



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. E113 OF 2024**

**MELLY KHACHESO WESONGA .....**

**APPELLANT**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup>**

**RESPONDENT**

**JIMROSE BUILDING CONTRACTORS LTD. .... 2<sup>ND</sup>**

**RESPONDENT**

*(Being an appeal against the judgment and decree of Hon. M.A. Onyango in Mumias SPMCC No. 63 OF 2022 delivered on 30<sup>th</sup> May 2024)*

**JUDGEMENT**

**Background of the Appeal**

1. In a plaint amended on 18<sup>th</sup> May 2023, the appellant sued the respondents seeking general damages, special

damages amounting to Kshs. 206,500/-, costs of the suit, and interest.

2. The appellant's case was that on the night of 24<sup>th</sup> October 2021, while lawfully and carefully driving motor vehicle registration number KCK 615Y, a Nissan AD, along the Mumias-Bungoma road towards Bungoma, he was accompanied by his wife, who was a passenger. Upon reaching the Soweto area, he suddenly encountered a heap of murram dumped across the entire left lane of the road, with no signage or warning of its presence. Consequently, he rammed into the heap of murram, causing his vehicle to lose control and roll several times. As a result, he sustained injuries, and his vehicle was extensively damaged.
3. The 1<sup>st</sup> respondent, in an amended statement of defence dated 16<sup>th</sup> May 2023, averred that pursuant to section 3 of the 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 2<sup>nd</sup> respondent a performance-based contract for the maintenance of the Mayoni-Bungoma road. The 1<sup>st</sup> 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 24<sup>th</sup> October 2021. It further averred that the 2<sup>nd</sup> respondent was responsible for ensuring the safety of all road users during the contract period, which covered the date of the alleged accident. The 1<sup>st</sup> respondent denied the allegation that it had contracted an incompetent contractor (the 2<sup>nd</sup> respondent) and appeared to attribute blame, if any, to the 2<sup>nd</sup> respondent.

4. The 2<sup>nd</sup> respondent, in a statement of defence dated 4<sup>th</sup> 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 30<sup>th</sup> May 2024, the trial court found that the appellant had failed to discharge his 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 12<sup>th</sup> June 2024 and filed on 18<sup>th</sup> 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 2<sup>nd</sup> 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 his submissions, the appellant reiterates the averments in his pleadings and maintains that his 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 his testimony should not be used to discredit his claim. He further challenges the 2<sup>nd</sup> 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 this claim. He also notes that the 2<sup>nd</sup> respondent failed to adduce evidence showing that it had leased portions of land for storing construction materials, as alleged.
10. The appellant submits that his evidence was corroborated by that of his wife and the investigating officer, both of whom confirmed the presence of murrum on the road. He attributes the cause of the accident to the 2<sup>nd</sup> respondent's negligence and holds the 1<sup>st</sup> 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. He 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.

### **1<sup>st</sup> Respondent's Submissions**

14. The 1<sup>st</sup> respondent identifies the issues for determination as those of liability and quantum. On the issue of liability, the 1<sup>st</sup> 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 1<sup>st</sup> respondent further questions the appellant's failure to call the alleged eyewitness, one Elias Kipyegon, to corroborate his account.

15. The 1<sup>st</sup> 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 this 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 1<sup>st</sup> 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 1<sup>st</sup> respondent's position that the 2<sup>nd</sup> respondent was an independent contractor, and as such, the 1<sup>st</sup> respondent cannot be held vicariously liable for his actions or omissions.
18. On the issue of quantum, the 1<sup>st</sup> 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 1<sup>st</sup> respondent proposes that Kshs. 100,000/- would constitute reasonable general damages in the circumstances.

20. Regarding special damages, the 1<sup>st</sup> 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.

### **2<sup>nd</sup> Respondent's Submissions**

21. The 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> respondent relies on section 107 of the Evidence Act (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'Bitu 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 2<sup>nd</sup> 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 this 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 2<sup>nd</sup> 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 his 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 His Case on a Balance of Probabilities**

27. The standard of proof in civil cases is on a balance of probabilities. Section 107 of the Evidence Act, 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 his case against the respondents on a balance of probabilities.
32. To discharge this burden, the appellant called five witnesses. The evidence of PW1 (the appellant) and PW3 (the investigating officer) sought to attribute liability to the respondents. The appellant testified that he left Mumias at about 7:30 a.m. heading to Bungoma in the company of his wife. He stated that the road was clear, his vehicle lights were on, and visibility extended to about 30 metres. He was driving at approximately 70 Km/h when he hit a heap of murrum on the left side of the road, which had no signage. The vehicle lost control and rolled. He was rescued by police officers who later took him to hospital. He later clarified that the accident occurred at around 8:00 p.m.
33. 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.

34. It is trite that the mere occurrence of an accident does not, ipso facto, amount to proof of negligence. See **Mwaka v Karua & Another (Civil Case E261 of 2022) [2024] KEMC 29 (KLR)**. The burden of proving negligence rests upon the plaintiff. 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 2<sup>nd</sup> respondent and that the 1<sup>st</sup> respondent failed to ensure

that the 2<sup>nd</sup> respondent does not act in a manner likely to endanger road users.

35. The respondents referred to **Kenya National Highways Authority v Ahmednassir Maalim Abdullahi [2022] KEHC 10344 (KLR)**. Emphasizing the absence of photographic evidence, Mutuku J stated that:

**“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.”**

While the Court appreciates that the appellant and his passenger 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.

36. This 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.
37. 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. This principle is also anchored in Section 112 of the Evidence Act, 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.**

38. I therefore find no basis upon which to interfere with the findings of the learned trial magistrate.
39. The appellant's evidence, though earnest, remained unsubstantiated and speculative. It lacked the necessary evidential support to meet the required legal threshold.
40. 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 his burden of proof.
41. Having found that the appellant failed to establish liability against the respondents, it remains necessary, purely for the sake of completeness, to consider what award would have been made had liability been proved. In doing so, this Court is guided by the principle enunciated in **Butt v. Khan (1977) 1 KAR 1**, where it was held that the assessment of damages is a discretionary exercise aimed at fairly compensating a party for the injuries sustained, and not at enriching them.

42. The medical evidence of PW2 and PW4, who were the clinical officer and medical officer respectively, indicates that both the appellant and his wife sustained bruises on the neck and head, as well as swellings. The injuries were classified as soft tissue injuries not resulting in any permanent disability. Jurisprudence on comparable injuries demonstrates that courts have generally maintained modest awards in recognition of the principle of proportionality. In **Kenyatta University v. Isaac Karumba Nyuthe & Another [2020] eKLR** and **Kenya Power & Lighting Co. Ltd v. Ezekiel Odhiambo Wanga [2022] KECA 598 (KLR)**, the Court of Appeal reaffirmed that damages must be commensurate with the nature and gravity of the injuries sustained.

43. 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. Likewise, in **Patrick Kiprop Langat v. Zakayo Chepng'etich Langat [2022] KEHC 18704 (KLR)**, an award of Kshs. 150,000/- was considered reasonable for similar harm. Guided by these authorities, this Court

would have assessed general damages for pain and suffering at Kshs. 150,000/-

44. On special damages, the appellant pleaded and produced receipts totaling Kshs. 206,500/-, covering medical expenses, the cost of the medical report, and vehicle repair charges. It is trite that special damages must be specifically pleaded and strictly proved, as reaffirmed in **Hahn v. Singh [1985] KLR 716** and applied in **Co-operative Bank of Kenya Ltd v. Patrick Kangethe Njuguna & Another [2020] eKLR**. The receipts on record bear the appellant's name and correspond with the pleaded particulars. Accordingly, the Court would have awarded Kshs. 206,500/- under this head.

45. Had liability been established, the award would have been as follows:

<b>Head of Damages</b>	<b>Amount (Kshs.)</b>
General Damages	150,000/-
Special Damages	206,500/-
<b>Total</b>	<b><u>356,500/-</u></b>

46. It is, however, to be emphasized that the foregoing assessment is entirely hypothetical, made solely for completeness of the appellate record, as this Court has

already found that the appellant failed to establish liability on a balance of probabilities.

47. Accordingly, the appeal fails in its entirety and is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Kakamega this 6<sup>th</sup> 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 1<sup>st</sup> Respondent

Ms. Ndirangu holding brief for Mr. Njehu for 2<sup>nd</sup> Respondent

Court Assistant: Polycap