



**Gitiche v Mwendwa & another (Civil Appeal 358 of 2023)
[2026] KEHC 92 (KLR) (16 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 92 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 358 OF 2023
H NAMISI, J
JANUARY 16, 2026**

BETWEEN

RICKY MBURU GITICHE APPELLANT

AND

ELIZABETH SYOMBUA MWENDWA 1ST RESPONDENT

BENJO (K) LIMITED 2ND RESPONDENT

*(Being an appeal from the Judgment and Decree of the Hon. V. Kachuodho (S.R.M)
delivered on 30 April 2020 in Thika Chief Magistrate's Court Civil Case No. 695 of 2015)*

JUDGMENT

1. This matter comes before this Court as a first appeal arising from the decision of the subordinate court. The mandate of this Court, sitting as a first appellate court, is well settled. It is not merely a review of the trial court's decision but a retrial on the record. This Court is tasked with the solemn duty to reconsider the evidence, re-evaluate the facts, and draw its own independent conclusions.
2. This principle was established in the locus classicus case of *Selle & Another vs. Associated Motor Boat Company Ltd & Others EA 123*, where the Court of Appeal for East Africa articulated the standard as follows:

“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 demeanor of a witness is inconsistent with the evidence in the case generally."

3. This duty to re-evaluate evidence extends to both questions of fact and law. While the trial court had the advantage of observing the demeanor of the witnesses—an advantage this Court lacks—I am nonetheless required to scrutinize the record to ensure that the findings of the trial magistrate are supported by the weight of the evidence and are legally sound. Where the trial court has misapprehended the evidence or applied wrong principles of law, this Court has the jurisdiction and indeed the duty to interfere.
4. The genesis of this litigation is a road traffic accident that occurred on 8 March 2015 along the Thika – Matuu Road at the Kilimambogo area. The 1st Respondent was a passenger in a matatu registration number KAZ 738L, which was owned by the 2nd Respondent.
5. By Plaint dated 10 July 2015, the 1st Respondent instituted proceedings against the Appellant. She averred that while lawfully traveling in motor vehicle KAZ 738L, the said vehicle was involved in a collision with a lorry, motor vehicle registration number EX 13 KA 39.
6. The 1st Respondent's case was that the accident was caused by the negligence of the driver of the lorry (EX 13 KA 39) and/or the driver of the matatu (KAZ 738L). She pleaded that the Appellant was the beneficial owner, possessor, and/or person having effective control of motor vehicle EX 13 KA 39. Consequently, she sought to hold him vicariously liable for the negligence of the driver of the said lorry. The 2nd Respondent was sued as the registered owner of the matatu KAZ 738L.
7. As a result of the accident, the 1st Respondent claimed to have sustained severe physical injuries, including blunt chest trauma, soft tissue injuries to the back and trunk, and injuries to the limbs. She sought general damages for pain, suffering, and loss of amenities, as well as special damages for medical expenses incurred.
8. The Appellant entered appearance and filed a Defence dated 22 August 2017, in which he denied the claim in toto. In the alternative, the Appellant pleaded that the accident was caused solely by the negligence of the 2nd Respondent's driver or the 1st Respondent herself. The 2nd Respondent also filed a Defence denying liability and attributing blame to the Appellant's driver.
9. At the hearing, the 1st Respondent testified as PW2. She adopted her witness statement and told the court that on the material day, she was a passenger in KAZ 738L. She stated that an oncoming lorry, registration EX 13 KA 39, attempted to overtake another vehicle and encroached into their lane. To avoid a head-on collision, the driver of the matatu swerved but collided with the Airtel van. She sustained injuries and was treated at Matuu Level 4 Hospital and later by Dr. Muli.
10. PW1 was PC Charles Mwadime, a Police Officer attached to Kilimambogo Police Station. He produced the Police Abstract (Exhibit P1) and testified based on the records held at the station. He confirmed that the accident involved motor vehicle KAZ 738L and EX 13 KA 39. Crucially, regarding ownership, he produced a police abstract indicating that the owner of motor vehicle EX 13 KA 39 was recorded as "Ricky Mburu Gitiche" (the Appellant). On cross-examination, he admitted he was not the Investigating Officer and had not visited the scene immediately after the accident but relied on the records in the Occurrence Book (OB).
11. PW3 was Dr. Muli Simeon Kioko, who produced the P3 Form and a Medical Report detailing the injuries sustained by the 1st Respondent. He assessed the injuries as severe soft tissue injuries.
12. The 2nd Respondent called its driver, Lazarus Mutunga Muthini (DW1). He testified that he was driving KAZ 738L towards Matuu when a lorry (EX 13 KA 39) coming from the opposite direction



- suddenly left its lane to overtake. He swerved to avoid a head-on collision with the lorry and ended up hitting a pickup (the Airtel van). He blamed the lorry driver entirely.
13. The Appellant, despite filing a defence denying ownership and liability, elected not to call any witnesses. He closed his case without testifying or calling the driver of the alleged lorry.
 14. In its judgement, the trial court made the following findings. On ownership, the court found that the Appellant was the owner of the motor vehicle EX 13 KA 39, relying on the Police Abstract and the failure of the Appellant to offer evidence to the contrary. On liability, the trial court found that the accident was caused by the negligence of the drivers of both vehicles but apportioned greater blame to the Appellant's vehicle for encroaching into the other lane. The court apportioned liability at 70% against the Appellant and 30% against the 2nd Respondent. The court further awarded the 1st Respondent Kshs 150,000/= as general damages and kshs 5,500/= as special damages.
 15. Aggrieved by this decision, the Appellant lodged this appeal on the following grounds:
 - i. That the Hon. Senior Resident Magistrate erred in law and in fact in failing to find that the suit herein was null and void ab initio having been filed by the Plaintiff who was a minor at the material time and who lacked legal capacity to file suit and this rendered the suit fatally defective;
 - ii. That the Hon. Senior Resident Magistrate erred in law and fact in failing to find that the 1st Respondent had failed to prove that the Appellant was the legal/beneficial owner of motor vehicle EX 13 KA 39 and ignored the binding Court of Appeal decision in *Thuranira Karauri -vs- Agnes Ndeche* [1997] eKLR where it was held that a police abstract is not sufficient proof of ownership;
 - iii. That the Hon. Senior Resident Magistrate erred in law and fact in holding the 2nd Defendant/ Respondent 70% liable for the accident contrary to the evidence on record;
 - iv. That the Hon. Senior Resident Magistrate erred and misdirected himself in law and fact in failing to hold that the accident was caused wholly and/or substantially by the negligence of the driver of motor vehicle KAZ 738L;
 - v. That the Hon. Senior Resident Magistrate erred in failing to hold that the Plaintiff had failed to prove negligence against the 2nd Defendant/Appellant;
 - vi. That the Hon. Senior Resident Magistrate erred in law and fact in failing to find that the Plaintiff's evidence was contradicted by her own witness, namely PW1, and was also inconsistent with the evidence of the 1st Defendant's witness which evidence also contradicted the pleadings contained in the Plaintiff;
 - vii. That the Hon. Senior Resident Magistrate erred in law and fact in awarding erroneous and excessive awards which was not supported by the evidence produced in court so as to amount to an erroneous estimate of damages;
 - viii. That the Hon. Senior Resident Magistrate erred in failing to adequately consider the written submissions and authorities filed and cited by the 2nd Defendant/Appellant's counsel
 16. The appeal was canvassed by way of written submissions.
 17. The Appellant argued that the suit was a nullity ab initio because the 1st Respondent was a minor, aged 17 years, at the time of filing and did not sue through a next friend as required by Order 32 Rule 1 of the Civil Procedure Rules. He argued that this is a matter of substantive law, not a procedural



technicality curable by Article 159 of *The Constitution*. He alleged deliberate deceit and perjury by the 1st Respondent for pleading that she was an adult.

18. The Appellant argued that ownership was not proved. He relied on *Thuranira Karauri vs. Agnes Ndeche* eKLR to argue that a police abstract is insufficient to prove ownership where it is denied in the defence. On liability, the Appellant contended that the 1st Respondent's evidence was contradictory regarding whether there was a physical collision between the lorry and the matatu. On quantum, the Appellant argued that the award of Kshs. 150,000/= was excessive for soft tissue injuries and proposed Kshs. 100,000/= based on *Ndungu Dennis vs. Ann Wangari Ndirangu* eKLR.
19. In her unnecessarily lengthy 40-page submissions, the 1st Respondent admitted that she was a minor at the time of filing but argued that the Appellant is estopped from raising this as he did not plead it in his Defence (Order 2 Rule 4). She argued that the defect is curable and the Appellant suffered no prejudice as she attained majority during the pendency of the suit. She relied on *FKN vs. Simon Ng'ang'a Njoroge* eKLR and *JN vs. Francis Githinji* eKLR.
20. On ownership, the 1st Respondent argued that the Appellant failed to rebut the Police Abstract by calling evidence. She relied on *Joel Muga Opija vs. East African Sea Food Ltd* eKLR, which overturned the rigid position in *Thuranira Karauri*. On liability, the 1st Respondent argued that liability was proved on a balance of probabilities and the Appellant's failure to testify warrants an adverse inference. On quantum, she submitted that the award is reasonable and within the range for similar injuries.

Analysis & Determination

21. Upon a thorough perusal of the Record of Appeal and the submissions, the following issues crystallize for determination:
 - i. Whether the suit was a nullity ab initio due to the 1st Respondent's minority at the time of filing, and whether this defect is curable.
 - ii. Whether the learned trial magistrate erred in finding that the Appellant was the owner of motor vehicle EX 13 KA 39.
 - iii. Whether the finding on liability and apportionment was supported by the evidence.
 - iv. Whether the quantum of damages awarded was manifestly excessive.

Legal Capacity

22. The Appellant has vigorously argued that the entire suit in the lower court was a nullity because the 1st Respondent was a minor at the time of filing but sued in her own name.
23. It is conceded in the submissions that the 1st Respondent was born on 9 August 1997. The suit was filed on 14 July 2015. Simple arithmetic confirms that on the date of filing, she was 17 years, 11 months old. She was approximately one month shy of her 18th birthday. She attained the age of majority on 9 August 2015, while the suit was pending and before the trial commenced.
24. Order 32 Rule 1 of the Civil Procedure Rules mandates:

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.
25. The Appellant argued that this provision is mandatory and substantive. He relied on *Gladwell Otieno vs. Standard Group Limited* eKLR, where the Court struck out a claim by a minor plaintiff who sued



- without a next friend, terming it a substantive flaw not curable by Article 159(2)(d) of *the Constitution*. The Appellant asserts that the 1st Respondent committed perjury by verifying an Affidavit stating she was an adult.
26. Conversely, the 1st Respondent relies on *FKN vs. Simon Ng'ang'a Njoroge eKLR*, where Justice Waweru held that failure to file a written authority of a next friend is a technicality that can be rectified.
 27. I must distinguish the authorities cited. In *Gladwell Otieno* case, the minor was 15 years old and the suit proceeded with the minor as a party throughout. In the present case, the 1st Respondent turned 18 weeks after filing the suit. The purpose of Order 32 is to protect the minor's interests and to provide the defendant with a person liable for costs (the next friend).
 28. The concept of 'nullity' in civil procedure has evolved. The strict application of the MacFoy principle (*MacFoy v United Africa Co. Ltd* 3 All ER 1169)—that you cannot put something on nothing and expect it to stand—has been tempered by the Oxygen Principles (Sections 1A and 1B of the *Civil Procedure Act*) and Article 159(2)(d) of *The Constitution*, which enjoins courts to administer justice without undue regard to procedural technicalities.
 29. While the Appellant argues that capacity is substantive, I am persuaded by the reasoning in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] KECA 767 (KLR), where the court discussed jurisdiction. While jurisdiction is fundamental, procedural missteps regarding capacity can often be regularized if no prejudice is occasioned.
 30. Significantly, the Appellant did not plead this incapacity in his Defence. Order 2 Rule 4(1) of the Civil Procedure Rules requires a party to specifically plead any matter that makes a suit not maintainable. The Appellant raised this issue for the first time in final submissions. This amounts to a trial by ambush, which modern civil litigation seeks to eliminate. If the Appellant had raised this in the Defence in 2017, the 1st Respondent, who was by then an adult, could have amended the pleadings or the court could have made orders under Order 32 Rule 2.
 31. Furthermore, Order 32 Rule 12 provides a procedure for a minor plaintiff who attains majority during the pendency of a suit. While the 1st Respondent did not formally apply to adopt the proceedings, her conduct of continuing the suit personally after turning 18 constitutes an implied adoption.
 32. The Appellant's argument regarding perjury is noted, but I find no evidence of malicious intent to defraud the court. It appears to be an error by counsel or the litigant regarding the exact date of majority relative to the filing date. To strike out a suit for personal injuries where the plaintiff has undeniably suffered harm, simply because she filed 25 days too early without a next friend, would be the height of technicality defeating justice.
 33. I find that the defect was an irregularity, not a nullity. It was cured by the 1st Respondent attaining the age of majority shortly after filing and prosecuting the case as an adult. The Appellant suffered no prejudice as he defended the suit against an adult plaintiff. This ground of appeal fails.

Proof of Ownership

34. The Appellant contends that the trial court erred in relying on a Police Abstract to find that he was the owner of motor vehicle EX 13 KA 39. He relies on the Court of Appeal decision in *Thuranira Karauri vs. Agnes Ndeche eKLR*, which held that where ownership is denied, a plaintiff must produce a search certificate from the Registrar of Motor Vehicles.



35. The legal position on this issue has shifted significantly since 1997. The strict requirement in *Thuranira Karauri* has been distinguished and effectively overturned by subsequent Court of Appeal decisions which prioritize the availability of evidence and the conduct of parties.
36. The leading authority now is *Joel Muga Opija v East African Sea Food Limited* [2013] KECA 181 (KLR). In that case, the Court of Appeal held:

“We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”
37. The Court in *Joel Muga Opija* case reasoned that a Police Abstract, being an official Government document produced by a public officer, constitutes prima facie evidence of the facts contained therein, including ownership. Once produced, the evidentiary burden shifts to the defendant to rebut it.
38. In the trial court, the 1st Respondent produced the Police Abstract (Exhibit P1) through PW1, PC Charles Mwadime. The abstract listed "Ricky Mburu Gitiche" as the owner of EX 13 KA 39. The Appellant denied ownership in his Defence but, crucially, did not testify or call any evidence to rebut the abstract.
39. Section 112 of the *Evidence Act* provides that the burden of proving any fact especially within the knowledge of any person is upon him. Whether the Appellant owned the vehicle was a fact especially within his knowledge. It would have been effortless for him to produce a search certificate showing a different owner or a sale agreement showing he had sold it. He chose to remain silent.
40. As held by the Court of Appeal in *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited* [2009] eKLR, where a party fails to call evidence in support of its case, its pleadings remain mere statements of fact and the evidence tendered by the opponent stands uncontroverted.
41. I also refer to the case of *Stephen Gachau Githaiga & Another v Attorney General* eKLR, cited by the Respondent, which reinforces that uncontroverted evidence meets the standard of proof on a balance of probabilities.
42. Consequently, I hold that the Police Abstract, in the absence of any rebuttal evidence from the Appellant, was sufficient proof of ownership. The trial court correctly applied the principle in *Joel Muga Opija* case and rightfully distinguished or departed from the archaic strictness of *Thuranira Karauri*.

Liability and Negligence

43. The Appellant challenges the finding of liability, arguing that the 1st Respondent's testimony contradicted the testimony of the Police Officer and the 2nd Respondent's driver, who said the lorry forced the matatu off the road but did not physically hit it.
44. PW2 stated that the lorry, Appellant's vehicle, was overtaking and hit the side of the matatu. DW1, the 2nd Respondent's driver, testified that the lorry came into his lane to overtake. He swerved to avoid a head-on collision and hit the Airtel van. He blamed the lorry for encroaching. PW1, the Police Officer, confirmed the accident involved the matatu and the lorry (as per the abstract) but admitted on cross-examination that the physical impact was between the matatu and the Airtel van.



45. Liability in negligence does not strictly require physical contact between vehicles. A driver who creates a dangerous situation e.g., by improper overtaking, that forces another driver to take evasive action resulting in an accident is liable for the agony of the moment. This principle was elucidated by Lord Reid in *Stapley v Gypsum Mines Ltd* AC 663, cited with approval in *Michael Hubert Kloss & Another v David Seroney & 5 others* eKLR. The Court stated:
- “The question must be determined by applying common sense to the facts of each particular case. One may find that... if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them.”
46. The learned trial Magistrate found that the Appellant's lorry encroached into the lane of the matatu. This finding is supported by the evidence of DW1 and the 1st Respondent. The discrepancy about whether there was physical contact is immaterial to the cause of the accident. The proximate cause was the lorry's encroachment.
47. Furthermore, the doctrine of *res ipsa loquitur* is applicable here. The 1st Respondent was a passenger. She is not required to explain the minute details of the collision. She relied on the negligence of both drivers. The Appellant, having been accused of encroaching into the oncoming lane, had a duty to explain his driver's conduct. His failure to call the driver or testify allows this Court to draw an adverse inference that he had no valid defence.
48. I find that the apportionment of liability was a reasonable assessment of the contribution of each driver to the accident. I see no reason to disturb this finding.

Quantum of Damages

49. The Appellant argues that the award of Kshs. 150,000/= for general damages is inordinately high and proposes Kshs. 100,000/=.
50. An appellate court will only interfere with an award of damages if it is shown that the trial court proceeded on wrong principles or that the award is so inordinately high or low as to represent an entirely erroneous estimate. This principle was settled in *Butt v Khan* KLR 349.
51. The medical evidence confirms the 1st Respondent suffered tenderness of severe degree to the anterior chest, tenderness of the back and body trunk of severe degree, tenderness of the right hand and bruises and tenderness of both knees. Dr. Muli classified these as severe soft tissue injuries.
52. The Appellant relied on *Ndungu Dennis v Ann Wangari Ndirangu* eKLR, where Kshs. 100,000/= was awarded. However, the injuries there were described as minor bruises on the back and tenderness on the leg. The 1st Respondent's injuries herein appear more serious.
53. The Respondent cited *Yusuf M. Hamza & Another v Farida Pendo Kapumu* eKLR in which the plaintiff was awarded Kshs. 180,000/= for multiple cuts.
54. In *Purity Wambui v Highlands Mineral Water Co. Ltd* [2015] eKLR, an award of Kshs. 120,000/= was upheld for soft tissue injuries.
55. Taking into account inflation and the nature of the injuries, an award of Kshs. 150,000/= is squarely within the acceptable range. It is neither inordinately high nor low. The Appellant's proposal of Kshs. 100,000/= is not significantly different enough to warrant appellate interference under the *Butt v Khan* principle.



56. Having re-evaluated the entire case, I find that the Appellant has failed to demonstrate any error of law or fact in the trial court's judgment.

57. Accordingly, this appeal is dismissed. Costs, assessed at Kshs 50,000/-, are awarded to the Respondents.

DATED AND DELIVERED AT THIKA THIS 16 DAY OF JANUARY 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered virtually in the presence of:

For Appellant: Mr Thuo

For 1st Respondent: N/A

For 2nd Respondent: N/A

Court Assistant: Lucy Mwangi

