Gathua & another v Ngui (Civil Appeal 39 of 2023)
[2026] KEHC 3889 (KLR) (19 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3889 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 39 OF 2023

RC RUTTO, J

MARCH 19, 2026

BETWEEN

JOHN KAMAU GATHUA ..... 1ST APPELLANT

JACINTA WAIRIMU MUGUNU ..... 2ND APPELLANT

AND

PATRICK MAKAU NGUI ..... RESPONDENT

(Being and Appeal from the Judgment delivered by the Honourable S. Kandie, Resident Magistrate on the 6th day of February, 202 in Mavoko RMCC No. E961 of 2021)

JUDGMENT

1. This appeal challenges both liability and quantum. In the trial court, the Respondent sued the Appellants seeking general damages, special damages of Kshs. 3,550/=, costs and interest arising from a road traffic accident that occurred on 1st July 2021 along the Devki-Mavoko road. According to the Plaint, the 1st Appellant was sued as the driver, servant, agent in control, possession in ownership and the registered owner of motor vehicle registration No. KBM 179 R Toyota Hiace M.Bus/Matatu, while the 2nd Appellant was sued as the registered owner of motor vehicle registration number KBM 179 R Toyota Hiace M.Bus/Matatu. At the time of the accident, the Respondent was riding motorcycle registration number KMCG 076S.

2. It was alleged that the Appellants' motor vehicle was being driven negligently, carelessly, recklessly and without any regard to other road users and it lost control and hit the Respondent's motor cycle. As a result of the collision, the Respondent sustained serious bodily injuries.

3. In their defence, the Appellants, denied the claim, and the matter proceeded to a full hearing. Upon conclusion, the trial court found the Appellants jointly and severally 100% liable for the occurrence

of the accident and awarded the Respondent general damages of Kshs.450, 000/=, special damages of Kshs.3, 550/= and future medical expense of Kshs.65, 000/= Total Kshs.518,550/=.

4. Aggrieved by the Judgment of the trial court, the Appellants filed this appeal raising prolix ten grounds points disputing the findings of the trial magistrate. I have condensed those grounds as follows, that: the trial court erred in its findings on liability since it went against the weight of the evidence adduced and the improper use of extraneous evidence; the award on damages was grossly and manifestly excessive; and the trial court failed to consider the Appellants' written submissions on liability and quantum.

5. On those grounds, the Appellants prayed that the appeal be allowed by setting aside and reassessing liability and quantum and replacing it with its own assessment. They prayed that the appeal be allowed with costs.

6. The appeal was canvassed through written submissions. However, as at the time of writing this decision, the Appellants' submissions had not been supplied.

7. The Respondent, on the other hand, filed submissions dated 17th June 2025. First, the Respondent underscored this Court's role as the first appellate court, making reference to the cases of Musera -vs- Mwechelesi & Another (2007) KLR 15, Selle vs. Associated Motor Boat Company Ltd [1968] EA 123 and Peters vs. Sunday Post Limited [1985] EA 424. On the question of liability, the Respondent submitted that the occurrence of the accident was not in dispute, but in issue was the question, who caused it. He submitted that before the trial court, he testified that on 1st July 2021, he was riding motorcycle registration number KMCG 076S TVS along Devki-Mavoko road at Sokoni Stage when motorvehicle registration number KBM 179R hit him from the rear thereby causing a road traffic accident as a result of which he sustained injuries. That on the other hand, the Appellants had blamed the Respondent for the accident stating that the Respondent made an abrupt U-turn to the right thereby colliding with the Motor vehicle the Appellant was driving. That while this Appellant's version was supported by the traffic officer's account as recorded in the occurrence book, the Respondent submitted that the traffic officer confirmed that what was recorded in the occurrence book was as narrated by the driver/Appellant and not as per the findings of the investigation officer.

8. He further submitted that it was common ground that the point of impact was at the rear of the motorcycle. He thus urged that for the rider to have been knocked from the rear by the motor vehicle, he had to be in front of the motor vehicle. Therefore, he urged, the evidence that the rider made a sudden U-turn was contradictory as this would mean the point of impact would have been on either side of the motorcycle.

9. It was thus urged that applying the test in Henderson v Harry E Jenclens [1969] 3 AER 756 on determining negligence on a balance of probability, the trial court was right in finding that it was more probable that the Appellants caused the accident by hitting the Respondnet from the rear and they were thus 100% liable. He urged this court not to interfere with that finding.

10. On quantum, the Respondent submitted that as per Dr.Ndeti's medical report dated 18th August 2021, he sustained blunt injuries and fractured right mid femur. Citing the case of Meru Express Services & another Versus A. M. Lubia & Another (1985) eKLR, he urged that it is trite law that the assessment of General Damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at the first instance.

11. It was thus urged that taking into account the nature of injuries sustained, it is evident that the award made by the Learned Magistrate was within reasonable range and should not be disturbed. In this regard, reference was made to the case of Kimani v Mango & 2 others (Civil Appeal E071 of 2023)

[2024] KEHC 6744 (KLR) (6 June 2024) (Judgment) where the Court on Appeal substituted an award of Kshs 450,000/= with Kshs 550,000/= for a claimant who had sustained Fracture of the femur on the right leg and cut wound on the left leg; and the case of Fred Mohinga Kipkigiya vs David Agreey Zimbiru [2011] eKLR where the court reduced an award of Kshs.800,000/= to an award of Kshs.650,000/= for a claimant who had sustained a fracture of the right femur and fracture of the distal femur in addition to soft tissue injuries.

12. Ultimately, the Respondent urged that the appeal be dismissed in its entirety with costs to the Respondent together with interest at the Court's rates from the Date of Judgment.

Analysis and Determination

13. This being a first appeal, this Court is under a duty to re-evaluate and reassess the evidence and draw its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424).

14. Upon careful analysis of the record of appeal and the submissions the following issues arise for determination:

    a. Whether the issue of liability was properly determined.

    b. Whether the Trial Magistrate misdirected herself in assessment of damages.

Whether the issue of liability was properly determined.

15. The Appellants' main contention is that the learned trial magistrate failed to appreciate the circumstances under which the accident occurred, failed to evaluate the evidence and wrongly found them wholly to blame for the accident.

16. Section 107(1) of the *Evidence Act*, Cap. 80 Laws of Kenya provides for who bears the burden of proof as follows:

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

17. In this appeal, the dispute is simply over who was to blame for the accident. The scope and extent of the fundamental legal principles on this subject are settled. In the cases of Nandwa v Kenya Kazi Ltd [1988] KLR 488 and Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR the Courts on this issue held that:

> " In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides same answer adequate to displace that inference."

18. In examining the evidence presented before the trial magistrate, PW1 Cpl. Amdan testified that the rider was riding his motor cycle Reg No. KMCG 076 S along Sokoni area when he was hit by motor vehicle No. KBM 179R. On cross-examination he stated that he did not know the point of impact, did not have pictures of sketch maps and could not tell the results of the investigations.

19. PW2, the Respondent herein, testified that he was riding a motor cycle along Devki – Makadara road at Pepe area from Kitengela when the Appellant's Motor Vehicle lost control and hit the motor cycle causing it to fall down. He stated that as a result he sustained injuries on the head, fracture of the right leg on the thigh and injuries below the knee.

20. He recalled that the driver of the suit vehicle rushed him to the County Government of Kajiado Health Services where he received treatment. On being administered first aid and on conducting an x-ray, it was revealed that he had suffered a fracture of the right thigh. He was thus transferred to Machakos Level 5 Hospital for further treatment. An ORIF was fixed on his right thigh and he was admitted for one month. Later, PW2/Respondent, reported the accident at Athi River Police Station. He recorded his statement and was issued with a P3 form and a police abstract. PW2 blamed the driver of the suit vehicle for driving at a very high speed, carelessly and negligently, without any due regard to other road users. In support of his evidence, PW2 pertinently produced treatment notes and medical records, medical report dated 18th August 2021, PW3 form, police abstract, motor vehicle search and receipt in support of special damages.

21. On cross examination the Respondent stated that the motor vehicle hit the rear of the motor cycle. That the motor vehicle was behind the motor cycle.

22. In their defence the Appellants called DW1, PC Kariuki who produced OB extract under OB 41/1/7/21 in respect to the accident. He stated that it was reported by the driver of the suit vehicle that he was driving the suit vehicle from Devki and collided with the rider after he made an abrupt U-turn and sustained injuries. The rider was rushed to Saitoti Hospital. The police abstract and OB extract were produced in evidence. In his conclusion, the rider was to be blamed for causing the accident.

23. DW2 Douglas Karuri stated that he was the driver of the suit vehicle. That he recalled that at around 9:30 a.m., he was driving the vehicle from Devki heading towards Makadara. That upon reaching Sokoni stage, about 10 metres shy of the Tuskys Namanga road, while on the left lane, the suit motorcycle abruptly joined the road from the left. He did not see the motorcycle approach the road as he had been obstructed by another matatu that was not in motion at the stage picking and dropping passengers. He applied emergency brakes to avoid a collision after his conductor shouted warning him about the motorcycle.

24. That unfortunately, the motorcycle was hit by the front left side of the motor vehicle while pushing it ahead and fell in front of the insured vehicle. That the rider fell off the motorcycle and sustained slight injuries. Dw2 stated that he rushed him to Saitoti Hospital. He recalled that a police officer came to the scene and blamed the rider for causing the accident.

25. On cross-examination DW2 at one point stated that he did not see the Respondent make a U-turn, and again that he saw him making a U-turn. He wanted to cross and there was no road and that he saw him about 6 feet. On re-examination he stated that he saw the rider emerging from parked motor vehicles.

26. After analyzing the evidence of the parties, the honourable magistrate found that the Appellant was 100% to blame for the occurrence of the accident. The trial court in the judgment observed;

> "it is not in dispute that the motor vehicle hit the rider in the rear....According to the defendant's driver, he had not seen the rider. He stated that the rider made a u-turn from the left side to the right side and that is when the accident occurred.
>
> If we were to go with this version of the story, it would mean both the motor vehicle and the rider were heading to the same direction. A U-turn meant that the rider was heading in the opposite direction prior the accident. In this case the plaintiff was hit from the rear.

That is to say he was ahead of the motor vehicle when the accident occurred. The defendant admitted that he did not see the plaintiff prior to the accident. On cross-examination, he stated that he saw the rider making a u-turn and wanted to cross the road.

27. The Respondent's case was that he was hit from the rear while riding lawfully. The 1st Appellant (DW2) gave contradictory evidence, claiming at one point that he did not see the motorcycle until the collision, and at another, that the Respondent made an abrupt U-turn. The Appellant's first witness, DW1's evidence is not credible given that first the testimony of DW2 was contradictory and what DW1 stated is what was said to him by DW2. In all probabilities, DW2 would narrate a version that absolves him from liability.

28. Under Section 107 of the *Evidence Act*, the burden of proof rests on the party asserting facts. A rear-end collision raises a strong prima facie inference of negligence on the part of the following vehicle. The trailing driver has a continuous duty to maintain a "reasonable and prudent distance" and a proper lookout.

29. The physical fact of a rear-end impact contradicts the U-turn theory advanced by the Appellant. Furthermore, the driver's admission that he was "obstructed" by another vehicle and did not see the motorcycle until his conductor shouted confirms a breach of the duty of lookout. Guided by the principles set out in Nandwa v Kenya Kazi Ltd KLR 488, where a set of facts raises a prima facie inference of negligence, the defendant must provide an adequate answer to displace that inference. The Appellants' contradictory testimony failed to displace this inference.

30. Consequently, I do agree with the trial court finding that the Appellants are 100% liable.

Whether the Trial Magistrate misdirected herself in assessment of damages.

31. The trial court awarded Kshs.450,000/= as general damages for pain, suffering and loss of amenities and Kshs.6,550/= as special damages. The Appellant contends that the award of general damages was excessive and that special damages were not strictly proved. He urged that general damages of Kshs.300,000/= would be appropriate and maintained that only the sum of Kshs.550/= for the motor vehicle search fee was strictly proved under special damages. The Respondent did not actively dispute the quantum on appeal.

32. The Court of Appeal observed in Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR held that –

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

33. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court stated:

> " On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See Butler vs Butler (1984) KLR 225.
>
> The assessment of damages in personal injury case by court is guided by the following principles: -

1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) The award should be commensurable with the injuries sustained.

3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR."

34. It is not in dispute based on the medical report produced by PW2 dated 2nd June 2022 that the Respondent sustained the following injuries, fractured proximal right tibia bone and blunt injuries to the lower limb. The doctor categorised the injuries as grievous harm and also stated that the Respondent required between Kshs.65, 000/= to Kshs.100, 000/= for removal of implants.

35. In making its determination, the trial court relied on two authorities, that is, Samuel Mugo Kinyanjui & Another versus Kairo Thuo [2017] eKLR and the case of Hernart Otara Marube versus Dunkan Ochora [2022] eKLR. The trial court also considered inflationary trends and the nature of injuries sustained. In these circumstances, I find no reason to disturb the award of general damages.

36. On special damages, the settled principle is that special damages must be strictly proved. The receipts for the medical report and medical expenses were contested on technical grounds. However, these objections did not disprove the actual costs incurred. The motor vehicle search fee of Kshs.550/= was not disputed. Accordingly, I find that the special damages awarded were properly proved, and I will not interfere with the trial court's finding.

37. In conclusion, this appeal is without merit and is hereby dismissed. The judgment of the trial court is upheld in its entirety.

38. The Appellants shall bear the costs of this appeal assessed at kshs.35,000/=.

39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF MARCH 2026.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant