of Kshs. 250,000 = in general damages. He relies on the decisions in *Catherine Wanjiru Kingori v Gibson Theuri Gichu*, Nyeri HCCC No. 320 of 1998, and *Equity Bank Kenya Ltd v David Githuu Kuria*, Siaya HCCA No. 5 of 2020, to support this assessment.
13. She further seeks special damages amounting to Kshs. 206,550 =, comprising the cost of vehicle repairs (Kshs. 179,800 =), medical expenses, the cost of the medical report, and P3 form processing fees. He prays that the appeal be allowed with costs.

1st Respondent's Submissions

14. The 1st respondent identifies the issues for determination as those of liability and quantum. On the issue of liability, the 1st respondent concurs with the finding of the learned trial magistrate that, since the accident occurred at night and the appellant's motor vehicle was fitted with functional headlights, the appellant ought to have seen the heap of murrum in sufficient time to either stop or swerve to avoid the collision. The 1st respondent further questions the appellant's failure to call the alleged eyewitness, one Elias Kipyegon, to corroborate her account.
15. The 1st respondent also contends that the investigating officer bore a duty to produce a sketch map or photographic evidence of the accident scene to assist the court in its determination. In support of her position, it relies on the decision in *Kenya National Highways Authority v Ahmednassir Maalim Abdullahi*, Kajiado Civil Appeal No. 27 of 2020, where the court observed:

“In today's world, when all of us have been turned into photographers because of the mobile phones we carry around, nothing would have been easier than to capture the scene with a



camera... As the evidence stands now, it can only mean one thing, that the respondent, who bears the burden of proof, has not discharged that burden.”

16. The 1st respondent further urges the court to take judicial notice that the Bungoma-Mumias Road is a busy public road, and it would be improbable that a heap of murrum could have been deposited and left overnight on the entire left lane without attracting public concern or media attention.
17. It is also the 1st respondent’s position that the 2nd respondent was an independent contractor, and as such, the 1st respondent cannot be held vicariously liable for her actions or omissions.
18. On the issue of quantum, the 1st respondent opposes the appellant’s proposed award of Kshs. 250,000 - for the soft tissue injuries sustained. It cites several authorities where courts awarded damages ranging between Kshs. 100,000 - and Kshs. 125,000 - for comparable injuries, including: *Jyoti Structures Limited & Another v Truphena Chepkoech Too & Another* [2020] eKLR; *Maimuna Kilungwa v Motrx Transporters Ltd* [2019] eKLR; *Ndung’u Dennis v Ann Wangari Ndirangu & Another* [2018] eKLR; and *John Wambua v Matthew Makau Mwololo & Another* [2020] eKLR.
19. Guided by these authorities, the 1st respondent proposes that Kshs. 100,000 - would constitute reasonable general damages in the circumstances.
20. Regarding special damages, the 1st respondent submits that they must be specifically pleaded and strictly proved, and argues that the appellant failed to produce valid ETR receipts to substantiate the alleged payment of Kshs. 11,700 -, thereby failing to meet the requisite evidentiary threshold.

2nd Respondent’s Submissions

21. The 2nd respondent highlights material contradictions in the evidence of the appellant’s witnesses. It notes that while the appellant testified that the heap of soil covered the entire left lane of the road, the investigating officer (PW3) stated that it only occupied approximately one-third ($\frac{1}{3}$) of the lane. The 2nd respondent further questions how, if the appellant’s vehicle headlights were functioning properly, as he claimed, and he could see up to a distance of eighty (80) meters ahead while driving at approximately 70 km h, he nonetheless failed to notice and avoid a heap of soil allegedly occupying the entire lane.
22. The 2nd respondent relies on section 107 of the *Kenya Evidence Act 1963* (Cap 80 Laws of Kenya), which places the burden of proof upon the party who asserts the existence of certain facts. In support of this principle, it cites *Mohamed Guyo Boru v Richard Mwilaria Aritho* [2022] eKLR and *M’Bita Ntiro v Mbae Mwirichia & Another* [2018] eKLR, where the courts underscored that a party seeking judgment on the basis of particular facts must adduce credible evidence to establish them.
23. The 2nd respondent also questions the absence of photographic evidence to substantiate the alleged presence of the heap of murrum or soil said to have occupied the left lane. It reiterates that in the age of accessible technology, it would have been easy to document the scene. In that regard, it places reliance on *Kenya National Highways Authority v Ahmednassir Maalim Abdullahi* (supra) and *MA (Minor suing through next friend AAG) v Spring Board Capital Limited & Another* (Civil Appeal No. E137 of 2021) [2023] KEHC 1634 (KLR), both of which emphasize the evidentiary value of photographic documentation in road traffic claims.
24. In conclusion, the 2nd respondent submits that the appellant failed to discharge the burden of proof as required by law, and accordingly prays that the appeal be dismissed with costs to the respondents.



Issues, Analysis and Determination

25. The mandate of this Court, sitting as a first appellate court, is well settled. It is to subject the entire evidence adduced before the trial court to a fresh and exhaustive re-evaluation and re-assessment, and to draw its own conclusions, bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
26. Having considered the record of appeal and the submissions by the parties, the following issues arise for determination:
- a. Whether the appellant proved her case on a balance of probabilities; and
 - b. If the answer to (a) is in the affirmative, who is liable, to what extent, and what quantum of damages ought to be awarded.

Whether the Appellant Proved Her Case on a Balance of Probabilities

27. The standard of proof in civil cases is on a balance of probabilities. Section 107 of the *Kenya Evidence Act 1963*, Cap 80 Laws of Kenya, expressly provides that the burden of proof lies upon the party who alleges. It states:

“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. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

28. Section 108 of the same Act further provides that:

“The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

29. The principles governing the burden and standard of proof were elaborated in *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR, where the Court, citing Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372, stated that proof on a balance of probabilities requires the tribunal to be satisfied that one version of events is more probable than the other. If the probabilities are equal, the party bearing the burden of proof fails.
30. Similarly, in *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR, the Court clarified that while the legal burden of proof rests on the plaintiff, the evidential burden may shift depending on the weight of evidence adduced by either party during trial.
31. From the foregoing, it is clear that the appellant, as the plaintiff before the trial court, bore both the legal and evidential burden of proving her case against the respondents on a balance of probabilities.
32. To discharge this burden, the appellant called four witnesses. The evidence of PW1 (the appellant) and PW3 (the investigating officer) sought to attribute liability to the respondents. The appellant testified that on the material day, her husband was driving the suit motor vehicle, and they were travelling from Mumias towards Bungoma when, upon reaching the Soweto area at about 8:00 p.m., she suddenly saw a hill in front of them. She described the hill as grayish in color. She stated that the vehicle’s headlights were on, although she could not tell how far they illuminated. Following the accident, they were rescued and taken to hospital by police officers from Bungoma Police Station. She further stated that she was not wearing her seat belt at the time of the accident.



33. Upon cross-examination, she testified that the hill was approximately one and a half meters tall and that she did not know whether her husband had seen it. She added that she only saw the hill after they had already hit it.
34. PW3, the investigating officer, testified that upon visiting the scene, he found the appellant's vehicle facing the Bungoma direction after hitting a heap of soil that occupied almost half of the road, which was under repair. He stated that although a bridge nearby was under maintenance, there were no warning signs or indicators on the road. He, however, did not establish who had deposited the soil. He referred the matter to KeNHA-Western Region for further action. On cross-examination, he stated that he visited the scene with a colleague who took photographs, though he did not produce them in court. He further stated that he drew a sketch of the scene but did not present it before the court.
35. It is trite that the mere occurrence of an accident does not, ipso facto, amount to proof of negligence on breach of statutory duty. The burden of proving negligence and or breach of statutory duty rests upon the appellant. In the present case, aside from the oral testimonies of PW1 and PW3, no documentary evidence was tendered to demonstrate how and by whom the accident was caused. While it is not disputed that roadworks were ongoing, the appellant was still required to prove that the heap of soil was negligently placed on the road by the 2nd respondent and that the 1st respondent failed to ensure that the 2nd respondent does not act in a manner likely to endanger road users.
36. The respondents referred to Kenya National Highways Authority v Ahmednassir Maalim Abdullahi [2022] KEHC 10344 (KLR) emphasizing the absence of photographic evidence. While the Court appreciates that the appellant and her husband may have been traumatized and unable to document the scene, the same cannot be said of the investigating officer. PW3, with 23 years of police service, 12 of which were in the Traffic Department, was undoubtedly experienced in accident investigations and well aware of the evidentiary requirements for such cases. He testified that photographs were taken, yet none were produced, nor was the sketch plan presented. If the officer's colleague indeed transferred, the expectation is that official evidence would remain in the station file. In Kenya National Highways Authority v. Ahmednassir Maalim Abdullahi (supra), Mutuku J. stated:-
- “In today's world when all of us have been turned into photographers because of the mobile phones we carry around nothing would have been easier than to capture the scene with a camera.”
37. The Court finds that PW3, as a seasoned investigating officer, was fully aware of the purpose of his testimony and the significance of corroborative evidence such as photographs and sketches. Such evidence would have assisted the Court in determining the point of impact and the state of the road, as observed in MA (Minor Suing Through Next Friend AAG) v Spring Board Capital Limited & Another (supra). The absence of this crucial evidence leads to the inference that, had it been produced, it would likely have been adverse to the appellant's case.
38. The principle governing adverse inference is well captured in Nesco Services Limited v CM Construction (EA) Limited [2021] eKLR, where Odunga J. (as he then was) held that where a party fails to call a material witness or produce evidence within its possession without reasonable explanation, the court is entitled to presume that such evidence would have been adverse to that party. The principle is also anchored in Section 112 of the *Kenya Evidence Act, 1963*, Cap 80 Laws of Kenya, and was reiterated in Kimotho v Kenya Commercial Bank [2003] 1 EA 108 and Kenya Akiba Micro Financing Ltd v Ezekiel Chebii & 14 Others [2012] eKLR.
39. I therefore find no basis upon which to interfere with the findings of the learned trial magistrate.



40. The appellant's evidence, though earnest, remained unsubstantiated and speculative. It lacked the necessary evidential support to meet the required legal threshold.
41. In the absence of photographic or sketch evidence linking the respondents to the alleged obstruction, the trial court cannot be faulted for finding that the appellant failed to discharge her burden of proof.
42. Having found that the appellant failed to establish liability against the respondents, it nonetheless remains necessary, for completeness of the appeal, to consider what award would have been made had the respondents been found liable for the accident. In doing so, the Court is guided by the well-settled principle in *Butt v Khan* [1977] 1 KAR 1, where the Court held that the assessment of damages is a matter of judicial discretion, the object being to fairly compensate a party for the injuries and losses sustained, but not to enrich them.
43. The Court takes cognizance of the medical evidence tendered by PW2 and PW4, both of whom were clinical and medical officers respectively. Their testimony was that the appellant and her husband sustained injuries comprising bruises on the neck and head, and swellings, which were classified as soft tissue injuries not resulting in any permanent incapacity. Jurisprudence on comparable injuries demonstrates that courts have generally adopted modest awards, consistent with the principle of proportionality. The Court of Appeal, in *Kenyatta University v Isaac Karumba Nyuthe & Another* [2020] eKLR and *Kenya Power & Lighting Co. Ltd v Ezekiel Odhiambo Wanga* [2022] KECA 598 (KLR), reiterated that awards for general damages must be commensurate with the nature and gravity of the injuries sustained.
44. In *Boniface Mutisya Mutua v H. Young & Co. (E.A.) Ltd* [2023] KEHC 191 (KLR), the High Court upheld an award of Kshs. 140,000 - for multiple soft tissue injuries involving bruises and muscle strain. Similarly, in *Patrick Kiprop Langat v Zakayo Chepng'etich Langat* [2022] KEHC 18704 (KLR), an award of Kshs. 150,000 - was found to be reasonable for comparable injuries. Guided by these authorities, this Court would have assessed general damages for pain and suffering at Kshs. 150,000 =.
45. With respect to special damages, the appellant pleaded and produced receipts totalling Kshs. 10,150 =, being medical expenses and fees for the preparation of a medical report. It is trite law that special damages must not only be specifically pleaded but also strictly proved, as was held in *Hahn v Singh* [1985] KLR 716 and more recently restated in *Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & Another* [2020] eKLR. The receipts produced bear the appellant's name and are consistent with the pleaded particulars. Accordingly, this Court would have awarded Kshs. 10,150 = under this head.
46. Had liability been established, the award would have been as follows:
 - a. General damages Kshs. 150,000 =
 - b. Special damages Kshs. 10,150 =Total Kshs. 160,150 =
47. For the avoidance of doubt, the assessment is purely hypothetical and made solely for completeness of the record, the Court having already found that the appellant failed to prove liability on a balance of probabilities.
48. In the result, the appeal fails in its entirety and is hereby dismissed with costs to the Respondents.

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

A. C. BETT



JUDGE

In the presence of:

Mr. Shiloya for the Appellant

Ms. Bodo holding brief for Mr. Maruti for the 1st Respondent

Ms. Ndirangu holding brief for Mr. Njehu for 2nd Respondent

Court Assistant: Polycap

