



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

CIVIL APPEAL NO. E159 OF 2022

GEOFFREY KIRAMBETI M'IMANJA.....APPELLANT

VERSUS

RUFUS MURITHI KARURU.....1ST RESPONDENT

**EVELYN GAKII KABURU.....2ND
RESPONDENT**

**(Being an Appeal from the Judgment of Hon. M.A Odhiambo (SRM)
in Meru CMCC No. 110 of 2016 delivered on 28th of October, 2022)**

JUDGMENT

1. This Appeal arises from the judgment of the Learned Senior Resident Magistrate Hon. M.A. Odhiambo delivered on 28.10.2022 in Meru Civil Suit No. 110 of 2016, wherein judgment was entered in the following terms;

1. Liability 50%
2. General Damages Ksh. 400,000
3. Special Damages Ksh. 5,000

2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 25th November, 2022;

1. The learned Trial Magistrate erred in law and fact when the Court found the plaintiff 50% liable when his liability was not proved by the defense and believing in a single defense witness.
2. The learned Trial Magistrate erred in fact and law in disregarding the plaintiff's evidence and that of his witnesses.
3. The learned Trial Magistrate erred in law and fact in awarding damages that were dismally low, all circumstances considered.
4. The Court erred in law and fact by disregarding the medical evidence adduced by Dr. Umoro yet the respondents were not able to challenge the same.
5. The award was against the weight of evidence and there was no sufficient evidence to enter judgment in the lower court as was entered.

Evidence at trial

3. **PW1 Geoffrey Kirambeti**, the Appellant herein, adopted his witness statement dated 7/4/2016 as his evidence in chief and produced the list of documents filed therewith as exhibits. He told the court that he sustained injuries to the head, hand and a fracture of the right leg, which was yet to heal, and he was treated at

Muthara and Meru Teaching and Referral Hospitals. He was walking on the edge of the road, at night, when the over speeding vehicle veered off the road, hit him and fled the scene. He was working with Red Cross at Lokichogio before the accident, and he was not drunk.

4. **PW2 Marias Buianga**, a businesswoman and an eye witness, adopted her statement dated 17/2/2022 as her evidence in chief. She told the court that the Appellant was walking in front of her at around 7.30 p.m, when a vehicle, which was over speeding, veered off the road and she saw the Appellant on the ground. There was a market center at the scene of the accident, and the Appellant was neither drunk nor crossing the road.
5. **PW3 Shadrack Mwenda**, adopted his statement dated 17/2/2022 as his evidence in chief. He told the court he was heading to the market when he witnessed the accident happen, and he blamed the driver of the vehicle.
6. **PW4 Dr. Omuro Adan** of Meru Teaching and Referral Hospital, produced the Appellant's medical report as exhibit 7. When he examined the Appellant on 20/1/2022, 10 years after the accident, he had a deformed leg, healed scars on the right knee, 2 puncture marks on the right hand, injuries on the ankle with a deformed feet, a deviated foot, and although the fracture had healed, he assessed the degree of permanent deformity at 30%.

7. **PW5 P.C Galgalo Boru** produced the police abstract as exhibit 1. He told the court that he was not the investigating officer, and he relied on the statement of the driver, who claimed that the pedestrian was crossing the road from right to left.

8. **DW1 Rufus Kirimi**, the 1st Respondent, adopted his statement dated 8/1/2020 as his evidence in chief. He told the court that the Appellant crossed the road from right to left at close proximity, he saw him and slowed down since it was at night, but unfortunately hit him. If there had been space, he would have swerved, and after he made a report at the next road block. The Appellant was taken to the hospital. The Appellant was intoxicated and unconscious at the time of the accident, and he was unaware whether the Appellant was charged. He denied veering off the road, and although he applied brakes and hooted, the Appellant emerged from the back of the lorry right into his lane, when he was hit.

Submissions

9. The Appellant through the firm of M.G Kaume & Company Advocates filed submissions dated 4/8/2025, faulting the trial court for failing to consider all the evidence adduced in court by the Appellant proving his case on a balance of probabilities. Counsel further faulted the trial court for awarding inordinately low general damages, which were not commensurate with the injuries sustained by the Appellant, and cited **Zipporah Nangila v Eldoret Express**

Ltd & 2 Others (2016) eKLR, Dorcas Wangithi Nderi v Samuel Kivuru Mwaura & Another [2015] KEHC 5180 (KLR) and Alex Wachira Njagua v Gathuthi Tea Factory & Another [2010] KEHC 3034 (KLR).

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10. The Respondents, through the firm of Mithega & Kariuki Advocates filed submissions dated 25/7/2025, citing **Gitobu Imanyara & 2 Others v Attorney General (2016) KECA 557 (KLR)**, on the duty of the first appellate court. Counsel faulted the police officer for failing to enlighten the court on the circumstances leading to the occurrence of the accident, in his capacity as an investigator or an officer with access to the results of the investigations, and cited **Peter Matara & 2 Others v Alloy Kenyatta Kevongo (2017) eKLR**. Counsel argued that it was impracticable for one person to be knocked down by a speeding motor vehicle on a busy road, and the apportionment of liability in the ratio of 50:50 was justified. Counsel contended that the injuries pleaded by the Respondent and ascertained by the P3 and discharge summary were soft tissue in nature, and the non-consideration of the medical report by Dr. Umuro was well-founded. Counsel cited **Ndungu Dennis v Ann Wangari Ndirangu & Eddah Mwihi (Civil Appeal 54 of 2016) [2018] KEHC 8799 (KLR) (1 February 2018) (Judgment), Ndungu v Maina (Civil Appeal E139 of 2021) [2023] KEHC 21312 (KLR) (28 July 2023) (Judgment) and George Kinyanjui T/A Climax Coaches & another v Hussein**

Mahad Kuyale [2016] KEHC 7251 (KLR) in support of the award of Ksh. 400,000 made by the trial court.

Analysis and Determination

11. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.

12. In **Selle & another v Associated Motor Boat Co. Ltd [1968]**

EA, the court held as follows: ***“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.”***

13. I have considered the appeal herein, the trial court’s judgment, which is the subject of this appeal, as well as the submissions by counsel.

14. From the grounds of appeal, the twin issues for determination are whether liability was proved and whether the award of Ksh. 400,000/- was inordinately low as to amount to an erroneous estimate of the pain suffered by the Appellant.

15. The age-old principle of law is that he who alleges must prove.
16. While PW1, PW2 and PW3 contended that the vehicle veered off the road and hit the Appellant, DW1 faulted the Appellant for contributorily causing the accident by carelessly crossing the road while drunk.
17. The Appellant insisted that the vehicle was over speeding and he vehemently denied the Respondents' contention that he was crossing the road when the accident occurred. He stated on thorough cross examination that, ***"It was at night. There were people on the road. The vehicle veered off the road and hit me. The others were far from the road. I was not drunk."*** His testimony was corroborated by PW2 who stated that, ***"PW1 was walking in front of me. There is a vehicle which was from Maua-Meru. I saw it veer off the road. I heard a loud noise and saw PW1 on the ground. The vehicle was at a high speed. There were other people around that area. There is a market center. We were all on the road at the pedestrian walk. PW1 was not crossing the road."***
18. PW3 recorded in his statement, which he adopted as his evidence in chief that, ***"I was walking off the road on pedestrian path about 5 meters from the tarmac. That the plaintiff was walking a head of me in the same direction about 40 meters away. Within seconds I saw the said motor vehicle leaving***

it's lane and coming towards the pedestrian's path without any signal or indication or hooting. It was at a very high speed. I shouted and all who were on the road started running for safety far away from the pedestrian path, to the extreme left side of the road facing Maua. Unfortunately Geoffrey (plaintiff) who was a head of me was caught by the said motor vehicle and hit him when he was about 5 feet from the road. The motor vehicle returned to its lane and stopped at Muthara and drove to Muthara police station."

That evidence was not in any way broached on cross examination.

19. I find that the Appellant led consistent and corroborative evidence to prove that the Respondents were wholly to blame for the accident. Sight must not be lost of the fact that the burden of proof on the Appellant, was, at all times, on a balance of probabilities, and not higher.

20. Consequently, I find that the Respondents were 100% liable for the accident, and the trial court's apportionment of liability at 50% was erroneous and unsupported by the evidence on record.

21. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the *locus classicus* case of ***Butt v Khan [1978] eKLR*** thus; ***"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.”

22. The injuries sustained by the Appellant are particularized at paragraph 5 of the plaint as injuries on the head, injuries to the hands and bruises all over the body. The injuries listed on the P3 form are bruises on the forehead, a wound on the scalp, bruised left iliac region, bruised right elbow region and bruises around the knee joint. When an X-ray was performed, it was evident that the Appellant had not suffered any fracture. Conversely, the injuries reproduced by Dr. Umuro, in his medical report, encompassed a compound tibiofibular fracture on the right leg.

23. In ***Ndungu Dennis v Ann Wangari Ndirangu & Eddah Mwihaki [2018] KEHC 8799 (KLR)***, cited by the Respondents, the court (Joel Ngugi, as he then was) set out the criteria upon which the findings in a medical report can be disregarded as follows; ***“31. In this case, as I observed above, it would appear that either the Learned Trial Magistrate proceeded without a proper finding of the actual injuries suffered by the Respondent or he erroneously relied on the Medical Report by Dr. Mwaura which was inconsistent and less reliable than the other medical documents tendered. This is one ground to interfere***

with the assessment of quantum by the Learned Trial Magistrate. 32. Secondly, if one takes into consideration the actual injuries suffered by the Respondent - to wit soft tissue injuries to the lower right leg and to the back - it becomes readily obvious that an award of Kshs. 300,000/= is manifestly excessive. 33. Given the policy goal of Courts to try to compensate comparable injuries as far as possible by comparable awards, these two factors call for this Court to revise the quantum awarded to the Respondent. In my view, an award of Kshs. 100,000/= would be adequate to compensate for the injuries suffered in this case."

24. I find that the injuries sustained by the Appellant were soft tissue in nature, and the award of Ksh. 400,000/- was commensurate with the pain he underwent.

25. In conclusion, I find the appeal partially merited, and it is hereby allowed in the following terms:

1. Liability is apportioned at 100% in favour of the Appellant against the Respondents.
2. The award of damages of Ksh. 400,000/- remains unchanged.

DATED AND DELIVERED AT MERU THIS 27TH DAY OF JANUARY, 2026.

S.M. GITHINJI

JUDGE

APPEARANCES:

Ms. Kaume for the Appellant (Absent)

Mr. Kariuki for the Respondent (Absent)