

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E007 OF 2025

VINCENT OMONDI OTIENO 1ST APPELLANT
WILSON OGINGA GWARA 2ND APPELLANT
- VERSUS -
DOUGLAS OWIDO RESPONDENT

(Being an appeal from the judgment and decree of Hon. D. Ogal SPM delivered on the 20/12/2024 in Winam PMCC No. E017 of 2023, Douglas Owido v Vincent Omondi Otieno & Wilson Oginga Gwara)

J U D G M E N T

1. The respondent filed the primary suit before the trial court vide a plaint dated **7/2/2023**. He claimed for general damages as well as costs of the suit for injuries sustained following a road traffic accident.
2. The 1st appellant entered appearance and filed a statement of defence dated **21/2/2023** in which he denied the respondent's claim and instead claimed contributory negligence on the respondent's part.
3. The matter proceeded to trial and by a judgment delivered on **20/12/2024**, the trial court decreed: -
 - a) *Liability at 100% for the respondent against the appellants.*
 - b) *General damages Kshs. 1,000,000/-*

c) Special damages Nil

d) Costs of the suit and interest at court rates.

4. Being dissatisfied with the said judgment/decreed, the appellants lodged this appeal vide the Memorandum of Appeal dated **6/1/2025** and raised four (4) grounds of appeal as follows: -

a) That the learned trial magistrate erred in law and fact in holding the appellants 100% liable in negligence.

b) That the learned trial magistrate erred in law and fact by failing to dismiss the respondent's suit in view of the evidence adduced.

c) That the learned trial magistrate erred in law and fact in failing to consider the submissions by the appellant on both issues of liability and quantum.

d) That the learned trial magistrate erred in law by awarding the respondent Kshs. 1,000,000/- which was excessive in the circumstances.

5. The appeal was disposed off by written submissions. The appellants submitted that the finding of 100% liability against them was against the

weight of evidence as the respondent conceded he was overtaking at the time of the accident and was carrying dangerous protruding metals.

6. That these admissions indicate a high degree of contributory negligence, if not primary negligence, on the respondent's part. That the trial court ignored these admissions and based liability purely on a misinterpretation of **Dw1's** testimony.
7. The appellant relied on the case of **Timsales Ltd v Wilson Libuywa [2008] eKLR**, where the Court of Appeal held that where both parties contributed to the accident, liability must be apportioned accordingly.
8. That PW2's testimony was irrelevant and unhelpful, as he was not present at the scene, did not investigate the matter, lacked basic documentary evidence (OB, police file, sketch map) and could not explain how the accident happened.
9. On quantum, the appellant submitted that the award of **Kshs. 1,000,000/=** for general damages was excessive given the injuries sustained and the precedents available. That whereas the injuries alleged to have been sustained by the respondent were serious, the respondent did not produce medical evidence of permanent incapacity or ongoing complications. The

appellant relied on his submissions filed in the trial court as contained at pages 67 – 71 off the Record of Appeal.

10. On the other hand, the respondent submitted on liability that the testimony of **Pw1 & 2** confirmed that the defendant's driver was solely to blame for the accident because the driver was driving at a very high speed, ignoring the fact that he was driving through an estate, a section of the road which was crowded with people.
11. That the appellants' driver was overtaking when it was not safe to do so and was not on the lookout for the safety of other road users and particularly the respondent, who were using the road at that time and that there was no mention of the alleged pro-box in the police abstract adduced, which the defendant blamed for the accident.
12. That the appellants ought to have included the said third party to the suit to which they had been sued for purposes of apportioning liability as was held in the cases of **Benson Charles Ochieng & Another v Patricia Atieno (2013) eKLR**, **Ntulele Estate Transporters Ltd & another v Patrick Omutanyi Mukolwe [2014] KEHC 3448 (KLR)**, **David Mwangi Kamunyu v Rachael Njambi Ruguru [2022] KEHC 1973 (KLR)** and

Doshi & Co. Hardware Limited & another v Ndumi [2023] KEHC 25460 (KLR).

13. That the appellant did not adduce any evidence or credible testimony to show that he had upheld his duty of care, he was in competent control of the accident vehicle and he did all within his power and control to avoid and or stop the accident from happening. That the trial court did not therefore err when it held the appellant to be 100% liable for that accident.

14. On quantum, the respondent submitted that the appellant did not call a witness to testify and rebut the extent of the respondent's injuries. That the trial court's award of **Kshs 1 million** was low as against the double fracture injuries suffered and that an award of **Kshs 1.5 million** would be fair and equitable in the circumstances. Reliance was placed on the following cases;

a) George William Awuor v Beryl Awuor Ochieng [2020] eKLR,

where Aburili J awarded **Kshs 1.2 million** for tibia and femur fractures.

b) Kakuli v Ngase & another (Suing as the legal representatives of

the Estate Stanley Alemba Chavasi - Deceased) (Civil Appeal

E192 of 2021) [20221 KEHC 12132 (KLR) (Civ) (21 July 2022)

(Judgment) where the plaintiff sustained fractured right tibia and

fractured right fibula. The High Court awarded **Kshs. 1,300,000/=** as general damages.

c) **Lucy Waruguru Gatundu v Francis Kinyanjui Njuku (2017)**

eKLR where the plaintiff suffered right femur fracture (distal end) with bone loss; right tibia segmental fracture; and right fibula segmental fracture. He was awarded **Kshs. 1,600,000/-**.

15. The respondent further submitted that the trial court erred in declining to award costs for future medical expenses despite the same being pleaded in paragraph 10 of the plaint as held in **Kenya Power & Lighting Company Limited v AMK (Suing as the mother and next friend of JMK - Minor (Civil Appeal 58 of 2020) [2021] KECA 52 (KLR) (8 October 2021) (Judgment)**. That an award of **Kshs. 600,000/-** would be applicable under this heading.

16. That the trial court further erred in failing to award loss of earning capacity which is a claim for general damages and need not be specifically pleaded and particularized though the same was done I paragraph 11 of the plaint and as such he ought to be awarded **Kshs. 1,000,000/-** under that head.

17. This being a first appeal, the Court is duty bound to evaluate the evidence at the trial afresh and come to its own independent findings and conclusions

but at all times having in mind that it did not have the advantage of seeing the witnesses testify. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**

18. Before the trial court, the respondent (**Pw1**) adopted his statement dated **7/9/2023** as his evidence in chief and testified that, he was a plant mechanic at Kibos Sugar Factory. That at the time of his testimony, he had not healed and had metal plates on his left hand and thigh.

19. In cross-examination, he denied carrying protruding metals on his motorcycle as alleged by the appellant. That the vehicle that knocked him down was coming from the opposite direction and that he saw it from about 1km away. That that vehicle knocked him down when he was in the process of overtaking a Probox that was stalled on the road.

20. **Pw2, No. 73627 Sergeant Katana Kana** produced an abstract of the accident between the respondent's motorcycle and the appellant's motor vehicle on behalf of the Investigations Officer **PC Gladys Chemutai** who was away on training. He stated that the vehicle belonging to the appellant was coming from the opposite direction from the respondent's motorcycle swerved from its lane and knocked down the respondent.

21.**Pw3 Dr. Abuya Anthony** from the JOOTRH produced the P3 form and treatment notes he filled after examining the respondent as **PExh. 3 & 4 (c)** respectively. He testified as to the respondent's injuries as contained in the plaint.

22.In cross-examination, he stated that the respondent had a deep cut on the left hand, swelling on the fore head, bruises on the chest, an open wound on the right thigh with a comminuted fracture of the thigh bone, a mid shaft tibia fracture and a swollen ankle that had bruises. He estimated future cost of treatment of the respondent at **Kshs. 600,000/-**.

23.**Dw1 Vincent Omondi Otieno** adopted his statement dated **8/2/2023** as his evidence in chief. In cross-examination, he stated that the accident happened along the Obunga – Kondele road while he was on his way to Kondele whilst driving his lorry.

24.That the respondent, a motorcycle rider, wanted to overtake the Probox but never looked in front to see the oncoming traffic. That in the process of overtaking the Probox, the respondent's luggage hit the right rear part of his vehicle and lost control. That the Probox never stopped at the scene. That he could not tell what the respondent was carrying on his motorcycle and

further that he did not make a report of the incident. He blamed the respondent for causing the accident.

25. It is based on this evidence that the trial court rendered its decision. From the foregoing, the grounds of appeal may be summarized into one, viz, ***‘That the trial court misdirected itself in ignoring the evidence, submissions, authorities and principles applicable on liability and quantum and consequently came to a wrong conclusion on the same’***.

26. On liability, the appellant was held 100% liable for causing the accident. In **Ndatho v Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment)**, the court reiterated Lord Reid’s statement in ***Stapley v Gypsum Mines Limited (2) (1953) A.C 663 at P. 681***, wherein he stated thus: -

“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 fact of each particular case. One may find that a matter of history,

several people have been at fault and that if anyone 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, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally.”

27. The general rule of law is that he who alleges must prove. That is the gist of *section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya*. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334*, the Court of Appeal held that: -

“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 case 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.”

28. Accordingly, it was the respondent's duty to produce evidence that the appellant was liable for causing the accident that led to the injuries complained of. It was his testimony that the appellant knocked him down because he was driving the vehicle so fast and in a zig zag manner within urban area.

29. However, in cross examination, he admitted that the accident occurred when he was in the process of overtaking the stationary vehicle.

30. On the other hand, **Pw2**, testified that the accident occurred whilst the respondent was swerving onto his opposite lane. However, in cross-examination, he stated that according to the police abstract that he produced as **PExh2**, the matter was still under investigation and no one was blamed for the accident.

31. Juxtaposed against this was the appellant's testimony in which he denied causing the accident. He admitted that he saw the Probox the respondent referred to in his testimony. However, it was his testimony that the Probox was not moving meaning it was stationary. The appellant attributed the

accident to the respondent's luggage that he was carrying that hit his vehicle on the right rear part.

32. The Court has considered this evidence. The appellant blamed the respondent for the accident. That it was the luggage he was carrying that hit his vehicle causing the motorcycle to lose control and fall. This testimony was not seriously challenged or controverted. The appellant on his part denied carrying anything that was protruding. The luggage that he was carrying was in a sack. He did not dispute that it was that sack that hit the rear of the appellant's vehicle.

33. The balance of probabilities is that; if the appellants vehicle was on the opposite lane when it collided with the respondent, it would have been a head on collision and the injuries would have been fatal. The Court finds so because, if the accident occurred on the wrong side of the appellant, and the respondent had just overtaken the Probox, definitely the appellant would have also knocked that Probox. This never happened meaning, the appellant may have hit the luggage the respondent was carrying. The damage to the motorcycle was not disclosed for the Court to be able to discern the point of impact. It was the respondent's burden to prove that fact. He did not.

34. In the circumstances, I am persuaded that the trial court should have considered some degree of contribution on the part of the respondent. I would apportion the same at 90:10 in favour of the respondent.

35. Accordingly, the Court only interferes with the trial courts finding to the extent that liability is apportioned at 90:10% in favor of the respondent.

36. The appellant impugned the trial court's judgment on quantum terming it excessive.

37. The law on the circumstances under which an appellate court will interfere with an award of quantum by the trial court is settled. That an appellate court will only interfere with an award of damages if; ***in exercising its discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice.*** See **Mbogo & another Vs Shah (1968) EA** and **Mkube v Nyamuro [1983] KLR 403.**

38. In **Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003 (unreported)**, the Court of Appeal observed that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the

judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257).”

39. Further, in Kemfro Africa Ltd -Vs- A.M. Lubia and Another (1988) KAR 722, the Court of Appeal stated: -

“The Principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. The same position was taken in Denshire Muteti Wambui V. KPLC (2013) eKLR.”

40. In his statement of claim, the respondent pleaded that he sustained the following injuries;

a) *Head injury which involved swollen head with cut wounds*

- b) Chest tenderness*
- c) Bruises on the upper limbs*
- d) Deep cut wound with stitches on the left hand*
- e) Deep open cut wound on the left thigh with tenderness*
- f) Fracture of the right mid shaft femoral bone*
- g) Fracture of the right mid shaft tibia*
- h) Swollen and tenderness of the right leg*

41. The aforementioned injuries were confirmed by the testimony of **Dr. Abuya** as detailed in the P3 form and treatment notes which he filled after examining the respondent. These were produced as **PExh3 & 4 (c)**, respectively. In short, in addition to the soft tissue injuries sustained by the respondent, he also sustained fractures to the mid shaft femoral bone (thigh) and the right mid shaft tibia (lower leg).

42. The appellant submitted that the trial court's award of **Kshs. 1,000,000/-** was excessive while the respondent submitted that the said award was too low and the same ought to be enhanced to **Kshs. 1,500,000/-**.

43. The Court notes that there was no cross-appeal by the respondent. In that regard, his submissions for enhancement of the award on general damages as

well as loss of earning capacity and future medical expenses were all in vain. If the respondent was dissatisfied with the trial court's award, as it would seem from his lengthy and forceful submissions before this Court, he ought to have filed a cross-appeal to the appellants' appeal.

44. On the appeal, the Court has considered the submissions and authorities relied on by both parties on the award for damages. The Court considers the following cases as being comparable to the instant suit: -

- a) In **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR**, the court held that an award of **Kshs. 700,000/-** as general damages was sufficient for injuries of fracture of the right mid-shaft femur, fracture of the right mid-shaft femur, fracture of the left mid-shaft femur, devolving wound on the right tibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead. That was 12 years ago.
- b) In **Sammy Mugo Kinyanjui & another v Kairo Thuo [2017] eKLR**, the plaintiff suffered fractures of the tibia and fibula bones of both legs. On appeal, the High Court set aside the trial court's award of **Kshs. 1,000,000/-** and substituted it with a sum **Kshs. 600,000/-** in 2017.

c) **EW0 (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018]**

eKLR, the appellate court upheld an award of **Kshs. 800,000/-** in 2018 where the plaintiff had suffered femur fractures and fractures of the tibia fibula. There were additional injuries in this case of femur fractures.

d) In **Kimani v Meresey (Civil Appeal E087 of 2022)**

[2025] KEHC 4819 (KLR) (10 March 2025) (Judgment), the plaintiff suffered the fracture of the distal end of left femur, shattered left patella, fracture of the proximal end of the left tibia with bone loss and severe soft tissue injuries of the left knee joint, the appellate court set aside the trial court's award of **Kshs. 600,000/-** and substituted it with an award of **Kshs. 1,200,000/-**.

45. From the foregoing, it is not correct to term the award made by the trial court as excessive. In light of injuries suffered and the factor of inflation, the award of **Kshs. 1,000,000/-** cannot be said to be excessive and is comparable with the awards given in the cases referred to above.

46. The upshot of the above is that the appeal is partially successful in that liability is apportioned at 90:10% in favor of the respondent. The appeal

having been partially successfully, the respondent is awarded half the costs of the appeal.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 12th day of **February, 2026**.

A. MABEYA, FCI Arb

JUDGE