



REPUBLIC OF KENYA



KENYA LAW
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**Kodieny v Kananu (Civil Appeal E164 of 2019)
[2026] KEHC 4350 (KLR) (5 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E164 OF 2019**

F WANGARI, J

MARCH 5, 2026

BETWEEN

JAMES KODIENY APPELLANT

AND

EVERLYNE KANANU RESPONDENT

*(Being an appeal against the Judgment of Hon. E. K Makori (CM)
delivered on 9th August 2019 in Mombasa Chief Magistrate's Court
Civil Suit No. 2404 of 2015, Everlyne Kananu v James Kodieny)*

JUDGMENT

1. The Plaintiff/Respondent vide a Plaint dated 9th December 2015 sued the Defendant/Appellant for general damages, special damages of Kshs. 21,200, costs of and incidental to the suit, and interest on special damages, general damages and costs, as a result of injuries sustained in a road traffic accident.
2. It is averred that on or about the 26th day of April 2015, the Plaintiff had lawfully crossed the Mombasa-Malindi Road at the junction to Bamburi Cement when suddenly the Defendant's authorized driver, servant and/or agent, one Edwin Mwalo Kodieny negligently and/or carelessly drove, controlled and/or permitted motor vehicle registration number KAW 530X to lose control, veer off the said road, land into the pavements and violently knock down the Plaintiff, in consequence whereof she sustained severe injuries and suffered loss and damage.
3. The particulars of injuries as pleaded by the Plaintiff included displaced compound fracture of the left tibia, displaced compound fracture of the left fibula, comminuted fracture of the right tibia, and a deep cut wound on the left leg.
4. Interlocutory judgment was entered on 2nd February 2016 against the Defendant in default of appearance despite having been duly served. The matter proceeded for formal proof hearing and judgment issued on 8th March 2017. Through an application by the Defendant, the said judgment



and/or decree was set aside, the Defendant entered appearance and filed Statement of Defence dated 2nd October 2018.

5. The Defendant in his Statement of Defence averred that save for what was expressly admitted, denied each and every allegation of fact contained in the Plaint. The Defendant stated that without prejudice to the denials and in the alternative, if the accident occurred (which was strictly denied) then the same was caused wholly due to the negligence of the Plaintiff. The Defendant prayed that the Plaintiff's suit be dismissed with costs.
6. The Plaintiff tendered her evidence in court by calling 3 witnesses: PW1, Dr. Stemaegen Ndegwa, who examined the Plaintiff and prepared the Medical Report dated 29th May 2015; PW2, No. 70875 CPL Abdullahi Dida, who testified on behalf of the Investigating Officer; and the Plaintiff, PW3, Everlyne Kananu. The said witnesses were cross examined and the Plaintiff closed her case. The defence closed their case without calling any witnesses. The court then gave directions for parties to file their submissions.

Submissions

7. The Plaintiff in her submissions dated 10th May 2019, prayed that the Defendant to be held 100% liable for failure to tender any evidence in rebuttal of the Plaintiff's evidence. On quantum, the Plaintiff prayed for an award of Kshs. 4,000,000 for general damages and special damages of Kshs. 21,200. The Plaintiff relied on the holding in the case of Gabriel Mwashuma v Mohamed Sajjad & Milly Glass Works Limited, Mombasa HCCC No. 79 of 2013 where the court made an award of Kshs. 3,000,000.
8. The Defendant in his submissions dated 3rd June 2019 urged the court to hold liability at the ratio of 70:30 in his favour as against the Plaintiff on the basis that PW2, the police officer, testified and confirmed that the Plaintiff was blamed for the accident, that there was no eye witness to corroborate the Plaintiff's version of events, that the police abstract adduced in evidence by the Plaintiff affirmed that the Defendant's driver was never charged with any traffic offence, and that no evidence was tendered to show that the Defendant was driving at a high speed or negligently.
9. On quantum, the Defendant submitted that given the nature of the injuries, an award of Kshs. 250,000 would suffice as guided by the authority in Elizabeth Mulwa v Tawfiq Bus Services (2003) eKLR where a similar amount was awarded for similar injuries. On special damages, the Defendant submitted that they were not proved and an award on the same should therefore not be granted.
10. On 9th August 2019, judgment was entered in favour of the Plaintiff as against the Defendant as follows;
 - a. 100% liability
 - b. General damages Kshs. 600,000
 - c. Special damages Kshs. 21,200
 - d. costs and interest at court rates.
11. Being dissatisfied with the judgment of the court, the Appellant filed this appeal through the Memorandum of Appeal dated 16th August 2019 on grounds that the learned trial magistrate erred in law and in fact in failing to appreciate the Appellant's submissions on both quantum and liability thereby arriving at a wrong conclusion, in apportioning liability at 100% in favour of the Respondent yet the police abstract produced in evidence blamed the Respondent for causing the accident, in finding that the Appellant was to blame for the accident since he did not testify, in ignoring the testimony of the Respondent and the police officer on the occurrence of the accident, in failing to consider all



circumstances of the accident and the Appellant's submissions, in failing to properly and/or at all evaluate the evidence on record cumulatively and hence reached a wrong decision on quantum and liability in view of the evidence on record, by awarding a figure that is inordinately too high in the circumstances of the case and deviating from existing and established judicial principals on accident claims, and in failing to properly and/or at all evaluate the evidence on record cumulatively and hence reached a wrong decision on quantum in view of the Respondent's witnesses who testified.

12. The Appellant prayed for orders that the appeal be allowed, that this court be pleased to set aside the trial court's determination on quantum and substitute the same with a determination of its own, and that the Appellant be awarded costs of the appeal and those of the lower court.

Submissions

13. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 14th March 2025, argued that contrary to the trial court indication that no defence was filed, the Appellant had filed a Statement of Defence on 3rd October 2018, which was served upon the Respondent. That in the defence, the Appellant denied in toto the Respondent's allegations and further attributed occurrence of the alleged accident to the sole and/or contributory negligence of the Plaintiff.
14. The Appellant stated that the Plaintiff confirmed on cross examination that the accident occurred at around 5.00 am as she was coming from a night out with her boyfriend and as they were crossing the road at a roundabout. That she further confirmed that she did not see motor vehicle registration number KAM 530X.
15. The Appellant submitted that a junction is not an area designated for pedestrians to cross, and that there was no independent eye witness who saw how the Appellant's motor vehicle registration number KAM 530X was driven prior to occurrence of the alleged accident.
16. That the police officer who testified, upon cross examination, confirmed that he was not the investigating officer, that the Appellant was never charged with any traffic offence and that the Respondent was to blame for causing the accident. The Appellant stated that the police abstract adduced in evidence unequivocally shows that no charges were preferred against the Appellant, and that the Appellant's driver was never charged with any traffic offence.
17. The Appellant argued that in civil cases, the standard of proof on a balance of probabilities lies with the party who alleges. That the law under Sections 107, 108 and 109 of the *Evidence Act* places the burden of proof as to any particular fact on the person who wishes the court to believe in its existence, unless it is provided that the proof shall be on a particular person.
18. That this position was reiterated in the case of *Kendi & Another (suing as the legal representatives of the estate of Duncan Mwenda (deceased) v Japheth Iringo (Civil Appeal 28 of 2022) (2022) KEHC 12793 (KLR) (31 August 2022) (Judgment)*. The Appellant was of the view that the Respondent failed to prove her case to the required standard and the trial court's finding on liability should therefore be set aside.
19. On the trial court's finding on quantum, the Appellant submitted that the trial court's award of Kshs. 621,200 inclusive of special damages was excessive in the circumstances considering the nature of injuries sustained by the Plaintiff, which injuries had fully healed with no incapacity. The Appellant emphasized on the holding in *Elizabeth Mulwa v Tawfiq Bus Services (2003) eKLR* where the court made an award of Kshs. 250,000 as general damages for similar injuries. Reliance was also placed on the case of *Robert Githinji Kithaka v Attorney General (2018) eKLR* where the court awarded Kshs. 250,000 as general damages for pain and suffering. That therefore, an award of Kshs. 250,000 would



have been sufficient in the circumstances. The Appellant prayed that this court allows the appeal with costs.

20. The Respondent in their submissions dated 10th March 2025 argued that the Court of Appeal has consistently held that in negligence claims, the Plaintiff bears the burden of proving the Defendant's fault on a balance of probabilities as was held in the case of *Kiema Muthuku v Kenya Cargo Handling Services Ltd* (1991) 2 KAR 258 cited with approval in *M'iruanji Muchai v Broadways Bakery & Another* (1996) eKLR. However, where a defendant defaults and an interlocutory judgment is entered, the court must still assess the evidence to ensure that justice is served, according to the holding in *Peter v Sunday Post* [1958] E. A. 424 as cited with approval in *Francis Gicharu Kariri v Peter Njoroge Mairu* (2005) eKLR.
21. The Respondent argued that on apportionment of liability, the Court of Appeal in *Butt v Khan* (1981) KLR 349 established that contributory negligence must be supported by evidence, and courts may apportion liability where the Plaintiff's conduct partially contributed to the harm. According to the Respondent, the trial court correctly apportioned liability at 90:10 which position was supported by the Plaintiff's testimony, the police abstract and P3 Form, which established the Defendant's involvement in RTA. The Respondent relied on the holding in the case of *Carolyn Indasi Mwononyo v Kenya Bus Services Ltd* (2012) eKLR and stated that the trial court's inference of negligence was sound as the Defendant offered no defence.
22. On the minor inconsistency in the Plaintiff's case, the Respondent concurred with the position in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] 1KAR 1 cited with approval in *Beatrice Njeri Maina v Augustine Maina Ngetha* (2015) eKLR that minor discrepancies do not negate the Plaintiff's case where core facts remain consistent.
23. On quantum of damages, the Respondent stated that the Court of Appeal in *Kigaragari v Aya* (1985) eKLR and *Southern Engineering Co. Ltd v Mutia* (1985) eKLR emphasized that awards must be reasonable, comparable to similar cases, and supported by evidence, avoiding speculative or excessive sums. The Respondent submitted that the award for pain, suffering and loss of amenities of Kshs. 450,000 which was reduced to Kshs. 405,000 after apportionment, was comparable to awards in similar cases. That in *Kemfro Africa Ltd t/a Meru Express Services v Lubia* (1987) eKLR, the Court of Appeal emphasized on uniformity in awards for similar injuries.
24. It is important to note that the Respondent in her submissions made reference to the ex-parte judgment which was set aside.

Analysis

25. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... Briefly put they are 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 ...”
26. I have considered the Record of Appeal dated 26th September 2023 and submissions by the parties. The issues for determination are: -
 - a. Whether the trial court properly apportioned liability
 - b. Whether the award on quantum was proper



- c. Whether the trial court considered the Appellant's submissions, circumstances of the case and evidence on record in arriving at its determination
 - d. Who should bear costs
27. On the issue of liability, the parties appear to mix up the ex-parte judgment on liability delivered on 8th March 2017 and the judgment subject to this appeal delivered on 9th August, 2019. The former judgment which was set aside paving way for fresh hearing inter-partes entered judgment on liability in favour of the Plaintiff at a ratio of 90:10 against the Defendant. The judgment subject to this appeal found the Defendant 100% liable. The proper position is that judgment on liability was entered at 100% against the Defendant. The interlocutory proceedings and the judgment are not applicable in this appeal.
 28. It is not in dispute that the accident occurred at 5.00 am when the Respondent was hit near a pavement as she crossed the road at the roundabout. According to the Appellant, the roundabout was not a designated area for pedestrian crossing. While the Respondent urged the court to apportion liability at 100%, the Appellant prayed that liability be apportioned at the ratio of 70:30.
 29. The trial court in its determination on liability found the Defendant 100% liable. It cannot be ignored that the Respondent was crossing the road at a roundabout, an area not designated for crossing. The Plaintiff's witness, the Traffic Police Officer who testified as PW2 stated that the Plaintiff was to blame for the accident. He did not elaborate on what basis the Plaintiff was to blame. The Plaintiff who testified as PW3 gave evidence that she ensured that the road was clear before crossing. She also stated that she did not see any vehicle. There are reasonable doubts as to whether or not the Plaintiff was alert on her surroundings as at the time of the accident. There being no other witness to the accident, I do apportion liability upon the Plaintiff at 10%.
 30. On whether the award on quantum was proper, the injuries sustained by the Respondent included displaced compound fracture of the left tibia, displaced compound fracture of the left fibula, comminuted fracture of the right tibia, and a deep cut wound on the left leg. It was the Appellant's contention that the award of Kshs. 600,000 for the injuries sustained was excessive in the circumstances.
 31. The appellant proposed an award of Kshs. 250,000 by citing authorities where similar amounts were awarded. The Respondent maintained that the trial court was fair in awarding Kshs. 450,000 which was reduced to Kshs. 405,000 after apportionment. The Respondent was still making reference to the Judgment delivered in year 2017 and not the impugned judgment subject to this appeal. The Respondent stated that the award of Kshs. 450,000 was fair. I will go by that amount of Kshs. 450,000 as proposed by the Respondent, though the correct figure in the judgment in issue was Kshs. 600,000. The appeal being partially successful, each party to bear its own costs.

Determination

32. In the upshot, this court makes the following orders;
 - a. The appeal is partially successful and allowed on the following terms;
 - i. The judgment delivered on 9th August 2019 is hereby set aside and substituted with the judgment of this court on the following terms;
 - i. Liability on a ratio of 90:10 in favour of the Plaintiff as against the Defendant
 - ii. General damages awarded Kshs. 450,000
 - iii. Special damages award of Kshs. 21,200 remains undisturbed.



b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF MARCH, 2026

.....

HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

Ms. Wanyama Advocate for the Appellant

Mr. Olendi Advocate h/b for Ms. Raladhil Advocate for the Respondent

Ms. Salwa, Court Assistant

