Joram v Maina (Civil Appeal E111 of 2024)
[2026] KEHC 331 (KLR) (21 January 2026) (Judgment)

Neutral citation: [2026] KEHC 331 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E111 OF 2024

RM MWONGO, J

JANUARY 21, 2026

BETWEEN

JOHN NJERU JORAM ..... APPELLANT

AND

HELLEN WANJA MAINA ..... RESPONDENT

(Appeal arising from the decision of Hon. D. Endoo in Embu MCCC No. E118 of 2022 delivered on 26 th November 2024)

JUDGMENT

The Appeal

1. Through a memorandum of appeal dated 11th December 2024, the appellant seeks the following orders:

    1. That the Appeal be allowed and the judgement delivered on 26th November 2024 in Embu CMCC 118 of 2022 be varied and or set aside;

    2. That this Honourable court be pleased to evaluate the law and evidence on record and make its own finding and judgement; and

    3. That the Appellant be awarded costs of the appeal herein and costs of the suit in the trial court.

2. The appeal is premised on the grounds that:

    1. That the Learned trial magistrate erred both in law and fact by apportioning liability at 80:20 against the defendant (appellant) which was in appropriate in view of the evidence on record;

    2. That the Learned trial magistrate erred both in law and fact by awarding Kshs.1,000,000/= as general damages for pain, suffering and loss of amenities which award was excessive in the circumstances and in view of the evidence on record;

3. That the learned trial magistrate erred both in law and fact by awarding special damages of Kshs.912,069/= without supportive evidence or receipts and disregarding the fact that the supportive documents were either invoices or N.H.I.F payments; and

4. That the learned trial magistrate erred both in law and fact by failing to consider the submissions made on behalf of the appellant and the authorities cited.

Background

3. In the lower Court, the respondent filed an amended plaint seeking judgment against the appellant for general damages, special damages of Kshs.1,165,050/=, costs of the suit and interest. Her case was that on 30th March 2020 along the Embu-Kiritiri Road near Maguna Andu super market within Embu Town, while the Plaintiff was walking along the said road. The defendant's driver, his agent and/ or servant drove Motor Vehicle registration number KBK XXXX, drove, managed and/or controlled the Motor Vehicle registration number KBK XXXX so negligently that he caused it to knock down the plaintiff, who was off the road, as a result of the accident, she suffered serious bodily injuries. She was treated at Embu level 5 Hospital and later to Kijabe hospital. Having suffered loss and damage, she claimed damages.

4. The appellant filed a statement of defense denying the averments made in the plaint and demanded that the allegations be strictly proved.

Summary of the Evidence in the trial Court

5. PW1 was the respondent who stated that she was walking beside the named road when she was hit by the appellant's vehicle from behind. She fell down and was rushed to Embu Level 5 Hospital by some well-wishers. She was transferred to AIC Kijabe Hospital the same day for further treatment where she was admitted from 31st March 2020 to 29th April 2020. After she was discharged, she had to go for monthly check ups and the treatments cost a total of Kshs.1,165,000/=. In cross-examination, she stated that she did not hear hooting as the appellant's vehicle approached her from behind. The vehicle stepped on her leg and then stopped a few meters ahead. She stated that the place where the accident happened was very busy that day. That she reported the matter at the police station after she was taken to the hospital. After her treatment, she still needs painkillers to manage pain.

6. PW2 was John Macharia Muhoro, PW1's husband, who stated that he was at work when PW1 called to inform him that she had been involved in a road traffic accident. He found her at Embu Level 5 Hospital where she was being treated. PW1 was referred to AIC Kijabe Hospital and so he arranged for an ambulance to take them there. They arrived there the following morning at 2am and PW1 was admitted. She stayed there for close to 1 month under treatment and it cost a lot of money for which she should be compensated. In cross-examination, he stated that he did not witness the accident but he found PW1 at the hospital. He reported the matter at Embu Police Station on 30th March 2020 at around 3pm.

7. PW3 was Patrick Kungu Joram who stated that PW1 called him informing him of the accident and that she was at Embu Level 5 Hospital. He rushed to the said hospital where he found her undergoing treatment. That PW1 was referred to AIC Kijabe for further treatment and he helped to hire an ambulance to transport her there where she was admitted for close to 1 month. He stated that even after her treatment, PW1 needed periodic checkups. The treatments costs PW1 and her family a lot of money for which they should be compensated. In cross-examination, he stated that PW1 had been taken to Embu Level 5 Hospital by good Samaritans where he found her. That they reported the matter to the police that day.

8. PW4 was PC Agnes Gitau of Embu Police Station who stated that the accident was reported at the police station on 30th March 2020 by PW2 who narrated the circumstances of the incident. That PC Muchiri visited the scene after the matter was reported. On cross-examination she stated that the matter was investigated by PC Muchiri who was transferred from Embu. That she did not know the exact point of impact and that the P3 indicated that the accident happened while she was crossing the road. She did not have contrary evidence.

9. PW5 was Dr. Stephen Maina Wambugu who produced a medical report stating that the respondent suffered a fracture on the right tibia and fibula, fracture of the 1st – 4th metatarsals of the right foot an she had a wound on the back of the right foot. She had received treatment at Embu Level 5 Hospital before being transferred to Kijabe Hospital. Several medical interventions were done and afterwards, the respondent complained of pain while standing and stiffness of the small toe and pain on the ankle when she was standing. She had made a full recovery but she still has difficulty standing for long and walking.

10. DW1 John Njeru Joram stated that while driving along the mentioned road, the respondent was crossing the road when it was not safe to do so, and as such, her leg was caught in the front tyre of his car and she got injured. He blamed her for the accident but he still took her to the hospital and then reported the matter at the police station. In cross-examination, he stated that he could not prove that he took the respondent to the hospital. He stated that the respondent put a foot in the road first because she was trying to cross the road in front of the car. After he took the respondent to the hospital, he paid the bill and did not keep any documents because he thought that the matter had been resolved.

Findings of the trial court

11. The trial court assessed liability at 80%:20% against the appellant and made an award on quantum as follows:

    1. General damages- Kshs.1,000,000/=
    2. Special damages- 912,069/=
    3. Costs to the respondent.

Parties' Submissions on the appeal

12. The appeal was canvassed by way of written submissions as directed by the Court.

13. The appellant submitted that there was no evidence proving that the appellant was driving the motor vehicle in a negligent manner hence the trial court's finding on liability is faulty. He relied on the case of Anita v Aseno (Suing as the personal and legal representative of the Estate of Brighton Otieno Ouya (Deceased) (Civil Appeal 227 of 2017) [2023] KEHC 26217 (KLR) where liability was apportioned at 50%:50%, the court noting that the pedestrian also had a responsibility to ensure that the road was clear before attempting to cross.

14. He also relied on the case of Nicolas v Wells Fargo Limited [2025] KEHC 2333 (KLR) where the court awarded general damages of Kshs.800,000/= for similar injuries. He suggested that the damages awarded by the trial court under this head be reduced to that amount against a liability of 50%:50%. Regarding the award of special damages, the appellant stated that there was proof that most of the medical costs were covered by NHIF, hence the respondent was not entitled to the special damages. He relied on the case of Mwaura & another v Njoroge (Civil Appeal 226 of 2023) [2025] KEHC 12684 (KLR) and urged the court to award Kshs.39,500/= which was proved through receipts.

15. The respondent stated that her testimony was not credibly challenged. She relied on section 107 of the *Evidence Act* and the cases of North End Trading Company Limited (Carrying on business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi (Civil Case 731 of 2008) [2019] KEHC 10180 (KLR) and Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another [1997] KECA 336 (KLR).

16. She argued that the appellant's defense did not challenge the plaintiff's evidence on liability and he cannot challenge the same in the appeal. That the trial court's assessment of damages is also fair and just and it should not be disturbed. Further reliance was placed on the case of Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] KEHC 8693 (KLR).

Issues for Determination

17. The issues for determination are:

    1. Whether the trial court's assessment of liability is fair;

    2. Whether the trial court's award of damages should be reviewed.

Analysis and Determination

18. As a first appellate court, it is the duty of this court to examine the evidence adduced before the trial court afresh. It must then re-evaluate the evidence and make its own conclusions. This was held in the case of Coghlan v. Cumberland (1898) 1 Ch. 704, where the English Court of Appeal stated as follows:

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

19. Liability is a matter of fact; hence, this court must re-evaluate the circumstances under which the accident in question occurred. Matters of fact are determined from evidence and the burden of proof lies on the party alleging any facts to prove them. In a similar vein, Section 107 (1) of the *Evidence Act* provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

20. The evidential burden is further established under sections 109 and 112 of the *Evidence Act*. In the case of Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] KEHC 8440 (KLR) the evidential burden was discussed and the court stated that:

> " As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given by either side."

21. PW1, the respondent, stated that she was walking beside the road when the appellant drove his motor vehicle so negligently that one of the tyres of the vehicle ran over her leg. DW1, the appellant, testified that he was driving along that same road and the respondent placed her foot on the road ready to cross but her leg was caught up in the tyre and she got injured. Both parties stated that the place where the accident occurred was busy and the appellant stated that he was not speeding but was driving at 10KPH.

22. The Court of Appeal in Michael Hubert Kloss & another v David Seroney & 5 others [2009] KECA 146 (KLR) held that:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> > 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and 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. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally..."'

23. The respondent denied that she was crossing the road at the time of the accident. She said that she was walking alongside the road and was hit from behind on her leg. The learned trial Magistrate in apportioning Liability at 80: 20 in favour of the plaintiff did not expressly state how the apportionment was arrived at. She did state that the Police Abstract blamed the defendant, and that the defendant stated that he only saw the plaintiff after the accident.

24. DW1, the driver, said he was driving at about 10 km/h because of the heavy 5.00 p.m traffic. He testified that:

> " She, (the plaintiff) looked behind. Her leg was trapped in the front tire."

This means that, according to the Driver, the plaintiff was hit from behind. In cross-examination, the defendant said she emerged suddenly on the road, and yet he also said, "I only saw her after the accident". It appears that, clearly, he - the driver was not paying attention, and did not use his emergency brakes to pre-empt the accident having said he was driving at a mere 10 kph.

25. The respondent also testified that the car ran over her leg from behind her, and it did not hoot to alert her that it was approaching. PW5 testified that there was a wound at the back of the respondent's leg and a skin graft was added to enable healing of the wound. That there were fractures on her tibia, fibula and 1st – 4th metatarsals.

26. Further, from the injuries described, it appears clear that the vehicle ran over the respondent's foot from behind and not sideways as described by the appellant. The doctor described a wound at the back of the right foot. Therefore, the findings of the trial court on liability need not be disturbed as they are fair and in consonance with the evidence.

27. On the issue of quantum, the appellant challenged the award of general damages and urged the court to reduce the award to Kshs.800,000/=. In reaching its finding, the trial court was guided by the case of David Mutembei v Maurice Ochieng Odoyo [2019] KEHC 1435 (KLR) where the plaintiff had suffered similar injuries as the ones suffered by the respondent herein. The court upheld an award of Kshs.1,600,000/= as general damages against a ratio of 50%:50%. The respondent suffered the following injuries: distal fracture of tibia, fibula, 1st 2nd 3rd and 4th metatarsals and a wound on dorsum of right foot.

28. In Sundries Bargains (Nairobi) Limited v Richard Karinga Mwangi [2019] eKLR, the High Court substituted the lower court award on general damages from Kshs. 600,000/= down to Kshs. 400,000/= where the Plaintiff suffered fracture of the lower right fibula, swollen right leg, blisters right foot, soft tissue injuries and fracture of the 2nd metatarsal.

29. In an older case, Samuel Mungai Niau v Wanainchi Sanitary & Hardwar Ltd (2004) eKLR, the High Court awarded general damages of Kshs. 150,000/= where the Plaintiff suffered (a) crushed leg, compound fracture of the right tibia and fibula (b) fracture of 1,2, 3rd and 4th metatarsal of right foot, and (e) superficial wounds over right arm. The doctor who confirmed the injuries noted the leg would have been amputated but they managed to save it.

30. More recently in the case of Muriuki v Mbaabu [2025] KEHC 402 (KLR), the plaintiff suffered the following injuries:a. Injury to both upper limbs; b. Injury to the right lower limb; c. Swollen tender and dysfunctional right arm near the right shoulder joint; d. Swollen tender and dysfunctional left arm; e. Deformed, swollen and tender right leg; f. Fracture of the right proximal humerus; g. A comminuted fracture of the left proximal humerus; and h. Fractures of the distal tibia and fibula bones. These injuries appear to be a little more severe than those suffered by the respondent herein. In that case, the court awarded Kshs.1,000,000/= as general damages.

31. Considering all relevant factors an award of Kshs.800,000/= as general damages for pain and suffering is fair in the circumstances of this case.

32. As for the award of special damages, the trial court notes that the amount was pleaded and proved. However, from the evidence adduced, a sum of Kshs.116,000/= of the medical bill was paid by NHIF and another sum of Kshs.767,958/= was paid by Medical Administrator Kenya Limited which handles medical insurance services for the respondent's former employer (TSC).

33. It is settled law that when medical expenses are paid by an insurer, the claimant cannot claim the same amount since it is obvious that they did not spend it. Special damages are meant to recompense a party who was forced to spend money as a result of the accident. The court in Mwaura & another v Njoroge (supra) stated that:

> "It is important to note that where an insurance company has already compensated their client, the said client can only go to court to claim the said compensation from the tortfeasor with the consent and authority of the insurance company. Any material damages awarded will be for the benefit of the insurance company but not for the plaintiff who has instituted the suit. The insurance company cannot use its name to claim from the tortfeasor or from a 3rd party. It must be clear in the plaint that the case has been filed by the party concerned under the doctrine of subrogation. Such a party cannot enjoy the damages awarded for the reason that he has already been compensated. Section 43 of the National Hospital Insurance Fund (NHIF) has provisions that place its Board as the beneficiary of such funds claimed from a tortfeasor and awarded by the court.
>
> In this appeal, it is noted that the respondent claimed damages from the appellant in respect of hospital bills already paid for him by NHIF. In his plaint and in his evidence, there was no indication that the respondent had obtained consent or authority to file the case for damages from the NHIF."

34. Through the plaint, the respondent claimed special damages of Kshs.1,165,050/=. However, Kshs.883,958/= was settled by insurance companies. Therefore, the only amount remaining that could have been pleaded is Kshs.281,042/=. The respondent was discharged on 01st May 2020 from AIC Kijabe Hospital where she had been admitted from 31st March 2020. The receipts produced as evidence are only held to be legitimate where the dates on them fall outside this 31-day period. These receipts make a total of Kshs.20,700/=, and this is the amount that I find was proved.

Disposition

35. In the result, the appeal partially succeeds. Accordingly, I make the following orders:

    1. The findings of the trial court on liability are hereby upheld at 80%:20% against the respondent;
    2. The findings of the trial court on damages are set aside and substituted as follows:
        i. General damages: Kshs.800,000/=
        ii. Special damages: Kshs.20,700/=
    3. Costs of this appeal to the appellant;
    4. All monetary awards shall be subjected to interest at court rates from the date of judgment in the lower Court until payment in full.

36. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 21ST DAY OF JANUARY, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Mwinja holding brief for Ithiga for Appellant

Murimi holding brief for Ndeke for Respondent

Francis Munyao - Court Assistant