Ogangira & another v Alusa (Civil Appeal E056 & E076 of 2023 (Consolidated)) [2026] KEHC 358 (KLR) (22 January 2026) (Judgment)

Neutral citation: [2026] KEHC 358 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E056 & E076 OF 2023 (CONSOLIDATED)

OA SEWE, J

JANUARY 22, 2026

BETWEEN

GEORGE LABAN OGUTU OGANGIRA .... 1ST APPELLANT

JOEL NDURURU MWANGI .... 2ND APPELLANT

AND

RHODA ALUSA .... RESPONDENT

(Being an appeal from the Judgment and Decree delivered by Hon. Celesa Okore, Principal Magistrate, delivered on 27th July 2023 in Oyugis Principal Magistrates Civil Case No. 112 of 2020)

JUDGMENT

1. The respondent was the plaintiff in Oyugis Principal Magistrate's Civil Case No. 112 of 2020. She had sued the appellants, George Laban Ogutu and his driver, Joel Mwangi, for compensation by way of general and special damages. The suit was in respect of injuries allegedly sustained by her in a road traffic accident that occurred on the 27th November 2019 along the Oyugis-Kisumu Road. The respondent had alleged that she was travelling as a lawful fare-paying passenger in Motor Vehicle Registration No. KCN 631T, Matatu, from Kisii to Bungoma; and that on account of the negligence of the appellant's driver, who was then driving the appellant's Motor Vehicle Registration No. KBL 270A the latter motor vehicle collided with Motor Vehicle KCN 631T thereby causing it to overturn several times.

2. It was further the contention of the respondent that she sustained serious injuries in that accident, including a pelvic fracture for which she blamed the appellant and his driver. Particulars of negligence were set out at paragraph 4 of the Plaint. She therefore filed the lower court suit claiming general and special damages for pain, suffering and loss of amenities.

3. VThe appellant and his driver, who was the 2nd defendant in the lower court suit, denied the respondent's allegations vide their Defence dated 30th November 2020. Upon hearing the parties, the lower court came to the conclusion that the appellant and his driver were 100% liable for the accident. The court then proceeded to assess damages payable at Kshs. 400,000/= together with special damages of Kshs. 43,750; making a grand total of Kshs. 443,750/=.

4. Being aggrieved by the decision of the lower court, the appellants filed this appeal vide the Memorandum of Appeal dated 1st August 2023 on the following grounds:

   (a) That the learned magistrate erred in law and misdirected herself when she failed to consider the appellant's submissions on both points of law and facts.

   (b) That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and therefore occasioned a miscarriage of justice.

   (c) That the learned magistrate erred in law and misdirected herself when she failed to consider the provisions set out in The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, CAP 405.

   (d) That the learned magistrate erred in law and fact in finding the appellants 100% liable in view of the evidence produced before the trial court.

   (e) That the learned magistrate erred in law and fact allowing the respondent's claim which was not proved on a balance of probability as required by law.

   (f) That the learned magistrate misdirected herself and based her findings on wrong considerations.

   (g) That the learned magistrate erred in law and fact in failing to dismiss the respondent's suit with costs.

   (h) That learned magistrate erred in law and in fact in awarding general damages of Kshs. 400,000/ =, an amount that was excessive and unjust in the circumstances, considering the evidence adduced before court and principles of law.

   (i) That the learned magistrate erred in law and fact in failing to appreciate and understand the provisions of Section 8 of the *Traffic Act*, Cap 405 Laws of Kenya.

   (j) That the learned magistrate erred in law and fact in over relying on the respondent's evidence and submissions.

   (k) That the learned magistrate erred in venturing to have issues as core issues for determination of the case.

   (l) That the learned magistrate erred in law and fact by allowing the respondent's claim which was not proved on a balance of probability as required by law.

   (m) That the learned magistrate erred in law and in fact in ignoring the appellants.

   (n) That the learned magistrate's decision albeit a discretionary one, was plainly wrong.

5. In the premises, the appellants prayed for judgment in their favour in the following terms:

   (a) That this Appeal be allowed in its entirety.

(b) That the whole Judgment of the lower court be set aside the damages be assessed afresh.

(c) That the costs of this Appeal and that of the lower court be awarded to the appellant.

(d) That the respondent's suit in the subordinate court be dismissed with costs.

(e) That such further orders may be made as this Courtmay deem fit.

6. The appeal was, by an order of the Court made on 20th February 2025, consolidated with Homa Bay High Court Civil Appeal No. 076 of 2023: Rhoda Alusa versus George Laban Ogutu Ogangra and Joel Mwangi; an appeal between the same parties (hereinafter, the 2nd appeal). In the 2nd appeal, the respondent filed two Grounds of Appeal, per her Memorandum of Appeal dated 24th August 2023:

   (a) That the learned magistrate erred in law and fact in failing to analyze the evidence on record as required by law, consider the extent of injuries sustained and award commensurate damages, hence awarded a sum that was inordinately low.

   (b) That the learned magistrate failed to adequately consider the submissions by the appellant (the respondent herein) hence giving an award that was inadequate.

7. The respondent accordingly prayed that the judgment of the lower court on quantum be set aside and that a fresh assessment of damages be made by this Court that will adequately compensate her for her pain and suffering. She also prayed that the costs of her appeal (the 2nd appeal) be borne by the appellants.

8. Granted the nature of the prayers sought by respondent in the 2nd appeal, the parties were in agreement that the 2nd appeal be treated as a cross-appeal and that the 1st appeal be the lead file. Accordingly, for ease of reference and clarity, the two defendants in the lower court matter will henceforth be referred to as the appellants; while the plaintiff, who is the respondent in the lead file and the appellant in the 2nd appeal will be referred to as the respondent.

9. Having perused the documents filed in both appeals, it is not manifest that the appellants filed written submissions in compliance with the directions of the Court dated 20th February 2025. What appear to be on record are submissions dated 24th June 2023. It is therefore to be presumed, as I hereby do, that those are the same submissions proffered by the appellants in the appeal; there being no evidence to the contrary.

10. The appellants summarized the agreed facts and commented on the burden of proof. They relied on Sections 107, 108 and 109 of the *Evidence Act*, Cap 80 of the Laws of Kenya to support their submission that, although the burden of proof was on the respondent to prove all aspects of her case on a balance of probabilities, that burden was not discharged. The appellants contended that the evidence adduced before the lower court fell short of proving liability on the part of the 2nd appellant.

11. The appellants relied on Civil Appeal No. 43 of 2001: Eastern Produce (K) Ltd v Christopher Astiado Osiro and Robinson v Oluoch [1971] EA 376 and Alfred Kioko Muteti v Timothy Miheso and another [2015] eKLR, among others, in urging the Court to find that the respondent utterly failed to prove liability on a balance of probability, since the traffic case in respect of the accident is still pending under investigations. In the appellant's submission, the lower court ought to have dismissed the respondent's case, or at the very least apportioned liability between them and the respondent.

12. On quantum, the appellant's submission before the lower court was that, since the respondent did not prove her case on a balance of probability, the claim under quantum ought to have failed. In the alternative, they submitted that, given the pleaded injuries an award of Kshs. 50,000/= would have

sufficed. In their view, the injuries were minor in nature. The appellants made reference to several authorities to justify their proposal, including the case of Tayab v Kinau [1983] KLR 114. In sum, the appellants urged that their appeal be allowed and that the lower court's decision be set aside in its entirely.

13. On the respondent's part, written submissions were filed in respect of each of the appeals. In support of their position in Homa Bay Civil Appeal No. E056 of 2023 (the 1st appeal), the respondent pointed out that the appellant's Record of Appeal is incomplete and therefore incompetent for purposes of Order 42 Rule 13(4) of the Civil Procedure Rules. In particular, the respondent urged the Court to note that the said Record has no copy of the Judgment of the lower court, a certified copy of the proceedings or copies of the submissions made before the lower court. She further observed that the Medical Report by Dr. Jennipher Kahuho which appears at the last page of the said Record of Appeal is incomplete in that the last page of the said report is missing.

14. While acknowledging that the appellants filed a Supplementary Record of Appeal dated 1st October 2024, the document only attached a copy of the Decree. Therefore, the respondent submitted that the appeal is fatally defective and ought to be struck out without further ado. They relied on Okech (suing as the administrator and legal representative of the Estate of Henry Okech Odiembo) v Ogwang & 2 others [2024] KEELC 4112 (KLR) (9 May 2024) (Ruling), Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR for the proposition that without a complete Record of Appeal an appeal is incompetent.

15. On the basis of the documents filed in the 2nd appeal, the respondent proceeded to defend the decision of the lower court and submitted that, the finding on liability at 100% was well justified. On quantum, the respondent submitted that an appellate court can only disturb the lower court's award if it is satisfied that the court proceeded on wrong principles. In support of this submission, the respondent relied on Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR.

16. In response to the assertion by the appellants that the injuries suffered were minor in nature, the respondent urged the Court to put into consideration the medical evidence produced before the lower court. In particular, she pointed out that, in the Medical Report produced on behalf of the appellants, it was explicitly conceded that she suffered a fracture of the pelvis and was advised on strict bed rest as she recuperated. She therefore insisted that the injuries she suffered were severe and hence the 2nd appeal.

17. In respect of the 2nd appeal, the respondent submitted that the single issue arising therefrom is quantum. In her view, the sum awarded by the lower court was inordinately low. She accordingly proposed an award of Kshs. 1.2 million instead as general damages for her loss, pain and suffering. The respondent made reference to the following decisions in support of her proposal:

    (a) Board of Trustees of Anglican Church of Kenya Diocese of Marsabit v Naomi Galma Galgalo [2019] KEHC 4255 (KLR) in which the plaintiff was awarded Kshs. 1,400,000/= for pelvic fracture.

    (b) Joseph Njeru Luke & others v Stella M. Kioko [2020] eKLR in which the court (Hon. Majanja J.) awarded Kshs. 750,000/= for pelvic fracture with soft tissue injuries.

    (c) Michael Maina Gitonga v Serah Njuguna [2012] eKLR in which the plaintiff was awarded Kshs. 1,500,000/=.

18. In first appeals such as these, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions thereon; while giving due

consideration for the fact that it did not have the advantage of seeing or hearing the witnesses. This is in line with Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 wherein it was held that:

> "…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…"

19. The respondent testified before the lower court on 23rd September 2021 as PW1. She stated that she was involved in a road traffic accident on 27th November 2019 while travelling from Kisii to Bungoma in a matatu Registration No. KCN 631T. She explained that the matatu was knocked from the rear by a lorry Registration No. KBL 270A thereby causing it to overturn and roll several times. As a result, she sustained injuries on head and chest, as well as a fractured pelvis. She was taken to Kericho hospital for treatment. She was later examined by two doctors, namely, Dr. Obed Omuyoma (PW4) and Dr. Jenipher Kahuthu.

20. As pointed out herein above, the accident gave rise to a series of cases, including Oyugis CMCC No. 110 of 2020 in which P.C. Bernard Kabayi testified as PW2. That evidence was adopted in Oyugis CMCC No. 112 of 2020 from which this appeal arises. Essentially, PW2 stated that, as a police officer then attached to the Traffic Section at Oyugis Police Station, he was aware that an accident occurred at Chabera Bridge along Oyugis-Kisumu Road on the 27th November 2019 at about 1200 hours. PW2 further stated that the accident involved motor vehicles registration Nos. KCL 631 Toyota Matatu, being driven by Christopher Omweri Obuya now deceased and KBL 270K Mitsubishi Lorry, then being driven by Emanuel Poppy Otiato. PW2 also testified that both motor vehicles were being driven from Oyugis direction heading to Kisumu general direction; and that the Matatu carried fare paying passengers and was ahead of the lorry.

21. PW2 explained that investigations conducted by his colleague, PC Kipkalis who had since been transferred, revealed that the lorry lost control and rammed into the matatu from behind. Both vehicles veered off the road to the right side facing Kisumu Direction. He therefore blamed the lorry driver for the accident for the reason that the said driver did not keep a safe distance from the matatu. He added that although the lorry driver alleged brake failure, the inspection report showed no pre-accident defects on the offending vehicle. He mentioned that the case was still pending under investigations as at the time of his testimony.

22. PW2 gave a list of the occupants of the Matatu who suffered injuries; and the victims include the respondent herein. It was on that basis that counsel for the parties registered a consent that the evidence of PW2 be adopted in the other three files, including Oyugis CMCC No. 112 of 2020 from which this appeal emanated.

23. Dorothy Moraa of Kericho Referral Hospital testified as PW3 and produced the Casualty Register and confirmed that their Patient No. 1309/76 was Rhoda Alusa; and that she visited the facility on 24th November 2019 following a road accident. It was the evidence of PW3 that Rhoda Alusa, the respondent herein, suffered a pelvic fracture, among other injuries; and that she was treated and discharged on 29th November 2019. She produced the Casualty Register, the respondent's Discharge Summary as exhibits before the lower court.

24. Dr. Obed Omuyoma (PW4) testified that he is a medical practitioner based in Nakuru; and that he examined and prepared a Medical Report for Rhoda Alusa on the 16th December 2019. He pointed out the Rhoda Alusa had suffered injuries which included a fractured pelvis; and that she still complained of chest pains as at the time of examination. He produced his Medical Report as an exhibit along with the primary medical documents issued by Kericho Referral Hospital on which he relied to generate his report.

25. The Defence opted to adduce no evidence save for the Medical Report prepared by Dr. Jennipher Kahuho, dated 25th March 2021. The report was produced by consent and marked Defence Exhibit 1.

26. From the foregoing summary of evidence, there is no dispute that an accident occurred at Chabera Bridge along Oyugis-Kisumu Road on the 27th November 2019 at about 1200 hours. There is also no dispute that the accident involved motor vehicles registration Nos. KCL 631, Toyota Matatu, and KBL 270K, Mitsubishi Lorry. Of particular significance is the evidence of PW2, which was largely uncontested, that both motor vehicles were being driven from Oyugis direction heading to Kisumu general direction; and that the Matatu had fare paying passengers and was in front of the lorry.

27. PW2 also explained that investigations conducted by his colleague, PC Kipkalis, revealed that the lorry lost control and rammed into the Matatu from behind. That impact caused both vehicles to veer off the road to the right side facing Kisumu direction. It is common ground that the respondent, among other passengers, sustained injuries in the said accident. Accordingly, one of the issues for consideration before the lower court were whether the respondent had proved liability on a balance of probabilities. The related issue was that of quantum. These are the same issues that present themselves for re-evaluation in the consolidated appeals.

28. I note that the respondent raised a technical objection to the competence of the 1st appeal and urged that it be struck out. She pointed out that the appellants' Record of Appeal is incomplete and therefore the appeal is fatally defective for purposes of Order 42 Rule 13(4) of the Civil Procedure Rules. The defects cited were that the Record of Appeal has neither a copy of the Judgment of the lower court nor a certified copy of the proceedings nor copies of the submissions made before the lower court. The respondent also pointed out that the Medical Report by Dr. Jennipher Kahuho which appears at the last page of the said Record of Appeal is incomplete, in that the last page of the said report is missing.

29. I have no hesitation in rejecting this argument on the ground that, with the leave of the Court, the appellants filed not just one but two Supplementary Records to cure the defect. Moreover, the instant appeal was consolidated with Homa Bay HCCA No. E056 of 2023 in which a complete record was submitted. It is also noteworthy that the two authorities relied on by the respondent to urge this point are not only of persuasive nature but also concern totally different circumstances. For instance, in the Okech case, a Decree was not included in the Record of Appeal, unlike the instant matter where a Decree was filed by way of a Supplementary Record. In the Bwana Mohamed Bwana case, the entire Record of Appeal was not filed.

30. Indeed, it was counsel for the respondent that urged that reliance be placed on the complete record if need be. In the circumstances, it is imperative to take into account that Article 159(2)(d) of *the Constitution* mandates that disputes be resolved, not on the basis of procedural technicalities, but with substantive justice in view. I therefore find no merit in the technical point raised by the respondent and the same is hereby overruled.

31. On the merits of the appeal, it must be mentioned at the outset that that the burden of proof was on the respondent, as the plaintiff before the lower court, to prove her allegations of negligence to the requisite standard. Section 107 of the *Evidence Act* is explicit that:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

32. Likewise, Section 108 of the *Evidence Act* provides that:

> The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

33. Thus, the Court of Appeal in the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, held:

> " ...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 cast 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..."

34. Credible evidence was adduced by the respondent that the lorry driver did not keep a safe distance and thereby rammed into the lorry and caused the Matatu to overturn and roll several times. Through PW2, the respondent presented evidence to demonstrate that, although the lorry driver alleged brake failure, the inspection report showed no pre-accident defects on the vehicle. The evidential burden therefore shifted to the appellants to rebut the respondent's allegation. No such evidence was adduced by the appellants to either rebut the respondent's case or to back up their own allegations of negligence against the respondent.

35. In Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR the Court of Appeal quoted with approval the following passage from the judgment of Lord Reid in Stapley v Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681:

> " 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..."

36. And, as was observed by Sir Kenneth O'Connor in Peters v Sunday Post Limited [1958] EA 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…"

37. I therefore find no basis for interfering with the lower court's finding on liability, and would therefore confirm the same at 100% against the parties.

38. On quantum, it is useful to bear in mind the caution expressed in H. West & Son Ltd v Shephard [1964] AC 326, that:

> " …In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

39. The Court of Appeal restated this principle thus in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

40. As has been noted herein above, the lower court awarded the respondent Kshs. 400,000/= as general damages for her injuries along with special damages in the sum of Kshs. 43,750/=. There is no dispute that the respondent justified her claim for special damages by producing supporting documents. As such, there is no contention about that aspect of her claim. The dispute is in respect of the general damages component. The award, naturally, was premised on the nature of the respondent's injuries. The injuries as pleaded and proved were:

    (a) Blunt injury to the head leading to soft tissue injuries.

    (b) Blunt injury to the anterior chest wall leading to soft tissue injuries.

    (c) Fracture of the pelvis

41. The learned magistrate made reference to the P3 Form, Discharge Summary, Treatment Notes and Medical Reports produced before the lower court and noted that, although the pelvic fracture was stable, there was a residual 10% permanent disability that ensued therefrom. The learned magistrate also put into consideration the awards made in the authorities that were relied on by the parties, the inflationary trends then prevailing and other relevant factors.

42. The appellant's submission before the lower court was that, since the respondent did not prove her case on a balance of probability, the claim under quantum ought to have failed. That argument is untenable, having found as indicated above, that the decision of the lower court on liability is in fact defensible.

In the alternative, the appellants submitted that, given the pleaded injuries an award of Kshs. 50,000/ = would have sufficed. They surmised that the injuries suffered by the respondent were minor.

43. On the other hand, the respondent cross-appealed the decision of the lower court with specific reference to the sum awarded under the head of general damages, contending that it was so inordinately low as to amount to an erroneous award.

44. Having given due consideration to the submissions made by either party, I am persuaded that the appellants did not fully appreciate the nature and extent of the respondent's injuries. In the three decisions they relied on to support their proposal for an award of not more than Kshs. 50,000/=, none of the plaintiff suffered a fractured pelvis. I therefore have no hesitation in holding that the appellants' proposal for an award of Kshs. 50,000/= as general damages in the circumstances is inordinately low; granted that in their own Medical Report, produced by consent before the lower court as Defence Exhibit 1, it was conceded that among the injuries sustained by the respondent was pelvic fracture.

45. In the premises, considering that the Medical Reports indicated that the respondent had made good recovery, an award of Kshs. 1.2 million as general damages for pain and suffering as proposed by her counsel would be way off the mark. While I entirely agree that the award of Kshs. 400,000/= was on the lower side, I consider an award of Kshs. 750,000/= reasonable. In this regard, I find the case of Joseph Njeru Luke & others v Stella M. Kioko [2020] eKLR in which the court (Hon. Majanja J.) awarded Kshs. 750,000/= for pelvic fracture with soft tissue injuries to be comparable.

46. In the premises, the appellants' appeal on both liability and quantum as per the lead file is hereby dismissed. The respondent's appeal, namely Homa Bay HCCA No. 076 of 2023 is hereby allowed and orders granted as follows:

    (a) The judgment and decree of the lower court on general damages be and is hereby set aside, and is substituted with an award of Kshs. 750,000/=.

    (b) The judgment and decree of the lower court on special damages and costs of the lower court be and is hereby left undisturbed.

    (c) Costs of the appeal are hereby awarded to the respondent.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 22ND DAY OF JANUARY 2026

OLGA SEWE

JUDGE