



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APEAL NO. E010 OF 2025

RASHID ALI OKALO

APPELLANT

VERSUS

IDDI AKITA SUMBA

RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S.W. Mathenge in Butere SPMCC No. E055 of 2022 delivered on 09/01/2025)

JUDGEMENT

Introduction

1. The Respondent had filed a suit against the Appellant for general and special damages arising from a road traffic accident that occurred on 28/9/2022 along Ekero - Sabatia (Buyangu) road at Nyenyesi area involving motor vehicle registration number KDA 211 B Toyota Matatu, where the Respondent was a passenger and the

Appellant's motor vehicle registration number KCU 599B TOYOTA PROBOX.

2. The Respondent averred that as a result of the accident, he sustained the following injuries: Head Injury, Blunt chest injury and bruises on the right leg.
3. The Appellant entered appearance and denied liability, and the matter proceeded for a hearing.
4. In a judgment delivered on 9th January 2025, the trial court found that the Respondent had proved his claim on a balance of probabilities and found the Appellant 100% liable for the accident. On the issue of quantum, the court awarded Kshs. 110,000/= as general damages. It further awarded Kshs. 12,550/= for special damages.
5. Being dissatisfied with the judgement on liability and quantum, the Appellant appealed against the judgment based on the following grounds;
 - a) *That the learned trial Magistrate erred in law and fact in holding the appellant 100% liable in negligence without taking into account the evidence on record.*
 - b) *That the learned trial Magistrate erred in law and fact in failing to take into account the evidence on record,*

hence arriving at a wrong decision on the issue of liability.

c) That the learned trial Magistrate erred in law and fact by failing to apportion liability on the part of the respondent in view of the evidence adduced.

d) That the learned trial Magistrate erred in law and fact by failing to consider the submissions by the appellant.

e) That the learned trial Magistrate erred in law and fact in adopting the wrong principles in the assessment of damages payable to the respondent, thereby arriving at an erroneous decision.

f) That the learned trial Magistrate erred in law and in fact in awarding damages which were excessive in the circumstances in view of the evidence adduced.

g) That the learned trial Magistrate erred in law and fact in failing to take into account the appellant's submission on quantum, thereby awarding excessive damages in the circumstances.

h) The claim was a fraudulent one, and this aspect was totally ignored by the Honourable court, and had the

Honourable Court considered that aspect of the claim he would have dismissed the suit.

6. He prayed that the judgment and the decree be set aside and that the court make its own finding on liability and quantum.
7. The appeal was canvassed by way of written submissions.

Appellant's Submissions

8. In the submissions dated 29th July 2025, the Appellant raised three issues for determination. On whether the trial court erred in finding him 100% liable for the claim, he submitted that the Respondent had failed to prove on a balance of probabilities that he was a fare-paying passenger on board the motor vehicle registration number KDA 211B and that he never called an independent witness to support his case. He further contended that the trial court should have dismissed the claim as fraudulent since the investigation report did not bear the name of the Respondent or other casualties.
9. He further urged that the court should have apportioned liability as there was no credible

eyewitness who saw the accident occur, there was no police report, sketch plan or investigation report. He quoted **Evans Mogire Omwansa v Bernard Otieno Omolo & Another [2016] eKLR** and **Osman Ahmed Kahia v Joseph G. Njoroge (2012] eKLR** in support of his position.

10. On whether the trial court erred in awarding general damages to the Respondent despite the Appellant asserting that the claim was fraudulent, he submitted that the Respondent failed to prove his case to the required standard, as the evidence he submitted was marred with fraud.

Respondent's Submissions

11. The Respondent raised two issues in his submissions dated 8th October 2025. On the first issue of whether the trial court erred in finding the Appellant 100% liable for the accident, he relied on the insurance investigator's testimony and report, which found that the Appellant's vehicle was at fault. It found the Appellant's driver was to blame for the accident and was charged with the traffic offence of causing an

accident by careless driving, for which he pleaded guilty and was fined Kshs. 80,000/=.

12. The Respondent maintained that he was a lawful fare-paying passenger aboard motor vehicle registration number KDA 211 B Toyota Matatu when he was involved in the road traffic accident with the appellant's motor vehicle registration number KCU 599 B Toyota Probox. He cited the case of **Wilter Chemutai Torongei v W.E Tiled Muthaiga & another [2017] eKLR** and argued that they were not responsible for causing the accident. He submitted that the Appellant's driver was responsible for the accident. He also relied on the case of **Kansa v Solanki (1969) EA 316** and prayed that the court dismiss the appeal on the issue of liability.
13. On the issue of quantum, he argued that the appellate court can only interfere with the award if it is manifestly high or too low. He averred that he had produced a medical report by Dr Andai, which proved that he had sustained moderate soft tissue injuries, which finding was corroborated by Dr James Obondi.

Analysis and Determination

14. As a first appellate court I am guided by the principle consistently followed by courts, as stated in the case of ***Selle v Associated Motor Boat Company Ltd (1968) EA 123*** that the appellate court is justified in setting aside the decision or findings of the trial court only when the decision or finding is not based on evidence, or is based on a misrepresentation or misinterpretation of evidence, or based on a wrong legal principle.
15. I have considered the record, the trial court's proceedings, submissions on appeal, and the authorities relied upon and find the issue for determination is whether the appeal has merit.
16. In the present case, the facts are clear. The Respondent avers that he was a passenger in the motor vehicle KDA 211B when it was struck by the Appellant's motor vehicle registration number KCU 599 B, which he claims was carelessly and recklessly driven.
17. In his evidence, he blamed the driver for the accident, where he claimed he sustained severe injuries and provided the particulars of injuries as blunt injury to the chest, blunt injury to the forehead and bruises to the

back. He provided the treatment notes from St. Mary's Hospital and Mumias Modern Health Centre.

18. The Appellant in his defence denied liability. However, in his report which he produced as a defence exhibit, DW1 confirmed that an accident occurred. However, he claimed that some of the accident victims were not in his records, he confirmed during cross-examination that he had never visited Mumias Model Health Hospital to verify whether the Respondent had been treated at the facility.
19. What is evident from the Appellant's testimony is that the Investigator never visited all the facilities where some of the victims had been treated and could not ascertain whether the Respondent had been treated at Mumias Model Health Hospital or not. Thus, the report regarding all the accident victims was incomplete.
20. The Appellant contended that the Respondent failed to prove that he was a fare-paying passenger and further faulted the absence of independent witnesses, police abstract, sketch plans and investigation reports. He also argued that the Respondent's name did not appear in

the investigation report, thereby rendering the claim fraudulent.

21. He further claimed that the report from Mumias model health facility was falsified and contended that the Respondent had failed to prove his case to the required standard.

22. The law on fraud is that an allegation of fraud must be specifically pleaded and proved. In **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR**, Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

23. The Appellant's allegations of fraud are not substantiated. The principle is quite clear. Pursuant to

Sections 107-108 of the Evidence Act, he who alleges must prove. The mere absence of the Respondent's name in the investigation report does not render his claim fraudulent, particularly where medical evidence corroborates the injuries, and the Appellant's witness does not dispute the accident's occurrence.

24. Further, the Respondent relied on the evidence tendered at the trial, including the investigator's report and testimony, which he maintained placed blame on the Appellant's driver. The Respondent further stated, and it was not disputed, that the Appellant's driver had been charged with the offence of causing an accident by dangerous driving, for which he pleaded guilty and was fined KShs. 80,000/=.

25. Having re-evaluated the evidence, I find that the Respondent discharged the burden of proof on liability. The plea of guilty to the charge of careless driving by the Appellant's driver is prima facie evidence of negligence on the part of the Appellant. In **Evans Mogire Omwansa v Benard Otieno Omolo & another [2016] KEHC 7139 (KLR)**, the court noted that a conviction in traffic proceedings, while not

conclusive, is relevant evidence in civil proceedings for negligence. Here, the guilty plea, coupled with the insurance investigator's report attributing fault to the appellant's driver, sufficiently establishes negligence.

26. As a passenger, the Respondent cannot be apportioned any liability. This is consistent with the holding in **Wilter Chemutai Torongei v W.E. Tilley Muthaiga & Another (Supra)**, where the court absolved passengers of blame in accidents caused by driver negligence.
27. Similarly, in **Ben Menngesa v. Edith Makungu Lande [2013] eKLR**, the court held that a passenger cannot be held liable in an accident as he is not in control of the vehicle. The only time a passenger may be held to be liable, in my view, is when, for instance, it is shown that he did not fasten his seat belt or was trying to jump out of the vehicle when it had not stopped. That way, some contributory negligence could be attached to him.
28. Accordingly, I do not see how the Respondent can be blamed for causing the accident as he was a passive, lawful paying passenger. I therefore find the trial court's

holding on liability at 100% proper. I see no justifiable reason to disturb the same, and it is hereby upheld.

29. The second issue raised by the Appellant was on the quantum, where he faulted the trial court for considering the Respondent's submissions on general damages.
30. The Respondent, on the other hand, submitted that the award was reasonable and not inordinately high, warranting no interference by this court. He relied on the medical report of Dr Andai, which confirmed moderate soft-tissue injuries, and on the corroborating report of Dr James Obondi. The Respondent maintained that appellate courts interfere with the quantum only if the award is manifestly excessive or unduly low, or based on incorrect principles.
31. The principles governing interference with quantum of damages are well-established. In **Butt v Khan [1981] KLR 349**, the Court of Appeal held:

"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."

32. The injuries sustained as per the doctor's report were a head injury, a blunt chest injury, and bruises on the right leg, all soft tissue in nature, with no permanent incapacity.
33. In **Kabue v Kurui & Another [2025] KEHC 1695 (KLR)**, the court allowed Kshs. 180,000/= for soft tissue injuries, although it noted that it was on the higher side.
34. In **Oyaro v Morris [2025] KEHC 5361 (KLR)**, an award of Kshs. 300,000/= was considered excessive for soft-tissue injuries and was reduced to Kshs. 130,000/=.
35. In **Manase & another v Muga [2022] KEHC 10487 (KLR)**, an award of Kshs. 200,000/= was substituted with an award of Kshs. 100,000/- for a cut wound on the forehead, tenderness of the neck, chest, back, left elbow and left hand and bruises on both knees
36. In **Edward Mutevu Maithya & another v Edwin Nyamweya [2022] eKLR**, an award of Kshs. 550,000/- was reduced to that of Ksh.100,000/= for cut wounds

on the scalp (head region), bruises to the back, right upper limb and the left lower limb.

37. Considering the nature of the injuries, and allowing for inflation since the earlier precedents, I find that the award of Kshs. 110,000/= is reasonable and not excessive. It aligns with awards in similar cases. I also find that the special damages of Kshs. 12,550/= were pleaded and proved, and no basis exists to disturb them.
38. For the reasons stated above, the appeal is dismissed in its entirety. The judgment and decree of the lower court is upheld.
39. The Respondent shall have the costs of this appeal.

Dated, signed and delivered at Kakamega this 12th day of February 2026.

**A. C. BETT
JUDGE**

In the presence of:

Ms Nyangano for the Appellant

Mr Wandallah for the Respondent

Court Assistant: Polycap

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