



REPUBLIC OF KENYA



EMU (Suing as a Friend/Next of Kin of GM) v Angiela & 2 others (Civil Appeal E117 of 2024) [2026] KEHC 1023 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E117 OF 2024**

AC BETT, J

FEBRUARY 5, 2026

BETWEEN

EMU (SUING AS A FRIEND/NEXT OF KIN OF GM) APPELLANT

AND

PATRICK ODHIAMBO ANGIELA 1ST RESPONDENT

NATIONAL INDUSTRIAL CREDIT BANK LIMITED 2ND RESPONDENT

BENJAMIN CHEBOI 3RD RESPONDENT

*(Being an appeal from the Judgment of Hon. A.A Odawo(PM) in
Kakamega CMCC.NO 142 OF 2018, delivered on 12th June 2024)*

JUDGMENT

Introduction

1. The Appellant filed suit in the subordinate court seeking general and special damages arising from an alleged road traffic accident said to have occurred on 15th October 2016 at Lunyerere area, involving motor vehicle registration number KBS 633T Mitsubishi Truck, in which the minor, GM, allegedly sustained serious injuries. She held the 1st and 2nd Respondents vicariously liable, as they were the registered and/or equitable owners of the suit motor vehicle.
2. The Appellant contended that the accident occurred due to the negligence of the 3rd Respondent, resulting in severe injuries to the minor, including head injuries leading to post-traumatic epilepsy and deteriorated intelligence. The Respondents denied liability, and the defence called an insurance investigator who alleged that the police abstract was forged and that no such accident occurred.
3. The trial court, upon evaluating the evidence, found that the Appellant had failed to prove the occurrence of the accident on a balance of probabilities. It highlighted the absence of an eyewitness, inconsistencies in the police evidence, and reliance on hearsay, leading to the dismissal of the suit.



4. The Appellant, being dissatisfied with the decision of the trial court, filed this appeal based on the following grounds;
 - a. That the learned Trial Magistrate erred in law and in fact in reaching a decision that the plaintiff had failed to prove his case on a balance of probabilities.
 - b. That the learned Trial Magistrate erred in law and in fact by relying on evidence that was not tendered by the plaintiff.
 - c. That the learned Trial magistrate failed to consider the nature and seriousness of the injuries sustained by the Appellant to reach a finding that the same were occasioned by a road traffic accident.
 - d. That the Learned trial magistrate erred in fact and in law in considering the defence witness testimony that was impeached by the plaintiff.
 - e. That the Learned Trial Magistrate erred in fact and in law by failing to find that the defendants, who are Key witnesses, did not testify and thus the defence was prosecuted.
 - f. That the Learned Trial Magistrate erred in fact and in law in failing to consider the authorities relied on by the Appellant in their submissions.
 - g. That the learned Trial Magistrate erred in fact and in law by finding that the plaintiff did not prove permanent incapacity.
 - h. That the learned Trial Magistrate erred in law and in fact by inferring that she could have made an award that is manifestly too low.
 - i. That the decision of the Learned Trial Magistrate has led to a miscarriage of justice.
5. The Appellant prays that the appeal be allowed and the decision by the trial magistrate delivered on 1st June, 2024, be set aside and or varied.
6. The court directed the appeal by canvassed by way of written submissions.

Appellant's Submissions

7. In her submissions dated 7th April 2025, the Appellant raised two grounds of appeal. On the first ground, as to whether the Appellant proved her case on a balance of probabilities, she stated that, being a civil case, the burden of proof was on a balance of probabilities and cited *Palace Investment Ltd v Geoffrey Kariuki Mwendu & another [2015] eKLR*.
8. According to the Appellant, the injuries that the minor sustained from the accident were proved by the testimony by Dr. Charles Andai, which was uncontested. She stated that she did not witness the accident but was informed by a neighbour, although she knew the registration number of the lorry that struck her daughter and reported the incident to the Vihiga Police Station, where the vehicle was impounded.
9. She questioned the trial court decision for relying on the defence case that the accident did not occur, and that the police abstract was forged.
10. She faulted the trial court's decision to rely on the insurance investigator's evidence saying that he was not part of the claim. She further contended that the trial court failed to interrogate the driver of the subject vehicle and other parties involved in the accident.



11. The Appellant averred that the failure to call the driver and owner of the motor vehicle by the defence weakened their case. She contended that the trial court erred in relying on the investigation report and using it to dismiss her claim.
12. She faulted the trial magistrate for not finding the Respondents jointly and severally liable despite her argument that the accident had occurred and that the minor was not responsible for the accident. She stated that she established the severity of the injuries by producing the P3 form and the discharge summary from Mbale Hospital, and prayed that the court finds that they have proved their case on the balance of probabilities.
13. On the claim of quantum, she asserted that the injuries sustained by the minor were severe and that the minor still gets dizzy spells, post-traumatic epilepsy and suffers deteriorated intelligence. She sought an award of Kshs. 8,000,000/= as prayed for in the trial court.

3rd Respondent's Submissions

14. The 3rd Respondent filed his submissions dated 10th June 2025, where he raised three issues for determination. On whether the Appellant discharged the burden of proof to the required standard, he averred that the burden of proof was on the Appellant to prove her case and cited Section 107(1) of the *Evidence Act*. He relied on the case of William Kabogo Gitau vs. George Thuo and 2 others [2010] eKLR as well as the Court of Appeal case of Palace Investments Ltd vs. Geoffrey Kariuki Mwendwa & another [2015] eKLR.
15. He stated that it was incumbent on the Appellant to prove negligence, which she failed as she did not call any evidence to prove her allegations of negligence. He asserted that the police officer, PW2, failed to provide sketch plans and photographs of the scene to assist the trial court in understanding how the accident occurred.
16. Noting PW2 sentiments that she was not the investigation officer and that the case was still under investigations, and that she was not able to ascertain how the accident occurred, he posited that the trial court could not have found the 3rd Respondent liable for the accident.
17. He faulted the evidence of PW3, the minor's mother, who was only informed of the accident and only knew that a vehicle had been impounded at Vihiga police station and thus did not know how the accident occurred and who was to blame for the accident.
18. He contended that a police abstract was not proof of an accident, and the Appellant should have called their eye witness to help the court prove the particulars of negligence. They contend that the police report did not indicate who was responsible for the accident.
19. He agreed with the trial court's holding that the Appellant had failed to establish a link that the minor was injured by the motor vehicle to warrant compensation by the 3rd Respondent. He reiterated that the Appellant failed to discharge the burden of proof under sections 107-109 to prove negligence on their part; therefore, the court should uphold the trial court's decision.

Analysis and Determination

20. I have carefully considered the Memorandum of Appeal, the record, the submissions filed by both parties, and the applicable law. As the first appellate court, this Court is mandated to re-consider and re-evaluate the evidence on record and draw its own conclusions, bearing in mind that it did not have the opportunity to observe the demeanour of the witnesses. This duty was stated in *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123.



21. It is clear that the determination of this appeal revolves substantially around the question of whether the Appellant proved her case on a balance of probabilities and if she is entitled to the award of damages. That the burden of proof was on the Appellant to prove their case is not in doubt. In *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR, it was held 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 Sections 109 and 112 of the 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 on that person who would fail if no evidence at all were given as either side.”

22. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 stated that:-

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party that is able to establish its case to a percentage of 51% as opposed to 49% of the opposing party is said to have established its case on a balance of probabilities. He has established that it is more probable than not that the allegations that he made occurred.”

23. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:- “Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say: “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

24. In this case, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent. The Appellant’s case was based on the evidence of the witnesses who did not witness the accident. Notably, the minor, despite indications that she was aged between 6 ½ to 7 years at the time of the accident, was not called to give evidence as to how she came to sustain the injuries. Neither was the neighbour whom the Appellant alleged informed her about the accident called to testify. Without the evidence of these two witnesses, the Appellant’s case was based on hearsay evidence. It is trite law that he who asserts must prove.

25. In *Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989 Ringeria J.* (as he then was) stated:-

“In the instant case the plaintiff did not adduce any evidence beyond stating that the accident was reported to police and produced a Police Abstract of the accident and all that is recorded therein is the fact of an accident involving the deceased and the 1st defendant’s motor vehicle which was being driven by the 2nd defendant. The burden of proof was on the plaintiff, and she had to prove her case on a balance of probabilities. On the undisputed facts, it is entirely



probable that the accident was caused by the negligence of the second defendant, who offered not to adduce evidence. It is equally probable that it was caused by the negligence of the deceased. And it is equally probable that it was caused partly by the negligence of the deceased and partly by the negligence of the defendant. Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth, and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, the court must, not without a little anguish, dismiss the plaintiff's suit on the ground that fault has not been established against the defendants; be that as it may, it is enjoined."

26. PW1, Dr Andai confirmed that the minor sustained serious head injuries likely to lead with post-traumatic epilepsy. He confirmed that he treated the minor a year after the accident and that most of her injuries had healed. However, medical evidence, while relevant in establishing injury, does not, of itself, establish how or by whom such injury was caused.
27. PW2, a police officer, produced a police abstract. Upon cross-examination, she was forthright in stating that she was not the investigating officer, had not perused the occurrence book entry, and could not state how the accident occurred or who was to blame. She did not produce the sketch map of the scene for the court to ascertain how the accident occurred.
28. Courts have held that a police abstract, while admissible as a public document under Section 35 of the *Evidence Act*, is not conclusive proof of liability or even the accident's details without corroborative evidence. In *Kasaam Hauliers Limited & Another v Shreeji Enterprises* [2025] KEHC 12039 (KLR), the High Court emphasised:-

"It is settled that a police abstract is not conclusive evidence of liability and that the contents therein must be proved. PW2 was not the IO and could not authoritatively give the circumstances of the accident as he was not an eye witness and did not visit the scene. He referred to records in his testimony on how the accident occurred but the said records were not produced in evidence hence reducing his evidence to hearsay."

Similarly, in *Kennedy Nyangoya v Bash Hauliers* [2016] KEHC 2616 (KLR), the court noted that even if the abstract blames a party, such a finding is not conclusive without supporting evidence.
29. In *Orioki v Kevian Kenya Limited* [2025] KECA 780 (KLR), the Court of Appeal noted that while a police abstract can serve as prima facie evidence, it must be corroborated, especially where liability is contested. Here, the defence challenged the occurrence of the accident, and the Appellant failed to establish that the accident did occur as alleged.
30. The courts have admitted that the absence of an eyewitness is fatal. In *William Kabogo Gitau v George Thuo & 2 Others* [2010] eKLR, the court held that hearsay evidence cannot suffice to prove negligence in accident cases. PW3's testimony was hearsay because she relied on information from a neighbour who was not called as a witness. The trial court rightly faulted this, noting that the circumstances of the accident remained unclear.
31. On the totality of the evidence, the occurrence of the accident, as pleaded and attributed to the Respondents, was left resting largely on hearsay and uncorroborated assertions.



32. On the failure of the Respondents to call the driver or owner of the motor vehicle, adverse inference may be drawn under Section 119 of the *Evidence Act*, but only if the plaintiff has first established a prima facie case. In *Kaikai v Chacha & 2 Others* [2025] KECA 1278 (KLR), the court held that the burden remains on the plaintiff unless shifted. Here, no prima facie case was made to shift the burden.
33. Upon re-evaluation, I find that the Appellant did not discharge the burden of proof. The trial court did not err in finding that the case was not proved on a balance of probabilities.
34. The Appellant faults the trial court for relying on the defence investigator's evidence and for ignoring the Appellant's authorities. I have reviewed the trial court's judgment, which I note demonstrates careful analysis of all the evidence, including inconsistencies in PW2's testimony and the absence of direct evidence. In *Mwangi & Another v Oginga* [2025] KEHC 7976 (KLR), the court apportioned liability equally where fault could not be established, but in the present case, the accident itself is in doubt due to evidential gaps.
35. The investigator's report, while not binding, raised legitimate questions about the abstract's authenticity, which the Appellant did not adequately address. The trial court's reliance thereon was not misplaced, as it formed part of the overall evaluation.
36. Having upheld the trial court's finding on liability, it is unnecessary to assess quantum. However, for completeness, had liability been established, the injuries (severe head trauma, post-traumatic epilepsy) would warrant substantial damages. Comparable awards in cases like *Dete v Mirieri* [2025] KEHC 3337 (KLR) suggest Kshs. 1,500,000/= to 3,000,000/= for similar injuries. See also *Maureen Maru Wamwitha Nduru (suing through Mary Wamwitha Nduru v. Hilltop Primary School & High School* [2009] KEHC 1717 (KLR), *Kavoi v. Peter & 3 others* [2020] KEHC 5427 (KLR) and *Ali Kher Mohammed Majid v. Nassir Ali Toza* [2023] KEHC 20487 (KLR). In the premises, I would have awarded Ksh. 1,200,000/=.
37. In conclusion, I find that the trial magistrate did not err in law or fact. The decision to dismiss the Appellant's claim was supported by the evidence and consistent with legal principles governing special and general damages. The Appellant failed to establish a direct causal link between the Respondent's actions and the claimed damages, and the trial court's findings were within the bounds of reason.
38. In the circumstances, this court finds no merit in the present appeal and hereby dismisses it with costs to the 3rd Respondent.
39. It is so ordered.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 5TH DAY OF FEBRUARY 2026.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Appellant

Ms. Nyiva for the 3rd Respondent

No appearance for the 1st and 2nd Respondents

Court Assistant: Polycap

