Mbuguah & another v Onyancha (Civil Appeal E1422 of 2024)
[2025] KEHC 17019 (KLR) (Civ) (19 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1422 OF 2024

AC MRIMA, J

NOVEMBER 19, 2025

BETWEEN

MOSES MURIUKI MBUGUAH ..... 1ST APPELLANT

ALI SHABAN ISAACK ..... 2ND APPELLANT

AND

JOSHUA NYATUKA ONYANCHA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. W. Mbulikah (PM) in Milimani Chief Magistrates Civil Court Case No. 3267 of 2020 delivered on 29 th October 2024)

JUDGMENT

Background:

1. Joshua Nyatuka Onyancha, the Respondent herein, instituted Milimani Chief Magistrates Civil Court Case No. 3267 of 2020 [hereinafter referred to as 'the suit'] through a Plaint dated 24th February 2020. He pleaded that on or about 30th March 2017, whilst crossing Argwings Kodhek Road within Nairobi County, he was knocked down by motor vehicle registration No. KAX 327J then driven by one Richard Maikuri [the 1st Defendant in the suit] and owned by Moses Muriuki Mbuguah and Ali Shabaan Isaack, the 1st and 2nd Appellants herein. As a result, the Respondent pleaded that he suffered a fracture of right tibia and fibula. He sought special and general damages thereto.

2. The Appellants challenged the suit through a Statement of Defence dated 20th November 2018. The 1st Appellant stated that on 14th February 2007, he sold the motor vehicle to the 2nd Appellant and as such he was a stranger to the Respondent's allegations. He explained that the only reason the vehicle was still registered in his name was because the 2nd Appellant owed him Kshs. 100,000-, which had since been settled. It was his case that the Respondent had no case against him.

3. In his witness statement, the 2nd Appellant conceded that he bought the motor vehicle from the 1st Appellant. However, he stated that he was completely unaware that there was an accident on 30th March 2017.

4. The suit was heard and, in its judgment, the trial Court observed that, despite pleading contributory negligence, the Appellants did not adduce any evidence on how the accident happened. Resultantly, the Appellants were found 100% liable for the accident. The Court made an award of Kshs. 650,000- and Kshs. 21, 670- for general and special damages respectively.

5. It was that decision that prompted the instant appeal which was heard by way of written submissions.

The Appeal:

6. Through a Memorandum of Appeal dated 2nd December 2024, the Appellants sought to set aside the judgment on the following grounds: -

    1. The Learned Magistrate erred in law and fact in failing andor neglecting to consider the defence filed by the Appellants at all thereby arriving at an erroneous decision.

    2. The learned Magistrate erred in law and fact in failing to appreciate the extensive and compelling evidence that emanated from the cross-examination of the Respondent during his testimony thereby arriving at a lopsided decision in favour of the Respondent

    3. The learned Magistrate erred in law and fact in misconstruing the provision of section 107 and 108 of the *Evidence Act* thereby arriving at an erroneous decision.

    4. The learned Magistrate erred in law and fact in failing andor neglecting to consider that there was a grave discrepancy in the medical reports pleaded thereby arriving at an erroneous decision on the issue of the liability of the Appellants.

    5. The leamed Magistrate erred in law and fact in failing andor neglecting to consider the grave discrepancies in the evidence adduced by the Respondent and his witness thereby arriving at an erroneous decision.

The Submissions:

7. In their written submission dated 22nd July 2025, the Appellants argued that the trial Court failed to consider their defence. They contended that the Court wrongly treated the case as undefended, lumping them in with the 1st Defendant, against whom interlocutory judgment had been entered, despite their active participation in the suit. They further argued that the trial Court misconstrued the burden of proof under sections 107 and 108 of the *Evidence Act*, which required the Respondent to prove his case. They submitted that the Court unfairly dismissed questions they raised by finding that they failed to call a witness even though those questions arose directly from the cross-examination of the Respondent and his witnesses.

8. The Appellants insisted that the Court ignored numerous glaring discrepancies and compelling evidence from cross-examination, including the Respondent's evasiveness about his age, contradictory testimony regarding his employment and salary, conflicting statements about the accident itself, and a lack of proof of the 2nd Appellant's ownership of the motor vehicle at the time of the accident.

9. Furthermore, the Appellants highlighted grave discrepancies in the medical evidence. They claimed that trial Magistrate failed to analyze inconsistencies regarding the Plaintiff's injuries, which led to an exorbitant award of Kshs. 650,000. They specifically noted that the Plaintiff's medical expert (PW2)

admitted under cross-examination to being a specialist in STDHIV, not an orthopaedic surgeon. The Appellants also pointed to a lack of sufficient police evidence, such as a sketch map of the accident scene or a vehicle assessment report, to justify a 100% liability finding.

10. In conclusion, the Appellants asserted that the trial Court failed to perform its duty of analysing the evidence or addressing the questions posed in their cross-examination and submissions. They described the judgment as manifestly unfair and unjust finding that simply accepted the Respondents testimony as gospel truth.

The Respondent's case:

11. The Respondent challenged the appeal through written submissions dated 28th July 2025. It was his position that the trial Court was correct in finding the Appellants 100% liable. He argued that of the evidence of the Police officer (PW1) was cogent and met the standard of proof on a balance of probabilities, as defined in the case of Miller -vs - Minister of Pensions 2 All ER 372. He further argued that their testimony established that the Appellants' driver was speeding, recklessly overtook a stopped the PSV bus on the wrong lane and struck the Respondent on a marked zebra crossing.

12. It was his case that the Appellants had failed to discharge their evidential burden. He pointed out that despite filing a Statement of Defence, they failed to call any witnesses or tender any evidence to support their claims during the trial. He relied on the case of Shaneebal Limited -vs- County Govt of Machakos (2018) eKLR, where it was observed that pleadings are not evidence and that the Appellants were duty-bound to adduce evidence to support their defence. He further relied on the decision in Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, which established that when a Defendant offers no evidence, the Plaintiff's case stands unchallenged and any defence is unsubstantiated. He asserted that the trial Court was correct to disregard the Appellants' defence.

13. The Respondent also refuted the Appellants' claims of material inconsistencies. He argued that any alleged discrepancies regarding the Respondent's employment were irrelevant because the claim for lost earnings was abandoned and not awarded by the court. Finally, with respect to the trial Court's award of Kshs. 650,000- as general damages, it was his case that the amount was not manifestly excessive for the severe injuries he sustained. He posited that his injuries were unanimously confirmed by multiple medical documents and that the award was fair and consistent with judicial precedent. He drew support from the case of Nashon Nyandega -vs- Peter Omboga (2021) eKLR, where the High Court awarded Kshs. 650,000 for allegedly comparable injuries.

14. In conclusion, he urged this Court to find that the appeal lacked merit and should be dismissed with costs.

Analysis:

15. From the foregoing appreciation of the parties' respective cases, a perusal of the record, the parties' submissions and the decisions therein, the following two issues arise for determination: -

    i. Whether the Learned Magistrate erred by finding the Appellants 100% liable.

    ii. The propriety of damages.

16. Before this Court ventures into a consideration of the above issues, suffice to look at its role as the first appellate Court. In Selle -vs- Associated Motor Boat Co. [1968] EA 123 the Court rendered that

this Court is duty bound to re-evaluate the evidence tendered at the trial Court and draw its own conclusions, in the following words: -

> .... An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

17. With the foregoing guidance, the Court now turns to the issues.

(a) Whether the Learned Magistrate erred by finding the Appellants wholly liable:

18. The Appellants were aggrieved that the trial Court treated the case as undefended, ignored their Statement of Defence, and thereby misapplied the burden of proof, which they argued, lay with the Respondent. They contended that the Respondent's case was riddled with inconsistencies, particularly regarding the accident itself and his employment, and that the trial Court ignored compelling evidence which arose during cross-examination.

19. The Respondent countered the foregoing by asserting that he met his burden of proof, on a balance of probabilities, by adducing cogent evidence from himself and the Police officer (PW1).

20. This Court has revisited the record. PW1, No. 77168 PC Bobby Okari, testified that the area where the Responded was knocked down was a T-Junction at Argwings Kodhek Road that joins Ring Road. He also testified that there are traffic lights and a Zebra Crossing for pedestrians. He, however, conceded that he did not carry out the investigations, but one P.C Gatheli did. He also conceded that he did not have any sketch maps of the scene, but relied on the Police Abstract since it contained a summary of what happened. He further admitted not having visited the scene of accident. The Respondent testified as PW3. It was his evidence that as he was crossing the road at a zebra-crossing, the motor vehicle overtook a stationery bus at a high speed on the wrong side and hit him. On cross-examination, he stated that he did not write a statement to that effect but he recorded a police statement.

21. The Appellants called no witness. There was no evidence contradicting the fact that the accident occurred at a pedestrian crossing area. The driver of the motor vehicle was an important witness for that purpose but the Appellants failed to secure his testimony. The cross-examination did not weaken fact that the accident occurred. On a balance of probability, the Respondent established negligence. The driver was speeding, overtook a stationary PSV bus on the wrong lane, and struck the Respondent on a designated zebra crossing.

22. In this case, the Appellant's failure to give an account of their own case was fatal. As was correctly observed by the Court in Shaneebal Limited -vs- County Govt of Machakos case [supra], pleadings are not evidence. The Statement of Defence filed by the Appellants, provided no means to discredit the occurrence of the accident. Similarly, it did not lend any credence to the concept of contributory negligence on the part of the Respondent. With the foregoing, the Appellants cannot approbate and reprobate by shifting the burden of proof entirely onto the Respondent and then fail to substantiate their own positive assertions on contributory negligence. Therefore, the Appellants' claims of glaring discrepancies are substantially weakened. The Respondent correctly pointed out that the alleged

discrepancies regarding his employment and salary were irrelevant, as the claim for lost earnings was abandoned. More importantly, it was not awarded by the trial Court.

23. Having now found that the accident occurred at a marked crossing area, and in view of the absence of rebuttal, and considering the fact that the cross examination did not discredit the occurrence and the manner the accident occurred, this Court affirms that the Respondent proved his case on a burden of probabilities as required in law. Since the Appellants failed to discharge the evidential burden of proof which had then shifted to them, trial Court's finding on liability remains sound in law. The appeal on liability, hence, fails.

(b) The propriety of damages:

24. The Appellants argued in their submissions that the award of Kshs. 650,000= for general damages was exorbitant. They based foregoing on grave discrepancies in the medical evidence, specifically claiming the Respondent's medical expert (PW2) was a specialist in STDHIV, not an orthopaedic surgeon. The Appellants' argument failed for two reasons. First, the Respondent's injuries, a fracture of the right tibia and a fracture of the right fibula, are not in dispute. They were substantiated by the documentary evidence namely; the Medical Examination Report (P3 from), The Report by Dr. Kungu Mwaura, the report by Kenyatta National Hospital and the Case Summary from Medanta Africare, a medical facility. Second, the Appellants' attempt to discredit the testimony of PW2 did not negate the contents of the foregoing primary medical documents. Even without the evidence of an orthopaedic surgeon, the injuries remained proved.

25. With the foregoing, the focus is now on the propriety of the award of Kshs. 650,000-. In doing so, this Court will be guided by the Court of Appeal decision in Gitobu Imanyara & 2 others -vs- Attorney General [2016] KECA 557 (KLR) where review of quantum damages by an appellate Court was discussed as under:

> .... This is the principle enunciated in Rook v Rairrie [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
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> > .. 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.

26. To determine this issue, this Court will make a tour of what Courts have previously awarded for comparable injuries. In Biojoule Kenya Limited -vs- John Njoroge Kiumu [2020] eKLR the Court, in awarding Kshs. 750,000- observed thus: -

> ... The plaintiff underwent open reduction and internal fixation (ORIF), and a metal plate was inserted. He was assessed with a 20% permanent disability.

27. In Sammy Mugo Kinyanjui & Another -vs- Kairo Thuo [2017] eKLR and Pauline Gesare Onami -vs- Samuel Changamure & Another [2017] eKLR an award of Kshs. 600,000- was upheld for fracture of both the right and left tibiafibula. In Joseph Mwangi Thuita -vs- Joyce Mwole (2018) eKLR, the Court

awarded Kshs.700,000- for compound fracture of right tibia and fibula with shortening and episodic pain. And, in Karanja & Another -vs- Mwachala (2024) eKLR, the Court observed thus;

> ... The Courts have been awarding damages ranging between Kshs. 450,000 to Kshs. 1,300,000- for fractures of tibia and fibular bones depending on the specific case and other injuries.

28. In this case, it is notable that the Respondent's evidence did not specify the extent and severity of the injury and the incidence of incapacity. It remained unknown whether the injury was compoundcommunited, communited or just compound. All that was stated was a fracture of the right tibia and fibula. Going by the above cited authorities, this Court finds that the award of Kshs. 650,000= for fracture of two major leg bones is consistent with judicial precedents. It is a fair compensation of the injuries suffered and this Court finds no basis to interfere with the award. As such, the appeal on quantum also fails.

Disposition:

29. Flowing from the above findings and conclusions, this Court finds that the trial Court correctly found the Appellants wholly liable and that the award of Kshs. 650,000= in general damages is fair compensation. The appeal is, therefore, unmerited and this Court hereby makes the following final orders: -

    (a) The appeal be and is wholly dismissed.

    (b) The Appellants shall jointly and severally bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Mutange, Learned Counsel for the Appellants.

Mr. Kipkurui, Learned Counsel for the Respondent.

MichaelAmina – Court Assistants.