



**Nzuki & another v Munyithya (Civil Appeal E155 of 2024)  
[2026] KEHC 934 (KLR) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 934 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E155 OF 2024  
RC RUTTO, J  
JANUARY 29, 2026**

**BETWEEN**

**WINFRED KAKUI NZUKI ..... 1<sup>ST</sup> APPELLANT**

**RYCE EAST AFRICA LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BONFACE MUTHENGI MUNYITHYA ..... RESPONDENT**

*(An appeal from the judgment and decree of the Principal Magistrate's Court at  
Kitihimani (Wechuli, PM.) delivered on 16th May 2024 in PMCC No. E214 of 2021)*

**JUDGMENT**

1. This appeal challenges both liability and quantum. The respondent, through a plaint dated 28th October 2021, sued the appellants seeking general and special damages amounting to Kshs.6,550/-, together with costs and interest, arising from a road traffic accident that occurred on 27th November 2020. The 1st appellant was sued as the insured, beneficial owner, and driver of motor vehicle registration number KCT 476W, while the 2nd appellant was sued as the registered owner of the said vehicle.
2. The respondent averred that on the material day, he was a pillion passenger aboard motorcycle registration number KMFE 654L along the Mwingi–Matuu road. Upon reaching Kitui Junction, motor vehicle KCT 476W was allegedly driven negligently and carelessly, encroaching onto the motorcycle's lane and causing an accident. As a result, the respondent sustained bodily injuries.
3. The appellants filed a defence denying liability, and the matter proceeded to full hearing. In its judgment delivered on 16th May 2024, the trial court apportioned liability equally, at 50:50, between the respondent and the appellants jointly. The court awarded the respondent general damages of Kshs. 1,800,000/- and special damages of Kshs. 6,550/-, together with costs and interest. After deducting 50% contribution, the net award amounted to Kshs. 903,275/-.



4. Dissatisfied with the Judgment, the appellant lodged this appeal on four grounds summarized as follows; that the trial court apportioned liability without proper justification; the trial court erred in failing to apportion liability against the third party; and that the award of damages was grossly excessive.
5. On these grounds, the appellants prayed that the appeal be allowed, execution of the judgment stayed, and the trial court's decision set aside. They further sought substitution of the award on general damages with a commensurate award, a reevaluation of both liability and quantum, and costs of the suit and this appeal.
6. The appeal was canvassed through of written submissions. The appellants relied on their submissions dated 21<sup>st</sup> March 2025 while the respondent submissions were dated 9<sup>th</sup> May 2025.

### **Appellant's submissions**

7. The appellants outlined the background of the case and argued that the trial court failed to properly analyze the evidence, thereby arriving at an erroneous finding on both liability and quantum. They urged this court to reconsider the evidence and reach its own conclusion, as guided by the principles in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR.
8. On grounds one and two, the appellants contended that the trial court misapprehended the evidence on liability and apportioned it unfairly against them. They further submitted that the court failed to correctly apply the principles of negligence. In support, they cited *Caparo Industries PLC v Dickman* [1990] 1 ALL ER 568 and *Chun Pui v Lee Chuen Tal* [1988] RTR 298.
9. The appellants argued that the testimony of PW1 did not provide a complete account of the events leading to the accident. They emphasized that DW2 confirmed PW1, PW2, and the deceased were intoxicated and chewing khat at the time of the incident.
10. Regarding the police abstract, the appellants submitted that it did not attribute blame to either party. They further argued that its production offended section 33 of the *Evidence Act*, since the witness who produced it was neither the investigating officer nor the person who prepared the abstract. In their view, the respondent failed to discharge the burden of proof required under sections 107, 109, and 112 of the *Evidence Act*. They relied on *Simba Commodities Ltd v CitiBank N.A* [2013] eKLR to reinforce this position.
11. The appellants also challenged the dismissal of the suit against the third party. They maintained that, contrary to the trial court's findings, they had adduced direct and compelling evidence establishing contributory negligence on the part of the rider and the third party, which the court ignored. They argued that DW1 had the right of way, being already on the highway, while the third party encroached from a feeder road. This, they submitted, was evident from the photographs produced in evidence.
12. For these reasons, the appellants urged that liability should have been apportioned at 30:70 in their favor as against the respondent.
13. On grounds three and four, the appellants submitted that the trial court misdirected itself by applying the wrong principles in assessing damages for the injuries sustained. They argued that the award of general damages awarded was inordinately high, oppressive, and punitive, and did not reflect the actual loss suffered. They did not dispute the award of special damages. They contended that the authorities relied upon by the trial court involved injuries of far greater severity. They urged this court to award Kshs. 450,000 in general damages, citing *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] KEHC 3078 (KLR) and *Patrick Mariana v Ronald Ondicho Mose* [2021] KEHC 2630 (KLR), where similar injuries attracted comparable awards.



14. Finally, the appellants prayed that they be awarded the costs of this appeal.

### **Respondent's Submissions**

15. The respondent opposed the appeal, pointing out that the appellants failed to attach a copy of the decree appealed against, thereby offending section 66 of the *Civil Procedure Act*. He argued that the appeal was incompetent and fatally defective. On the merits, the respondent submitted that the trial court properly analyzed the evidence and reached a correct finding.
16. On liability, the respondent submitted that both parties presented their cases before the trial court, which was guided by the Court of Appeal decision in *Hussein Omar Farah v Lento Agencies* (2006) eKLR. That case established that where neither party could prove fault against the other, liability would be apportioned equally. The respondent emphasized that the appellants' witnesses did not rebut or controvert his evidence on the occurrence of the accident. Both DW1 and DW2 testified that they did not witness the accident directly; they only heard a bang and later realized that a motorcycle had been hit by DW1. On this basis, the respondent urged the court not to interfere with the trial court's finding on liability.
17. Regarding the admissibility of PW1's evidence, the respondent argued that since PW1 was not the investigating officer, the issue was not raised before the trial court nor included in the Memorandum of Appeal. Consequently, it was not a matter for determination in this appeal and should be disregarded altogether.
18. On quantum, the respondent maintained that the damages awarded were neither excessive nor unjustified, but rather commensurate with the injuries sustained. He cited several authorities in support, including *Paul Kipsang Koech & Another v Titus Osule Osore* (2013) eKLR, *Kiwanjani Hardware Ltd & Another v Nicholas Mule Mutinda* (2008) eKLR. Also relied upon was the case of *B A J v Roadstar Limited & 2 Others* [2018] eKLR, where the court awarded Kshs.1,500,000 for a zygomatic arch fracture among other injuries. For these reasons, the respondent prayed that the appeal be dismissed with costs.

### **Analysis and Determination**

19. This being a first appeal, this court is duty-bound to re-evaluate and reassess the evidence and draw its own conclusions. However, it must bear in mind that the trial court, unlike the appellate court, had the advantage of observing the demeanor of witnesses and hearing their testimony first-hand. This principle was clearly articulated by the Court of Appeal in *Selle v Associated Motor Boat Company Ltd* (1968) EA 123, *Peters v Sunday Post Limited* [1985] EA 424, and *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] KECA 312 (KLR).
20. Before delving into the merits of the appeal, it is necessary to address the respondent's preliminary objection on competency of the appeal. The respondent argued that the appeal was fatally defective for failure to attach a copy of the decree appealed against, relying on section 66 of the *Civil Procedure Act*, which provides that appeals lie from decrees or orders of the High Court to the Court of Appeal. While that provision is not disputed, I do not find that omission fatal to the appeal. The appeal clearly challenges the decree of the trial court.
21. In my view, the relevant provision is Order 42 Rule 13(4)(f) of the Civil Procedure Rules, which states:

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of



either party have been served on that party, that is to say... the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.”

22. From the record, the judgment of the trial court has been furnished. The rule requires that either the judgment, order, or decree appealed from be on record. Since the judgment is available, I find no reason to question the competency of the appeal. The respondent’s objection is therefore dismissed.
23. The central question before this appellate court is whether the trial court arrived at a correct finding on both liability and quantum. To resolve this, I shall briefly review the evidence presented at trial.
24. The respondent called three witnesses: PW1 (PC Nyokabi), PW2 (the respondent), and PW3 (Joshua Musembi Muthengi, the motorcycle rider). PW1 (PC Nyokabi), testified that the accident occurred and the respondent was injured. He produced the police abstract (Pexhibit 1). He confirmed that he was not the investigating officer, as the officer had been transferred. I note that his evidence was properly admitted under section 33 of the *Evidence Act*, since he laid a basis for the absence of the investigating officer. Accordingly, the appellants’ challenge to the admissibility of PW1’s evidence fails.
25. PW2 (the respondent) testified that he was a pillion passenger aboard motorcycle registration number KMFE 654L along the Mwingi–Matuu road, wearing a helmet. The motorcycle carried two other pillion passengers. At Kitui Junction, motor vehicle KCT 476W, coming from the opposite direction, was driven at high speed, veered off its lane, and encroached onto the motorcycle’s lane, causing the collision.
26. As a result, PW2 sustained serious injuries to his head, arms, and legs. He was rescued by good Samaritans and taken to Matuu Level 4 Hospital, where x-rays and a CT scan were performed (Pexhibits 3 and 4). He also produced treatment notes (Pexhibit 7) and relied on Dr. Muli’s medical report dated 21st May 2021 (Pexhibit 8).
27. PW2 reported the accident at Matuu Police Station on 23rd December 2020 and was issued with a P3 form (Pexhibit 7), which was filled on 15th February 2021. He was later issued with a police abstract linking the vehicle to the 1st appellant. A motor vehicle search revealed that the vehicle was registered in the name of the 2nd appellant (Pexhibit 11). PW2 blamed the driver of KCT 476W for careless driving, overtaking recklessly, and over speeding. He sought general damages, special damages of Kshs. 6,550 (supported by receipts, Pexhibit 12), costs, and interest.
28. PW3, Joshua Musembi Muthengi, the rider corroborated PW2’s testimony, stating that the vehicle veered off its lane and collided with his motorcycle at high speed. He confirmed that he was carrying his father, Josphat Muthengi and PW2 who sustained serious injuries. PW3 blamed the driver of KCT 476W for careless driving and over speeding. He testified that the accident occurred at about 3:00 p.m.
29. DW1, the 1st appellant, testified that on 27th November 2020 she was driving the suit vehicle along the Matuu–Mwingi road to collect her grandmother’s medication. While driving on the left side of the road towards Thika, she heard a loud bang which jolted the vehicle to the right. She saw a person on her windscreen following the impact. DW1 stated that she lost control, veered off her lane, and encroached onto the opposite lane, though she managed to maneuver through a road barrier. Upon alighting, she saw a motorcycle on her left side and blamed its rider for failing to give way.
30. DW2, CI Joel Musingi, testified that he was among the first people to arrive at the scene. He stated that while standing at a bus stop near the barricade, he heard a loud bang and a screech. He observed the suit vehicle slow down and eventually stop after maneuvering the barricade. He administered first aid to the injured persons and assisted DW1 out of the vehicle. He too blamed the motorcycle rider for failing to give way.



31. From the evidence, certain facts are not in dispute: an accident occurred on 27th November 2020 at Kitui Junction involving motor vehicle registration number KCT 476W and motorcycle registration number KMFE 654L. The motorcycle was ridden by the third party (PW3), while the motor vehicle was driven by DW1, the 1st appellant.; PW2 was a pillion passenger, while another pillion passenger, Josphat Musembi, died on the spot; PW2 sustained bodily injuries as a result of the accident. The vehicle was registered in the name of the 2nd appellant.
32. The respondent and PW3 testified that at Kitui Junction, DW1 was driving at high speed, veered off her lane, and encroached onto the motorcycle's lane, thereby causing the collision. She claimed that the motorcycle struck her on the left side, causing her to lose control.
33. DW1's testimony, however, does not provide a clear sequence of events leading to the accident. Her account begins only after she heard a loud bang. Similarly, DW2's testimony was limited to what he observed after hearing the bang; he did not witness the events leading to the collision.
34. In contrast, both PW2 and PW3 gave consistent and corroborated accounts of what transpired before the accident. They testified that DW1 was over speeding, veered off her lane, and collided with the motorcycle.
35. The trial court concluded that there were two conflicting sets of evidence, creating doubt as to liability. However, upon closer scrutiny, this court finds that the evidence was not truly conflicting. The respondent and PW3 spoke to the events leading up to the accident, while DW1 and DW2 only described what happened after the impact. Thus, the respondent's evidence was direct and probative, whereas the appellants' evidence was circumstantial and incomplete.
36. Furthermore, the appellants introduced issues not supported by evidence on record, such as alleged photographs that were never produced in court, and claims that the respondent and third party were chewing khat or intoxicated. These allegations were not substantiated by testimony or subjected to cross-examination. It must be emphasized that submissions cannot substitute for evidence. Any new matters raised at the appellate stage without evidentiary foundation must be disregarded.
37. For these reasons, this court finds that the respondent and PW3's evidence was credible and consistent, while the appellants' evidence was insufficient to displace liability. However, given that respondents have urged this court not to interfere with the award on liability, I will not interfere with the trial court's apportionment of liability at 50:50.
38. I now turn to the question of quantum. The trial court awarded the respondent Kshs.1,800,000 in general damages and Kshs.6,550 in special damages, subject to 50% contribution. The appellants challenged the award of general damages as being inordinately high, while the respondent maintained that it was commensurate with the injuries sustained.
39. The principles guiding appellate interference with awards of damages are well settled. An appellate court will only interfere where the trial court applied the wrong principles, misapprehended the evidence, or where the award is so inordinately high or low as to represent an entirely erroneous estimate. The general principle, as stated in *Kemro Africa Ltd & Another v Lubia & Another* (1982–88) KLR, is that comparable injuries should attract comparable awards, keeping in mind inflationary trends and the circumstances of each case.
40. In the present case, the respondents sustained the following injuries a left zygomatic arch fracture, pain and tenderness on the back-posterior body trunk, tender cut wound over the left temporal scalp skin, proximal tibia hairline fracture, pain and tenderness of severe degree on both shoulders, generalized



and diffuse scalp skin tenderness, tender hematoma formation over the left face and pain and tender oedematous soft tissues on the left knee joint.

41. The trial court awarded Kshs. 1,800,000 in general damages, citing comparable authorities such as *Kyoga Hauliers (K) v Philip Mahiw Nyangi* (HCCA No. 21 of 2013), *Isaac Waweru Mundia v Kiilu Kakie Ndeti* (HCCA No. 312 of 2009), and *John Joel Koskei v Kenya Power & Lighting Co. Ltd* (HCCA No. 171 of 1998), where awards ranged between Kshs.1,000,000 and Kshs. 1,700,000 for skull fractures and multiple injuries.
42. The appellants urged reliance on *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] KEHC 3078 (KLR) and *Patrick Marianya v Ronald Ondicho Mose* [2021] KEHC 2630 (KLR), where plaintiffs with fractures and soft tissue injuries were awarded Kshs. 450,000.
43. Comparing the authorities, I find that the injuries sustained by the respondent were more severe than those in the cases cited by the appellants, and closer in nature to those relied upon by the trial court. The trial court's reliance on those authorities was therefore justified.
44. I find that the award of Kshs.1,800,000 in general damages was within range and not inordinately high. The award of Kshs.6,550 in special damages was specifically pleaded and proved, and is therefore upheld.
45. In light of the foregoing analysis, the appeal is dismissed with costs

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF JANUARY 2026.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

