

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
HIGH COURT CIVIL APPEAL NO. E309 OF 2025

-between-

KENEDID **AHMED**
DEEN.....APPELLANT

-versus-

FREDRICK **MUGO**
RUBIA.....RESPONDENT

[Being an appeal against the Judgment and Decree of Hon. Ruguru (SPM) in Nairobi Milimani Chief Magistrate Court Civil Case No. 12852 of 2021 delivered on 18th October 2021]

JUDGMENT

Background:

1. The appeal, subject of this judgment, arose from a road traffic accident that occurred on 26th March 2021 along Thika Road near Muthaiga Stage. *Fredrick Mugo Rubia*, the Respondent herein, instituted *Nairobi [Milimani] Chief Magistrate's Court Civil Suit No. E12852 of 2021* (hereinafter referred to as '**the suit**'), alleging that he was lawfully walking along the road when *Kenedid Ahmed Deen*, the Appellant herein, driving motor vehicle registration number KCM 125E (hereinafter referred to as '**the motor vehicle**'), negligently lost control and knocked him down, causing him severe bodily injuries.
2. The Appellant filed a defence denying liability. He asserted that the accident was wholly caused by the Respondent's negligence, when he ran across a busy road without due regard to motorists and failing to use a designated pedestrian crossing. Upon hearing the suit, the trial Court, in its judgment, apportioned liability at 90% :10% in favour of the Respondent and awarded him Kshs. 550,000/- in general damages.

3. Dissatisfied with the trial Court's decision, the Appellant lodged the instant appeal.

The Appeal:

4. Through a Memorandum of Appeal dated 11th March 2025, the Appellant challenged the whole of the trial Court's decision on the following grounds: -
 1. *THAT the Learned Trial Magistrate erred in law and in fact and misdirected herself by failing to consider at all the submissions made before her by the Defendant and reached an erroneous conclusion thereby occasioning a miscarriage of Justice.*
 2. *THAT the Learned Trial Magistrate erred in law and in fact by apportioning liability in the ratio of 90:10 as between the Plaintiff and the Defendant in the absence of any evidence and having disregard of the submissions by the Defendants and cited legal authorities.*
 3. *THAT the Learned Trial Magistrate erred in law and in fact in, failing to uphold the doctrine of Ex dolo malo, non oritur action, and in finding that, the Respondent had discharged their burden of proof.*
 4. *THAT the Learned Trial Magistrate misdirected herself in her judgement as to who bears the burden of proof.*
 5. *THAT the Learned Trial Magistrate misdirected herself in her judgement by failing to uphold the doctrine of volenti non fit injuria.*
 6. *THAT the entire judgment is unfair to the Appellant and ought to be set aside and/or award adjusted downward.*
 7. *THAT the Learned Trial Magistrate in assessing quantum of damages took into account irrelevant factors and wrong principles and arrived at a wrong decision and excessive award on quantum of damages.*

The Submissions

5. The Appellant filed written submissions dated 14th October 2025. On liability, it was his case that the Respondent failed to discharge the burden of proof on a balance of probabilities. He argued that under Section 107(1) of the Evidence Act, the

burden rests on the person alleging negligence, a principle he bolstered by citing *Kirugi & Another -vs- Kibiya & 3 Others* (1987) eKLR 347, which affirmed that the burden is always on the plaintiff even in formal proof.

6. The Appellant further relied on the case of *David Mwangi Kariuki & another -vs- Stephen Mwangi & another* [2017] eKLR, to argue that the Respondent's failure to avail the police file or an investigating officer to prove how the accident occurred was detrimental. To that end, he cited the case of *Sally Kibii & another -vs- Francis Ogaro* [2012] eKLR and *Kenital (K) Ltd -vs- Charles Mutua Mulu & other* (Eldoret HCCA No. 103 of 2001), which demonstrate that failing to call key witnesses like the investigating officer drastically undermines a plaintiff's case. Relying on *Jamal Ramadhan Yusuf & another -vs- Ruth Achieng Onditi & another* [2010] eKLR, the Appellant emphasized that negligence cannot be inferred merely from the occurrence of an accident, but must be proved with cogent evidence.
7. The Appellant pointed to the defence evidence that the Respondent carelessly crossed the road. He invoked the decision in *Julius Muriuki Mutiria -vs- Joseph Mogere & 2 others* [2017] eKLR and *Andrew Kamau Waweru -vs- Guchu Muruguri & another* [2002] eKLR to urge the Court to find his case before the trial Court to be more reliable and dismiss the Respondent's claim for failing to discharge the burden of proof. Further to the foregoing, the Appellant submitted that the Respondent voluntarily assumed risk by ignoring a footbridge. He drew heavy support from the case of *United Millers Limited & another -vs- John Mangoro Njogu* [2016] eKLR to establish that the Respondent willingly placed himself in the position of danger by attempting to cross a busy highway where he knew he was not allowed.
8. Separately, it was his case that the Respondent was engaged in an illegal act by crossing at an undesignated area and was thus barred from benefiting from his wrong. He referred the Court to the decision in *Michael Mwaura Njoroge -vs- Peter Kamau Munene & Beatrice Kori (Interested Party)* [2019] eKLR to argue that the court should not aid a party founding their cause of action on an illegal transgression.

9. On quantum, the Appellant submitted that the award of Kshs. 550,000/- was excessive. Guided by the decision in *Osman Mohammed & Ano. -vs- Saluro Bundit Mohammed* (Civil Appeal No. 30 of 1997), he claimed that damages must be within limits the Kenyan economy can afford. He proposed an award of Kshs. 100,000/-. To that end, he relied on comparable awards in *Ogolla -vs- Easy Coach Limited* [2023] KEHC 25366 (KLR), *Annet Noti Jefwa Kayaa -vs- David Njau Kungu & another* [2019] eKLR, and *Martin Mutuku & another -vs- SN* [2021] KEHC 2650 (KLR), where Courts awarded between Kshs. 250,000/- and Kshs. 300,000/- for similar injuries including, degloving injuries, scalp wounds, and abrasions.

The Respondent's case:

10. *Fredrick Mugo Rubia*, the Respondent, challenged the appeal through written submissions dated 21st October 2025. He commenced by citing the decision in *Gitobu Imanyara & 2 others -vs- Attorney General* [2016] eKLR which sets out the grounds upon which an appellate Court may interfere with a trial Court's findings and submitted that the trial Court acted on wrong principles, disregarded facts, or made an inordinately high award.
11. On the issue of liability, the Respondent submitted that the evidence adduced at trial, including his own testimony and that of a police officer, proved the Appellant drove negligently and hit him. He argued that the trial Court's apportionment of 90% :10% was sound because the accident occurred near a bus stage, an area prone to pedestrians, thus demanding a higher degree of caution from the driver. Drawing support from the case of *Cosmas Mutiso Muema -vs- Kenya Road Transporters Limited & another* [2014] eKLR, the Respondent submitted that the trial Court correctly answered whose evidence was more credible, finding the Respondent's case more consistent.
12. On quantum, the Respondent maintained that the trial Court's award was justified. He fortified his position from various Court pronouncements among them, *PAS -vs- George Onyango Orodi* [2020] eKLR, *Artan Hussein & 2 others -vs- Said Hamadi Upepo* [2017] eKLR, and *Rent Works East Africa Limited -vs- SSM*

(Minor), arguing that the trial Court's assessment should be upheld.

Analysis:

13. Arising from the pleadings, the grounds of appeal, and the rival submissions, the following issues emerge for determination: -

i. Whether the trial Court erred in law and in fact in apportioning liability at 90% :10% in favour of the Respondent.

ii. Whether the trial Court erred in its assessment and award of general damages.

14. As a first appellate Court, this Court, as was observed in **Selle - vs- Associated Motor Boat Company Ltd** [1968] E.A. 123 is duty bound to re-evaluate the evidence tendered before the trial Court and reach its own independent conclusions. In the case, it was observed;

.... An appeal from a High Court is by way of rehearing and the Court of Appeal is a first appellate court. It is not sufficient to merely scrutinize the evidence and say whether the trial Judge was right or wrong. An appellate court is not bound to accept the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

15. In **Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates** [2013] eKLR the Court set out the role of the first appellate Court in the following terms;

.... This being a first appeal, we are reminded of our primary role as a first appellate Court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.

16. With the foregoing guidance, I now turn my focus on the issues.

[a] Liability:

17. The burden of proof in the suit rested upon the Respondent to prove negligence on the part of the Appellant on a balance of probabilities, a requirement provided for in sections 107, 108 and 109 of the Evidence Act. The said provisions were elucidated by the Court of Appeal in the case of **Palace Investments Limited -vs- Geoffrey Kariuki Mwenda & another** [2015] KECA 616 (KLR) in reference to *Denning J.* in **Miller -vs- Minister of Pensions** [1947] 2 ALL ER 372 when he spoke to the burden of proof in the following terms: -

.... 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 or preponderance 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.

18. The evidence on record indicates that the accident occurred along Thika Road near Muthaiga stage. The Respondent's evidence-in-chief was that he was hit from behind while walking off the road. On cross-examination, he stated that he did not see the motor vehicle before the accident. He admitted that there is a foot bridge at Muthaiga for pedestrians. On re-examination, however, he stated that there is no foot bridge at the scene of the accident. *No. 88537 PC Jessie Mwololo* testified as PW2. She stated that she did not witness the accident and neither did she visit the scene of the accident. It was her evidence that the Investigating Officer was PC Mutua. On cross-examination, she conceded that there is no foot bridge at Muthaiga stage but there is a foot bridge at Muthaiga. She categorically stated that there is no footbridge where the accident happened.
19. The Appellant testified as DW1. He stated that the accident happened along Thika Road service lane after the stage, below

the bridge. On cross-examination, he stated that he blamed the Respondent for the accident since he crossed the road diagonally and saw him only a few seconds before the accident. It was his evidence that he could not swerve due to proximity with the Respondent. He stated that he crossed from the left lane to the right lane below the footbridge.

20. Gauging from the totality of the evidence, it is apparent that while a driver owes a duty of care, a pedestrian is equally bound to exercise reasonable care for his or her own safety. In this matter, the issue as to whether there was a footbridge at or near the scene of accident remains a crucial indicator on liability since the Respondent was knocked down while crossing the road. Attempting to dash across a busy highway where a designated footbridge is provided constitutes a high degree of contributory negligence. In ***Catherine Wangechi Wariahe (Suing as the Administratrix of the Estate of the late James Mwambiriro Njeri) v Meridian Hotel Limited*** [2016] eKLR, the Court succinctly discussed the doctrine of *volenti non fit injuria*. The excerpts of the Court's rendition are as hereunder;

.... The general principles applicable to this defence were stated by the judicial committee in Letang -vs- Ottawa Electric Railway Company in the following terms quoted from the judgment of Wills J in Osborne vs the London and North Western Railway Company.

... If the defendant desires to succeed on the ground that the maxim "volenti non fit injuria" is applicable they must obtain a finding of fact that the Plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it...

Volenti non fit injuria means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. It must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him.

21. A scrutiny of the evidence by the Respondent, the police officer and the Appellant reveal that the accident occurred at the Muthaiga stage near the Muthaiga Police Station where there were several matatus which had blocked the left side of

the service lane as the Appellant aimed at joining the main Thika road using the right lane which was adjacent to the main road. Whereas the Respondent and the police officer stated that there was no footbridge at the scene, but one was at Muthaiga, the Appellant alluded that the accident occurred right under the footbridge. Since there was unanimity that the accident occurred at the stage, this Court finds the evidence by the Appellant and the police officer that there was no footbridge at the scene of accident credible and believable.

22. As the accident occurred at the stage, then given the number of people and activities thereat, drivers are under a duty to ensure they are more attentive at such places. In fact, the Highway Code in Sections 85 - 101 variously impose upon drivers the obligation to accord paramount care to pedestrians by driving carefully, at reduced speeds and to be watchful of emerging pedestrians.
23. On the other hand, the Respondent being a matatu conductor and at a busy stage with many people and vehicles, he was equally under a duty to carefully cross the road more so bearing the fact that some vehicles had blocked the left side of the service lane at the stage. Whereas this Court would have found both the Respondent and the Appellant equally to blame for the accident in the unique circumstances of this case, its attention was drawn to damage occasioned to the vehicle. It is on record that the vehicle hit the Respondent on the left side, the Respondent was thrown to the windscreen and eventually landed onto the bonnet. Such evidence suggests that the vehicle was driven at a rather high speed at such a busy stage with a heavy human and vehicular traffic. The Appellant, therefore, ought to have been more careful in the circumstances.
24. The trial Court then apportioned liability at 10%: 90% against the Respondent and Appellant respectively. To this Court, and with utmost respect to the trial Court, whereas the Appellant was to blame more for the accident, the Respondent, being a person who is always on the road by virtue of being a conductor, ought to have shouldered a reasonably high blame for his failure to accord himself a duty of care. A 30%

apportionment against the Respondent would have been fair and it is for that reason that this Court interferes with the liability as decreed at trial.

[b] Quantum:

25. The general principle, as was observed by the Court of Appeal in ***Kemfro Africa Ltd -vs- A. M. Lubia & Another*** (1988)1 KAR 727 is that an appellate Court should not disturb a trial Court's finding on quantum, unless it is shown that the trial Court took into account an irrelevant factor or left out a relevant one or the quantum is inordinately low or high as to reflect an erroneous estimate of the extent of the damage.
26. The medical evidence on record established that the Respondent suffered a degloving injury to the frontal scalp which healed with no permanent incapacity. The trial court awarded Kshs. 550,000/- as general damages.
27. Having considered comparable decisions including ***Ogolla -vs- Easy Coach Limited*** [2023] KEHC 25366 (KLR) where the Court upheld an award of Kshs. 300,000/- for blunt and laceration injuries to the forehead; and in ***Martin Mutuku & another -vs- SN*** [2021] KEHC 2650 (KLR) where an award was reduced to Kshs. 300,000/- for degloving injuries and scalp abrasions; and in ***Annet Noti Jefwa Kayaa -vs- David Njau Kungu & another*** [2019] eKLR where the Court upheld Kshs. 250,000/- for a cut wound on the scalp and a leg degloving injury, coupled with the calling for comparable awards for comparable injuries; this Court, once again and respectfully so, has to interfere with the award on general damages. The award of Kshs. 550,000/- for a healed degloving injury to the scalp was manifestly excessive and is hereby set aside and is substituted with an award of Kshs. 300,000/-.

Disposition:

28. As I come to the end of this judgment I wish to apologize to the parties for the late delivery of this decision which was to be in February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running

interviews since December 2025 to date. Once again, galore apologies.

29. As the appeal has succeeded on both limbs, the impugned judgment is hereby interfered with and the following final orders hereby issue: -

- [a] Liability is hereby apportioned at 70% against the Appellant herein and 30% against the Respondent herein.**
- [b] General damages for pain, suffering, and loss of amenities are hereby reviewed from Kshs. 550,000/= to Kshs. 300,000/-.**
- [c] The Special damages of Kshs. 60,222/- as awarded at trial is hereby affirmed subject to the apportionment of liability herein.**
- [d] The general damages shall attract interest at Court rates as from the date of the judgment in the trial Court whereas the special damages shall attract interest as from the date of filing the suit.**
- [e] The costs of the suit shall be borne by the Appellant.**
- [f] The parties shall bear their respective costs of the appeal given the net effect of this judgment on the awards payable to the Respondent.**

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 15th day of May, 2026.

**A.C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

Mr. Wambua holding brief for **Mr. Kiwinga** for the Appellant.

No appearance for the Respondent.

Amina - Court Assistant.