



REPUBLIC OF KENYA



**Palan'a v King'oo (Civil Appeal E050 of 2024)
[2025] KEHC 19191 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E050 OF 2024
MS SHARIFF, J
DECEMBER 18, 2025**

BETWEEN

MARY NALIAKA PALAN'A APPELLANT

AND

CHEPKENEN ARAP KING'OO RESPONDENT

(Being an appeal from the Judgement and Decree of the Principal Magistrate's Court in Webuye Civil Case No. 184 of 2017 delivered by Hon. P. Y. Kulecho (SPM) on 10th November 2023.)

JUDGMENT

A. Introduction

1. The Appellant seeks to overturn the decision in Principal Magistrate's Court in Bungoma Civil Case No. 184 of 2017 delivered by Hon. P. Y. Kulecho (SPM) on 10th November 2023 on both liability and quantum of damages. In the said case, the Appellant had sued the Respondent seeking recovery of general and special damages arising from a road accident that occurred on 14th August 2017, in which the Appellant sustained injuries.

B. The Duty of a First Appellate Court

2. A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others* {1968})



EA 123). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* {1958} E.A. page 424: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

3. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate Court had discharged the duty expected of it. (See *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L. Rs {2001} 3 SCC 179).

C. The Pleadings

4. In the Amended Complaint dated 25th June 2018, the Appellant averred that on or about the 14th August 2017, she was lawfully travelling as a fare paying passenger aboard Motor Vehicle Registration number KCK 769 S Toyota Townace along Eldoret-Malaba Highway, particularly at Chimoi area, when the Respondent’s agent driver and/or servant drove and controlled Motor Vehicle Registration number KCK 769 S Toyota Townace in such a reckless, negligent and careless manner resulting into the Motor Vehicle rolling several times thereby causing the Appellant to sustain bodily injuries.
5. The Respondent in his Amended Statement of Defence dated 8th October 2018, denied liability and alternatively attributed the accident to the Appellant’s negligence wholly or substantially.

D. The Evidence

6. The Appellant’s case in the lower Court rested on the evidence of four witnesses, namely, PW1, Mary Naliaka Palang’a, PW2, James Kegicha, a Police Officer, PW3, Dr. Charles Andai, a medical officer, and PW4, John Weremba, a clinical officer. The Respondent called one Catherine Lusweti, a health records and information officer.
7. PW1, Mary Naliaka Palang’a, adopted her witness statement dated 29th August 2017 as her evidence in chief. The substance of her evidence was on 14.08.2017 she had been travelling as a fare paying passenger on board a motor vehicle registration No KCK 769S along Eldoret- Malaba highway when upon reaching Chimoi area the vehicle’s right hind tyre busted thus causing it to overturn and as a result, the Appellant sustained bodily injuries. She was then treated at St. Mathews Chimoi and Webuye District Hospital. She produced her treatment notes, P3 form, a Police abstract and a medical report prepared by Dr Andayi as her exhibits. She then craved for compensation for the injuries, special damages and costs of the suit.
8. On cross-examination, she told the Court that the accident had occurred at 11.00 a.m. and that she found herself at the hospital after regaining her consciousness. It was her evidence that she was treated



- at St. Mathias and discharged and she later proceeded to Webuye County Hospital after recording her statement with the police. Also, she testified that she was attended to in Chimoi.
9. PW2, James Kegicha, a Police Officer then based at Webuye Police Station, testified that an accident had occurred along Eldoret-Webuye road at Chimoi area 14th August 2017 at 11.30 a.m. and the same was reported at the station and the victim was duly issued with a P3 form and latter an abstract, which he duly produced.
 10. On cross-examination, he told the Court that he was not the investigating officer and that he was not aware of the circumstances of the accident and could not categorically assign blame upon the Respondent.
 11. PW3, Dr. Charles Andai, a medical officer based at Lubinu medical clinic testified that he examined PW1 herein on 18th August 2017 as she had survived a road traffic accident that occurred on 14th August 2017. He observed that PW1 sustained blunt injuries to the neck, left shoulder, chest and right upper arm and that he captured his observations in his medical report authored on 18th August 2017. He availed the same as an exhibit.
 12. PW4, John Weremba, a clinical officer based at Webuye County Hospital, had testified that PW1 had visited the facility vide OP No. 5681/2017. That the patient had sustained soft tissue injuries on her head and left upper arm, and chest following a road traffic accident. He assessed her nature of injuries as soft tissue injuries. He availed PW1's treatment notes and cash receipts as exhibits.
 13. On cross-examination, he stated that the treatment notes were dated 16th August 2017, and that the same did not bear the hospital's logo, but were rubber stamped.
 14. On re-examination, he told the Court that the patient's name was Mary Naliaka Palang'a but the letter marked as DMFI-1 indicated Mary Nekesa, and noted that the hospital's treatment chit bears two sides, the front side bears the official hospital logo unlike the other side that strictly captures the patient's information.
 15. DW1, Catherine Lusweti, a health records and information officer at Webuye County Hospital, testified that when a patient visits the facility, registration is conducted that the revenue section where the patient's name, age and residence is captured. The patient then proceeds to pay the registration amount and is then issued with a receipt bearing the registration number. She noted that the receipt number are numerical and by 2017 the same was at six digits. It was her evidence that at the scrutiny of the facility's register as well as the system she were not able to trace PW1's name and the OP number was not in tandem with the 2017 series. She availed a letter from the facility mandating her to handle this case, as an exhibit.
 16. On cross-examination, she testified that on 14th August 2017, she was working at the facility's reception desk and that her desk was her first point of contact with a patient, and that she was at the position to generate a list of all the patients that visited the facility of the respective date. She maintained that all the cash receipts issued by the facility are electronically generated and that the impugned documents had the hospital's stamp.
 17. On re-examination, she told the Court that she was the custodian of all health records at Webuye County Hospital and before a patient is attended to, she ought to be registered first.
 18. In her judgment, the trial Magistrate observed that the Defendant (now Respondent) managed to cast doubt on veracity of the Plaintiff's (now Appellant) case as she found it strange that the Appellant would sustain injuries on the 14th of August 2017 and only go to the hospital on 16th August 2017. Further, she held that the Plaintiff failed to discharge the burden of proof cast upon her, namely, to



demonstrate on a balance of probability that she was involved in the suit accident, on 14th August 2017. Finally, she observed that the Plaintiff referred the trial Court to treatment notes dated 14th August 2017, from St. Mathais Chimoi Dispensary, but did not avail the same in evidence. She concluded that the Plaintiff failed to demonstrate that she was involved in the suit accident and proceeded to dismiss the whole suit.

On quantum, the trial Court held that had the Plaintiff established liability then in light of the sustained injuries as captured by the medical expert's report she would have been awarded Kshs. 100,000/= plus costs and interest.

E. The Appeal

19. The Appellant seeks to overturn the judgment citing the following grounds: -
 - a. The Learned Trial Magistrate erred in law and in fact by finding and holding that the Appellant did not discharge her burden of proof as required by the law and the decision made was against the weight of evidence that was adduced thereby occasioning miscarriage of justice
 - b. The Learned Trial Magistrate erred in law and in fact by absolving the Respondent from blame which finding was against the evidence that was tendered thereby occasioning miscarriage of justice.
 - c. The Learned Trial Magistrate erred in not taking into account the evidence presented by the appellant.
 - d. The Learned trial Magistrate misdirected herself in ignoring the written submissions presented and filed by the appellant.
 - e. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
 - f. The Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's claim in its entirety.
 - g. That the Learned Trial Magistrate's decision albeit, a discretionary one was plainly wrong.
20. The Appellant prayed that this Court do set aside the decree of the subordinate Court and substitutes the same with an order allowing the Appellant's claim by awarding the Appellant both general and special damages. Subsequently, that the costs both of the appeal and those of the subordinate Court be awarded to the Appellant.
21. Vide Court directions issued on 17th June 2025, this Court directed the parties to canvass the appeal by way of written submissions.
22. At the point of writing this judgement and after strict perusal of the Court record and the Court Tracking System both parties did not comply with the Court directions as issued on 17th June 2025.



F. Analysis And Determination

23. First, I will address the question of liability. As Sir Percy Winfield, quoted in Clerk & Lindsell on Torts (15th Edition, London: Sweet & Maxwell, 1982, at page 1) states: -

“Tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redress-able by an action for un-liquidated damages.” (Winfield, Province of the Law of Tort, Page 32.)

24. In *Blyth v The Company of Proprietors of the Birmingham Waterworks* {1856} 11 Ex 78, (E.R. Vol. CLV1 1047), at page 1049 it was held inter alia:-

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do...”

25. In *Halsbury's Laws of England* (4th Ed at Para 662 (page 476)) it stated: -

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established.”

26. The Appellant’s counsel faulted the learned Magistrate’s finding on negligence/liability for not properly addressing herself to the legal issues that had been raised by the Appellant and absolving the Respondent from blame which was contrary to the availed evidence.

27. “Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff’s claim will fail.

28. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the Defendant bears the burden of proving an affirmative defense. If the Claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the Defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the Court decides whether the (1) the Claimant has proved the fact, (2) the Defendant has proved the fact, or (3) neither party has proved the fact.

29. Talking about the legal burden and evidential burden of prove placed upon the Plaintiff by the law, I find it useful to recall *Mbuthia Macharia v Annah Mutua Ndwiga & another* Civil Appeal No. 297 of 2015 {2017} eKLR in which the Court of Appeal when dealing with the issue of burden of proof observed: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant,



the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift" to the party who would fail without further evidence?"

30. Section 107 of the *Evidence Act*, Section 109 and Section 112 of the *Evidence Act* were dealt with in the case of *Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

"As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

31. In every legal proceeding, parties must follow key rules known as evidentiary standards and burdens of proof. These rules dictate which side must present sufficient evidence to establish or challenge a given claim, as well as the level of proof required. In my assessment, the Appellant fell short of this threshold before the lower Court, as I will demonstrate. As noted earlier, the Appellant's case relied solely on four witnesses who were not present at the scene of the incident. The Police Officer merely confirmed that a report had been made at the station; he did not witness the accident. His testimony did not capture how the accident happened and he was not the investigating officer; his evidence amounted to indirect or secondary evidence. Likewise, neither of the witnesses was an eye witness to describe how the accident occurred or provide a firsthand account. Eyewitness evidence is vital in both civil and criminal matters and is often given significant weight in Court.

32. "Direct evidence" refers to proof that establishes a fact outright, without requiring the Court to draw any inference to link the evidence to that fact. It directly supports the truth of a claim, in criminal matters, whether a person is guilty or innocent, by proving or disproving the fact in question on its own. In essence, direct evidence is concrete, explicit, and self-explanatory proof of an event or circumstance, requiring no reasoning or deduction to confirm that the fact exists.

33. The Appellant availed evidence of a Police Abstract to testify to the occurrence of an accident on 14th August 2017. In the case of *Fredrick Wichenje Ikutwa v Florence Mwikali* {2020} eKLR the Court in support of the proposition that in civil cases, the degree of burden of prove is on a balance of probabilities and refused to be persuaded by hearsay evidence since the witness was not at the scene of the accident. Additionally, the case of *Florence Mutheu Musembi & Geoffrey Mutunga Kimiti v Francis Karengi* {2021} eKLR the Court said: -

"A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The Police Abstract Report which was produced before the trial court did not contain any other information apart from the date, of the accident, the particulars of the vehicle involved, its ownership, the insurance company that covered the vehicle, the victim and the name of the investigating officer. There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the Respondents."

34. Also, the Appellant availed evidence that she sought medical attention at Webuye Sub-County Hospital on 16th August 2017, but the same information was disputed by DW1, the health records and



information officer at the facility. Further, the Appellant alleged that she sought medical attention at St. Mathias Chimoi Dispensary on 14th August 2017, immediately after the accident but failed to adduce substantive evidence to that effect. The only availed medical treatment notes were from Webuye Sub-County Hospital which were disputed by DW1 as her investigations of the hospital records indicated that no patient with her details visited the facility on 16th August 2017. It is imperative to note that DW1 did not avail any evidence to that effect, but this Court finds it strange that no evidence was availed by the Appellant to show that she indeed was involved in an accident on 14th August 2017, and that she did visit St. Mathias Chimoi Dispensary on the same date for medical attention. PW2 did not visit the scene of the accident or take any sketch plan or map of the area where the accident happened for production in Court. Even if the police abstract indicated that Respondent 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.

35. On the balance I find that the evidence tendered by the Appellant in the lower Court was not direct evidence. It had no probative value and in absence of further evidence connecting it with what happened at the scene, the Court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate Court reasonably make a finding that liability had been established on 100% basis as against the Respondent. At this juncture, it is imperative to hold that I uphold the lower Court's decision on liability.
36. I will address the question quantum of damages. In the lower Court the Appellant submitted that an award of Kshs. 400,000/= under general damages for pain and suffering will be appropriate. Counsel relied on the cases of Veroniah Mkanjala Mnyapara vs Charles Kinanga Babu (2020) eKLR and Carolyne Indasi Mwonyonyo vs Kenya Bus Service Ltd (2012) eKLR where the Court made an award of Kshs. 300,000/= and Kshs. 350,000/= respectively.
37. It is settled law that an appellate Court will not interfere with an award of general damages by a trial Court unless:- (a) the trial Court acted under a mistake of law; or (b) where the trial Court acted in disregard of principles; or (c) where the trial Court took into account irrelevant matters or failed to take into account relevant matters; or (d) where the trial Court acted under a misapprehension of facts; or (e) where injustice would result if the appellate Court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage. (See *Dumez (Nig) Ltd v Ogboli* {1972} 3 S.C. Page 196." Per BADA, J.C.A (P. 28, paras. C-G).
38. Additionally, in *Kivati v Coastal Bottlers Ltd*⁴² the Court of Appeal (Civil Appeal No. 69 of 1984) stated:-

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”
39. Award of damages is an exercise of discretion of the trial Court, but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment.
40. In her judgement, the trial Magistrate held that: -

“Had the Plaintiff succeeded in providing that she was involved in the suit accident then in light of the injuries expressed as sustained by the Plaintiff, by the medical expert who classified



the same as Harm, the Court would have awarded her Kshs. 100,000/= plus costs and interest.”

41. In my view, based on the injuries as captured in the medical report dated 18th August 2017, by Dr. A Charles Andai, it is clear that the Appellant herein sustained moderate soft tissue injuries. Recent awards by superior Courts on soft tissue injuries range from Kshs. 100,000 to Kshs. 300,000/-. Like, in the case of Jyoti Structures Limited & another v Truphena Chepkoech Too & another [2020] eKLR, the High Court awarded Kshs. 125,000/= to a person who had sustained blunt injuries to the head, neck, chest, back, and both thighs. It also made a similar award for a second person who had sustained bruises on the parietal scalp, blunt injury to the chest, and deep cut wounds on the right forearm and right hand and also, In Ogaro & another v Olang' (Civil Appeal 122 of 2019) [2022] KEHC 15465 (KLR), the High Court awarded 150,000/= to a party who had sustained tenderness to the head, neck, thorax, and abdomen as well as swelling in the upper and lower limbs. Also, in Ochola v Owuor (Civil Appeal E039 of 2022) [2024] KEHC 7689 (KLR), the High Court awarded Kshs. 150,000/= to a party who had sustained soft tissue injuries of the right shoulder joint and both knee joint.
42. I have considered the injuries sustained by the Appellant (claimant). They are largely soft tissue injuries, taking into account awards in comparable cases, and the rate of inflation, I find an award of Kshs. 100,000/= is reasonable for compensation for injuries suffered by the Appellant/Claimant if she had proved her case on liability.

G. Conclusion

43. In view of my findings on liability, the inevitable conclusion is that this appeal is unmerited and therefore it fails. I dismiss it and uphold the judgment of the learned Magistrate dated 10th November 2023.
44. The Respondent is awarded costs of this appeal.

Orders accordingly

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 18TH DAY OF DECEMBER 2025.

MWANAISHA.S. SHARIFF

JUDGE

In the presence of:

N/A For Appellant

N/A For Respondent

Peter Machoni- .court Assistant

