



REPUBLIC OF KENYA



KENYA LAW
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**Gakuo v Mugo (Civil Appeal 39 of 2022)
[2025] KEHC 17655 (KLR) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 39 OF 2022
MA ODERO, J
NOVEMBER 28, 2025**

BETWEEN

AUGUSTUS WANDERI GAKUO APPELLANT

AND

ESSAU MWANIKI MUGO RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 21st July 2022 by which the Appellant Augustus Wanderi Gakuo seeks the following orders:-
 - “(a) That the judgment of the Trial Court delivered on 7/7/2022 and all consequential orders arising therefrom be set aside.
 - (b) That this Appeal be allowed and the orders of the Lower Court be substituted with the orders of the Superior court.
 - (c) That the Respondent to pay the costs of this Appeal and the Lower court.”
2. The Respondent Esau Mwangi Mugo opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 29th September 2025. The Respondent despite proper service did not participate in the Appeal and did not file any submissions.

Background

3. The genesis of this appeal is a road traffic accident which occurred on 30th March 2018. The Appellant in his written statement dated 20th November 2019 said that on the material date he was riding a motor cycle Registration Number KMDR 261V along the Nyeri-Kiandu Road.



4. That the Respondent drove his motor-vehicle KCC 580 Q recklessly causing the said vehicle to lose control and hit the motor cycle.
5. As a result of the accident the Appellant sustained serious injuries. He was admitted at PGH Nyeri having sustained a fracture of the mid-shaft with open wound as well as a fracture of the tibia fibula.
6. The Appellant then filed Civil Suit being Nyeri CMCC No. 382 of 2019 and vide the Plaint dated 20th November 2019 sought general damages for pain suffering and loss of amenities.
7. The Respondent filed a statement of Defence dated 13th February 2022 denying having caused the accident due to negligent driving.
8. The suit was heard in the Lower Court and vide a judgment delivered on 7th July 2022 Hon. M. N. LUBIA, Senior Resident Magistrate dismissed the plaintiff's suit. Being aggrieved by this decision the Appellant filed this present appeal which was premised upon the following grounds;-

- “ 1. That the trial court erred in law by ignoring and or not taking into account the submissions and legal authorities of the Plaintiff and the evidence of The Plaintiff and the investigation officer.
2. That the trial court erred in law by finding that the Plaintiff did not prove liability.
3. That the trial court erred in law by dismissing the Plaintiff's suit.
4. That the trial court misdirected itself on all points of law.”

Analysis And Determination

9. I have carefully considered this memorandum of appeal as well as the record of Appeal filed in this matter.
10. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusion [see Peters -vs- Sunday post limited [1958] E.A 424]
11. In Selle And Another -vs- Associated Motor Boat Company Ltd & Others [1968] 1 E.A 123 it was stated that

“An appeal to this court from 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 [the fact] 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 that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”

12. Likewise in Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR, the Court of Appeal stated as follows:-

“An appeal to this court is by way of a 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.”

13. On the question of liability the Appellant merely stated that the motor vehicle Registration KCC 580 Q was being driven carelessly lost control and hit his motorcycle. The mere fact that an accident occurred is not in itself proof of negligence.
14. As the trial magistrate correctly observed the Appellant did not expound on what was negligent in the Respondents manner of driving - was the vehicle speeding, was it being driven in the wrong lane, on the pavement or what? To merely claim negligent driving is not sufficient. The Appellant must demonstrate what was negligent in the manner of driving.
15. The Police Abstract dated 5th February 2018 was produced by PW2 a police officer from Naro Moru Police Station. The police blamed the driver of the KCC 580Q for the accident but once again it is not explained why he was to blame.
16. Furthermore the fact that police blamed the Respondent for the accident does not amount to proof of liability. In the case of Kennedy Nyangoya -vs- Busia Hauliers [2016] eKLR Hon. Lady Justice Mwangi observed as follows:-

“ Even if the police abstract indicated that DW1 was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it. Another shortcoming in the appellant’s case was the unexplained failure to call the Driver who was driving the matatu at the time of the accident. The said Driver could have shed light on how the accident happened, thus assist the Court in determining who was liable for the said accident.” [Own emphasis]

17. The police officer did not produce as evidence a sketch map to enable the court visualize the scene and no point of impact was shown. The fact that the Respondent failed to testify during the trial is no reason to apportion liability against him. It is trite law that he who alleges must prove. It is not for the Respondent to prove his innocence, the onus lay on the Appellant to prove the blame worthiness of the Respondent.
18. In the premises I cannot fault the finding of the learned trial magistrate that liability was not proved on a balance of probability.
19. Finally the Appellant in evidence admitted that though he was riding the motorcycle he had no licence to drive a motorbike. Therefore the Appellant himself was in breach of Section 30 (1) of the [Traffic Act](#) Cap 403 Laws of Kenya which provides that:-

“(1) No person shall drive a motor vehicle of any class on a road unless he is the holder of a valid driving licence or a provisional licence endorsed in respect of that class of vehicle.”

20. The fact that the Appellant had no valid licence raises the suspicion that he was not qualified to drive a motorcycle. The Appellant could very well have been the author of his own misfortune.
21. On the issue of quantum the trial court found that had the Appellant succeeded in his claim an award of Kshs. 350,000/= would have sufficed as damages. An award of damages must be made considering the type of injuries sustained and awards made in similar cases. The trial court did not cite any authorities to back this finding.



22. In *Akamba Public Road Services vs Abdikadir Adan Galgalo* [2016] eKLR the court reduced the lower court award of Kshs. 800,000/= to Kshs. 500,000/= where the respondent therein had sustained a fracture on the right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. In his prognosis, the doctor had observed that the respondent therein had a permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain and estimated the permanent partial disability at three (3%) per cent. It was his opinion that the soft tissue injuries would leave no residual disability.
23. In *Peter Namu Njeru vs Philemone Mwangoti* [2016] eKLR The court held that Kshs. 700,000/= was sufficient as general damages where the plaintiff sustained a fracture of the humerus and soft tissue injuries.
24. In *Barnabas vs Ombati* [2022] KEHC 12136 (KLR) The court upheld the trial court's award of Kshs.800,000/= for general damages where the plaintiff therein had sustained soft tissue injuries together with fracture of the right femur, right humerus and fracture of the pelvic.
25. Therefore had the Appellant been successful I find that an award of Kshs. 600,000 in damages would have been more appropriate.
26. In conclusion I find no merit in this appeal. The same is dismissed in its entirety. Costs to be met by the Appellant.

DATED IN NYERI THIS 28TH DAY OF NOVEMBER 2025.

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MAUREEN A. ODERO

JUDGE

