



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. E154 OF 2024

CHRISTOPHER INGUTIA WERE
APELLANT

VERSUS

DOUBLE SHASA LTD. 1ST
RESPONDENT

HENRYCO SHIKANDA 2ND
RESPONDENT

***(Being an appeal from the judgment and decree of Hon. V.O Amboko
(SRM) in Kakamega CC No. E253 of 2019 delivered on the 17th
September, 2024)***

JUDGEMENT

1. The Appellant herein had filed a suit vide a plaint dated 22nd October 2021. In his plaint, the Appellant averred that on or about 11th April, 2021, he was lawfully riding a motorcycle registration Number KMFG 951X along the Kakamega-Kisumu road when the 2nd Respondent, negligently/ recklessly driving

motor vehicle KCF 073Z, caused it to ram into the motorcycle from behind, from which the appellant sustained severe injuries.

2. The Appellant sought relief, seeking General damages for pain and suffering, together with special damages of Kshs. 29,700/=.
3. The Respondent entered an appearance and denied liability. The matter proceeded to a full hearing, and in its judgment dated 17th September 2024, the trial court found that the Appellant had failed to prove its case on a balance of probabilities and dismissed their case with costs. The court held that it would have awarded general damages of Kshs. 300,000/= and special damages of Kshs. 23,700/= if the case had been proved to the required standard.
4. The Appellant, being dissatisfied with the entire judgment of the Honourable court, filed their memorandum of appeal dated 19th September 2024 based on the following grounds;
 - a) *The Learned Trial Magistrate erred in law and in fact by finding that the Appellant did not prove her case against the defendant.*
 - b) *The Learned Trial Magistrate erred in law and in fact by applying the standard of proof beyond a reasonable doubt as opposed to the test of proof on the balance of probability as applied in civil matters.*
 - c) *The Learned Trial Magistrate erred in law and facts by failing to judicially and adequately evaluate the pleadings, evidence and exhibits tendered before it and thereby arrived at a decision unsustainable in law.*

- d) *The Learned Trial Magistrate misdirected itself on the principles applicable in the determination of Liability and relied on technicalities to arrive at its decision.*
- e) *The Learned Trial Magistrate erred in law and fact in making a finding on general damages that is inordinately too low and incommensurate to the injuries sustained.*
- f) *The Learned Trial Magistrate erred in law and fact by failing to consider and take into account the materials presented before it holistically.*
5. He prays that the appeal be allowed with costs and that the judgment of the learned Trial Magistrate be set aside and replaced with the findings and determination of this Honourable court.
6. The appeal was canvassed by way of written submissions.

Appellant's Submissions

7. In the submission dated 23rd October 2025, the Appellant averred that the trial court failed to adequately evaluate the pleadings, evidence and exhibits presented before it and relied on technical matters. According to the Appellant, the trial court admitted that the plaintiff was involved in a road traffic accident on 11/4/2021 from which he sustained injuries. Still, it held that they failed to produce a sketch map and did not challenge the defendant's account of how the accident occurred.
8. The Appellant faulted the trial court for relying on the Respondent's case that the motorcycle was being ridden in the wrong direction, claiming that the motor vehicle was expected to

be on the right side, while it would be on the front of the motorcycle.

9. He relied on the certificate of examination produced as Dexh 2, which indicated that the motor vehicle KCF 073Z had an impact on the front bumper, which, according to them, was from the front of the motor vehicle and further, the motorcycle was hit on the rear, resulting in fatal injuries to the pillion passenger.
10. The Appellant asserted that although DW2 was acquitted in the criminal traffic accident, the trial court had misdirected itself on the grounds of acquittal, as the standard of proof in the criminal case was higher than in the civil case. On a balance of probabilities, they cited the case of **William Kabogo Gitau vs George Thuo & 2 others (2010) KLR 526**. They held that the trial court erred in finding that they had failed to prove their case on a balance of probabilities.
11. He averred that the Respondent produced no conclusive evidence to show that the motorcycle joined the road from the wrong direction. As such, the trial court should have relied on the impact on the two automobiles to conclude where the probability test tilts.
12. The Appellant contended that the fact that the motor vehicle had an impact on the front and the motorcycle had an impact on the rear indicated that the two were headed towards the same direction and that the motorcycle was hit from behind, as opposed to the claim that the motorcycle joined the road wrongly from the right side of the motor vehicle.

13. The Appellants submitted that the trial court erred in dismissing the suit with costs and prays that the same be substituted and find that the Appellant proved his case on a balance of probability and decide on liability at 100% in their favour and against the Respondent jointly and severally.
14. The Appellant further stated that he suffered severe soft tissue injuries, including internal injuries of a ruptured liver and prayed for compensation for general damages of Kshs. 450,000/= and special damages of Kshs. 29,700/= that had been pleaded and proved for medical treatment, preparation of a medical report and the cost of a motor vehicle search.

Respondent's Submissions

15. In their submissions dated 22nd October 2025, the Respondent raised three issues for determination. On the first issue of the standard of proof that the trial court used to determine liability, they contended that the trial court was correct in finding that their evidence of how the accident occurred was more plausible compared to the Appellant's and denied the allegations by the Appellant that the trial court's standard of proof was beyond reasonable doubt.
16. According to the Respondent, they called an eye witness to corroborate their case, and further, the criminal case at the lower court had exonerated them from the liability in the traffic case. In contrast, the Appellant had called a police officer who was not present at the accident scene, and further did not provide any sketch plan or photographs. Therefore, the trial court did not err

in finding that their case was more plausible than that of the Appellant.

17. The Respondent submitted that the Appellant's evidence lacked the support of an eyewitness, and their case did not bear much weight other than proof of the fact that an accident occurred. They quoted the case of ***Hassan vs Nathan Mwangi Kamau Transporters & 5 others (1986) eKLR***.
18. They relied on evidence of the 2nd Respondent, who was the driver of the subject motor vehicle. He testified that the Appellant rode the motorcycle on the wrong side of the road and encroached on his lane at the roundabout, and as a result, the rider was responsible for the accident due to his negligent actions and that the trial court was right in holding that their evidence outweighed the evidence by the Appellant.
19. On the manner in which the Quantum was assessed, they asserted that despite the trial court dismissal of the Appellant's suit, it assessed the damages taking into account the injuries sustained by the Appellant.
20. In conclusion, they submitted that the trial court did not err in deciding that the award of the general damages it would have awarded had the Appellant proved its case.

Analysis and Determination

21. This being a first appeal, this court is obligated to re-evaluate and re-analyse the entire evidence afresh and arrive at its own independent conclusions, while bearing in mind that it did not have the benefit of seeing and hearing the witnesses testify.

22. This principle is well-settled in ***Peters v Sunday Post Limited [1958] EA 424***, where Sir Kenneth O'Connor P. stated: "**An appellate court has, indeed, jurisdiction to review the evidence to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution.**"
23. From the memorandum of appeal and submissions, the following issues arise for determination;
- (a) *Whether the trial court applied the correct standard of proof and adequately evaluated the evidence on liability.*
 - (b) *Whether liability was proved on a balance of probabilities against the Respondents.*
 - (c) *If liability is established, what quantum of damages is appropriate?*
24. The first issue for determination was whether the trial court applied the correct standard of proof in determining the liability of the Appellant's suit. This would entail the court's review of the evidence adduced by the parties to determine whether the court agrees with the trial court's factual finding. In ***Selle v. Associated Motor Boat Co. Ltd. & Others [1968] EA 123***, the Court held 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. In particular this Court is not bound necessarily to follow***

the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence." See also ***Gitobu Imanyara & 2 others v. Attorney General [2016] eKLR.***

25. It is trite law that in civil matters, the standard of proof is on a balance of probabilities. The burden of proof is placed upon the Appellant and is to be discharged on a balance of probabilities as he who alleges must prove. Denning J. in ***Miller v Minister of Pensions [1947] 2 ALL ER 372***, discussing the burden of proof, stated that;

"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. Thus, proof on a balance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

26. In ***Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] KECA 616 (KLR)***, the Court of Appeal reiterated that a balance of probabilities means that a court must

be satisfied that it is more probable than not that the plaintiff's case is true.

27. Sections 107 and 108 of the Evidence Act Cap 80 provide who bears the burden of proof in a case. The two Sections provide:-

“107. (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.

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

28. In ***Evans Nyakwana v. Cleophas Bwana Ongaro [2015] KEHC 8440 (KLR)***, the Court 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(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), which provides:

107. (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.

16. Furthermore, 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. That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. The Court of Appeal in Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013] eKLR considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert

witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the 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 on either side.”

29. The Appellant contends that the trial court applied a criminal standard of proof rather than the civil standard. His case was that he was involved in a road traffic accident around 8.00-9.00 p.m. While riding his boda boda. He avers that he was transporting a customer from the stadium to Amalemba when he was struck from behind by the motor vehicle KCF 073Z, a Toyota Prado, at the Golf roundabout.
30. The Appellant testified that he suffered severe injuries being internal bleeding and multiple bruises, as a result of the accident, which resulted in him being admitted for 10 days at Kakamega General Hospital.
31. He produced his treatment and discharge form, P3 form, search receipt, driving license, as well as the police abstract that indicated that an accident had occurred.
32. PW2 was PC Collins Kholo, a police officer whose evidence was entirely omitted from the typed proceedings but is in the handwritten notes of the trial court as having testified the same day as the Appellant. Although PW2 was not the Investigating Officer, he produced the police abstract confirming the accident. According to him, the motorcycle's rear part was bent, the leg

shield was scratched, the front rest and left foot rest were dented, and the rear mud guard was dented as well. He concluded that the impact was from behind. The witness stated that there was a sketch map which would show the point of impact. However, he did not produce the sketch map or the motor vehicle inspection report as exhibits.

33. DW1, Envico Shikanda Alwanga was the driver of the motor vehicle KCF 073 Z. He produced his driving license, Inspection report and the judgment in MCTR No E450 of 2021.
34. According to DW1, he was coming from Webuye to Kisumu. At the same time, the motorcycle approached from the Mumias direction on the wrong side and attempted to join the Kakamega-Kisumu road without negotiating the roundabout even though he had the right-of-way, thereby leading to the collision.
35. The defence called an independent eye witness, DW2 Peter Khalumi Okwako who testified that on the material date, at about 9.30 p.m., he was near Khetias supermarket, intending to board a tuk-tuk when the motorcycle from Mumias road crossed the Kakamega- Kisumu Highway improperly, thus colliding with a Toyota Prado, which was negotiating a corner and the motorcycle was hit by the Prado's front bumper. He faulted the rider for taking a shortcut.
36. The evidence presented by the parties consist of eyewitness testimony and documentary evidence including a judgement in MCTR No. E450 of 2021, which indicates that the 2nd Respondent was acquitted of the counts of causing death by dangerous

driving and careless driving. It is common ground that the accident occurred along the Kakamega-Kisumu Highway at the Golf roundabout. However, the two parties gave conflicting accounts of the accident, with each party blaming the other for negligence.

37. It is well settled that acquittal in a criminal court does not automatically absolve a party from civil liability as the standard of proof differs significantly, with criminal liability attaching only when proof is beyond reasonable doubt. See **Michael Hubert Kloss & Another v. David Seroney & 5 others [2009] KECA 146 (KLR)**.

38. With the two contrasting narratives, it is quite difficult for the court to establish who is to blame. In the case of **Michael Hubert Kloss & Another v. David Seroney & 5 others (Supra)**, the Court of Appeal stated:-

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

“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, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

39. The Respondents provided ocular evidence from an independent eye-witness who corroborated the 2nd Respondent's account that the Appellant was riding across the road from Mumias direction without negotiating the roundabout when the accident occurred. At the scene. He remained steadfast when cross-examined and clarified that he was within 50 feet from the roundabout and that there was sufficient light. There is no reason to doubt his testimony.
40. Under Section 52 (1) (b) of the Traffic Act, all drivers are required to obey traffic signs as they drive along the road. In my view, this provision includes signs that govern roundabouts. The

Appellant was therefore in breach of Section 52 of the Traffic Act and the Highway Code that requires predictable lane discipline as one approaches a roundabout or exits a junction.

41. Whereas the Appellant did not have any eye witness to support his claim, the evidence adduced by the Respondents tended to buttress his claim that the 2nd Respondent did not observe the due care and attention that was required of a driver. The issue then is whether the Appellant was entirely to blame.
42. The court must treat the evidence adduced by the parties holistically as it re-evaluates the same. The inspection report of motor vehicle registration number KCF 073Z indicates that the vehicle sustained damage to the “front bumper midway”. The position of the damage to the bumper is indicative of the point of impact and is prima facie consistent with a rear-end collision and strongly suggests that the motor vehicle hit the motorcycle from the rear as claimed by the Appellant, hence corroborating the Appellant’s version of the accident to an extent.
43. On further review of the judgement of the traffic case, it is apparent that the 2nd Respondent was acquitted under Section 215 of the Criminal Procedure Code. The summary of the 2nd Respondent’s defence in the judgement is that on the fateful date, while he was negotiating a roundabout, the motorcycle came from nowhere into the roundabout and he tried in vain to avoid a collision by braking and swerving to the left lane; the collision occurred, but with a very small impact. His witness, who also gave evidence in the civil suit, testified that the motorcycle

got in front of the motor vehicle, and the pillion passenger attempted to jump off, but the accident inevitably occurred. The said evidence is indicative of a possibility that the 2nd Respondent was at a speed which made it impossible for him to stop on time so as to avoid the accident.

44. While the 1st Respondent was acquitted of criminal charges, civil liability is determined on a preponderance of evidence. The 1st Respondent still owed a duty of care as a driver approaching the roundabout at night, in the town centre, to maintain a reasonable speed and have a proper lookout. Conversely, the Appellant's abrupt manoeuvre at the roundabout cannot be ignored, as it contributed to the accident. Under the principle enunciated in ***Nance v. British Columbia Electric Rly [1951] AC 601***, if a party fails to take reasonable care for their own safety, they may be found liable in contributory negligence.

45. Having carefully reviewed the evidence, the parties' submissions and the relevant law, I find that the trial court erred in dismissing the Appellant's claim. Had the trial court reviewed and weighed the conflicting evidence and considered the evidence adduced through documentary material, it would have arrived at a different conclusion as there was sufficient evidence that the 2nd Respondent was negligent in his driving.

46. Where liability is not clear but both parties contributed to the accident, the courts apportion liability. In the case of ***Hussein Omar Farah v. Lentoli Agencies [2006] KECA 388 (KLR)***,

the court held that where evidence from both sides is conflicting but suggests mutual fault, liability may be shared.

47. The failure by the Appellant to produce the sketch plan and the inspection report for his motorcycle means that the court is left to rely on the evidence of the Respondents to determine the extent of contribution. The Appellant needed to adduce the said evidence in order to prove that it was more likely that the accident occurred as he asserted and not as the Respondents claim. Absent the said evidence, I find that the scales tilt in favour of the Respondents in that despite finding that both parties were to blame for the accident, the Appellant must bear the larger share of the blame.
48. The trial court assessed general damages at Kshs. 300,000/= for soft tissue injuries and internal injury, which was the ruptured liver.
49. The principles upon which an appellate court may interfere with an award of damages were settled in **Butt v Khan [1978] KECA 24 (KLR)**, where the Court of Appeal held that interference is warranted only where the award is inordinately high or low or where the court acted on wrong principles.
50. Similarly, in **Kemfro Africa Ltd t/a Meru Express Services v A.M. Lubia & another [1985] KECA 137 (KLR)**, it was held that an appellate court should not disturb an award unless it is a wholly erroneous estimate.
51. The parties produced two medical reports that reflect similar injuries, save that Dr Sokobe's report is more reflective of the

primary treatment documents and discharge summary. In **Angeline Akinyi Odhiambo v. Teresia Mbaika Kanyo & Another [2016] KEHC 3456 (KLR)**, which both parties relied on, the court upheld an award of Kshs. 200,000/= for soft tissue injuries and a ruptured spleen.

52. The trial Magistrate awarded Kshs. 300,000/= against a prayer for Kshs. 450,000/-. Since it was not disputed that the Appellant suffered a ruptured liver due to severe blunt injury to the abdomen, which led him to a one-week stay in hospital and left a residual scar on the abdomen, the award ought to have been commensurate with the injuries. Taking into account that the award in the **Teresia Mbalia Kanyo** (supra) case was made 10 years ago and the inflationary trends, I find that the award of Kshs. 300,000/- was so inordinately low that it did not reflect the severity of the injury. An award of Kshs. 400,000/- would be more appropriate.
53. In the end, the appeal on liability and quantum is allowed. The judgement dismissing the suit is set aside, and the following orders made:-
- (a) Judgement be and is hereby entered against the Respondents as prayed by the Appellant.
 - (b) Liability is hereby apportioned at 70% against the Appellant and 30% against the Respondents.
 - (c) The general damages are re-assessed at Kshs. 400,000/-.
 - (d) Special damages remain at Kshs. 23,700/-.

(e)The Appellant shall have the costs of the suit in the lower court and the costs of the appeal.

54. It is so ordered.

Dated, signed and delivered at Kakamega, this 5th day of March 2026.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Muriithi for the Appellant

Mr. Asembo for the Respondent

Court Assistant: Polycap