

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**APPEAL CASE NO. E040 OF 2025**

**GEORGE OUMA ONGILI.....**  
**APPELLANT**

**- VERSUS**

**GABRIEL OKELLO.....**  
**RESPONDENT**

**(Being an appeal from the judgment and Decree of Hon J.P  
Mkala (RM) in Siaya Chief Magistrate’s Court CMCC No.  
E047 of 2023 delivered on 18<sup>th</sup> February 2025)**

**BETWEEN**

**GEORGE OUMA**  
**ONGILI.....PLAINTIFF**

**VERSUS**

**GABRIEL**  
**OKELLO.....DEFENDAN**  
**T**

**JUDGEMENT**

1. The appeal herein arises from the judgement and decree of Hon J.P Mkala (RM) in Siaya CMCC No. E047 of 2023 delivered on 18<sup>th</sup> February 2025, wherein he dismissed the Appellant's suit and directed each party to bear their own costs.
2. The Appellant was aggrieved by the aforesaid decision and has filed his Memorandum of Appeal dated 18/3/2025 wherein he raised the following grounds of appeal:
  - i) That the learned trial magistrate erred in law and fact in finding that the Respondent suffered injuries despite not producing P3 form or medical report to show being attacked, fought and injured by the Appellant.
  - ii) That the learned trial magistrate erred in law and fact in dismissing the Appellant's case based on facts and no allegations of the prosecution in the criminal case between the parties herein yet the Respondent pleaded guilty while the Appellant denied the facts and was acquitted.
  - ii) That the learned trial magistrate erred in law and fact in taking the facts given by the prosecution as gospel truth yet no evidence was led by the Respondent in the civil case to demonstrate that he was attacked and injured by the Appellant
  - iv) That the trial magistrate erred in law and fact in failing to make a reasoned finding on liability so as to either apportion

blame or find a party wholly liable having concluded that both parties fought and injured each other.

V) That the trial magistrate erred in law and fact in failing to take into account that the Respondent filed no counterclaim against the Appellant despite claiming that the Appellant attacked and injured him.

vi) That the trial magistrate erred in law and fact in finding that the Appellant failed to prove his case on a balance of probabilities by failing to analyze, consider and appreciate evidence led by the Appellant to wit, a ruling and P3 form/medical report.

vii) That the trial magistrate erred in law and fact in failing to consider the Appellant's submissions and authorities in support of his case.

The Appellant therefore prayed that the appeal be allowed and the judgement and decree be set aside and be substituted with an order entering judgement for the Appellant and that costs be awarded to the Appellant both in this appeal and in the trial court.

3. This being the first appellate court, its duty is to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. This court must also take into account the fact that it neither saw nor heard the witnesses as they testified

and must therefore make due allowance for that. See **Selle Vs Associated Motor Boat Co. Ltd [1968] EA 123.**

4. The Appellant vide the plaint dated 13/5/2024 had sought for reliefs inter alia; general damages; future medical expenses of Kshs 450, 000/; costs of the suit and interest. On the other hand the Respondent filed a statement of defence dated 23/9/2023 wherein he sought for dismissal of the suit with costs.

5. **George Ouma Ongili (PW1)** adopted his statement dated 25/7/2023 as his evidence in chief. He also produced certain documents as exhibits namely, copy of court proceedings in Cr case No. E712 of 2021, copy of ruling dated 20/4/2023, copy of charge sheet and a copy of medical report.

On cross-examination, he stated inter alia; that he was not arrested together with the Respondent; that a criminal case was instituted against him and the Respondent vide Cr No.E712 of 2021; that the case was that of affray; that the decision to charge was by the Odpp; that the Respondent later pleaded guilty to the charge; that he lost three teeth; that he was then grazing his cows before he was attacked by the Respondent; that the Respondent too has a P3 form; that he cannot tell if the Respondent also sustained injuries; that he is the one who made the report first to the plice; that the Respondent pleaded guilty to the charge while he did not as he was later found not guilty and acquitted of the charge.

6. **Dr Adoyo Alexander Liech (PW2)** testified that he is a dentist and works at Ambira sub county hospital within Siaya County. That he attended to the Appellant on 9/8/2021 and that he filled the P3 form on 10/8/2021 which he produced as exhibit 4. That the Appellant had freshly dressed wounds on the fore-arm and forehead. On cross-examination, he stated that he is a dentist and not a medical doctor. That the examination was conducted at Siaya County Referral Hospital. That there were dental injuries. That the report was purely on the dental clinic. That he used the treatment notes to fill the P3 form. That he has not produced the treatment notes. That he is the one who attended to the patient.
7. That marked the close of the Appellant's case.
8. **Gabriel Okello Odhiambo (DW1)** adopted his statement as his evidence in chief. That the criminal case was one of affray in which it had been alleged that they had fought. On cross-examination, he stated that they were both charged in Cr case No. E712 of 2021. That he admitted to the charge of affray.
9. The trial court later considered the matter and came up with the impugned judgement.
10. The appeal was canvassed by way of written submissions. Both parties duly complied.
11. Vide submissions dated 27/2/2026, learned counsel for the Appellant reiterated all the seven grounds of appeal and went on to fault the learned trial magistrate for deviating

from the usual mode of proof of the case on a balance of probabilities and failed to consider that the Respondent did not even make a counterclaim against the Appellant's suit and further failed to take note of the fact that the Appellant had already been acquitted of the criminal charge of affray. He finally contended that the trial court went into error by seeking to rely heavily on the criminal proceedings to decide the civil matter yet the truth is that the Appellant had been acquitted in that criminal case. The Appellant therefore urged the court to allow the appeal and set aside the trial court's judgement and award the Appellant costs of the appeal.

12. Vide submissions dated 27/4/2026, learned counsel for the Respondent submitted that the Appellant did not prove his case on a balance of proof pursuant to the provisions of section 107 of the Law of Evidence which provides thus:

*"Whosoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist,"*

Learned counsel placed reliance in the case of **Kipkebe Limited Vs Peterson Ondieki Tai [2016] e KLR** where it was held as follows:

*"It is trite law of evidence that he who asserts must prove his case. No evidence was adduced by the Plaintiff. In such cases, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims.*

*Section 107 of the Evidence Act succinctly states: Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

It was also submitted that the trial court had correctly found that the acquittal of the Appellant did not necessarily mean that the Appellant was innocent when it held as follows:

*“Upon closing of the prosecution’s case, he further noted that only two witnesses had testified and from the evidence of the two witnesses and in the absence of testimonies and evidence from key witnesses, he dismissed the prosecution’s case. This to me does not necessarily mean that the Plaintiff was innocent. To my understanding of the above ruling, it only speaks of the failure of the prosecution to produce and present evidence of key witnesses that jeopardized the case. Further being found innocent or guilty in a criminal case, does not necessarily speak of one’s innocence or culpability in a civil case where the burden of proof is lower than in criminal cases.”*

13. It was therefore submitted that the Appellant has not given any reasons why this court should depart from the findings of the trial court. The Respondent therefore urged this court to dismiss the appeal with costs.

14. I have given due consideration to the record of appeal and the rival submissions. It is not in dispute that the parties herein had earlier been involved in a brawl while they were

grazing their cows within Boro area and that as a result each of them sustained injuries and that both were issued with P3 forms and later jointly charged with an offence of affray vide Siaya CM Criminal case number E712 of 2021. It is not in dispute that the Respondent pleaded guilty to the charge and was sentenced to three months non-custodial sentence while the Appellant herein denied the charge and who was later acquitted of the charge under section 210 of the Criminal Procedure Code. It is also not in dispute that the Respondent in the lower court only filed a defence without a counterclaim against the Appellant. I find the issue for determination is whether the Appellant had proved his case on a balance of probabilities.

15. As the Appellant was the Plaintiff in the lower court suit, he bore the burden of proving his case in accordance with the provisions of section 107 of the Evidence Act which provides as follows:

*“ Whosoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist,”*

In the case of **Kipkebe Limited Vs Peterson Ondieki Tai [2016] e KLR** it was held as follows:

***“It is trite law of evidence that he who asserts must prove his case. No evidence was adduced by the Plaintiff. In such cases, the burden of proof lies with whoever would want the court to find in his favour in***

***support of what he claims. Section 107 of the Evidence Act succinctly states: Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

**Also in the case of M’ Bitu Ntiro Vs Mbae Mwirichia & Another [2018] eKLR it was held as follows:**

***“Obviously, in civil cases, the onus is on the plaintiff or any other claimant to prove the position he or she postulates on a balance of probabilities. This position is anchored in law...”***

16.The Appellant has faulted the trial court for failing to consider the fact that the lower court matter related to an earlier incident where the parties herein were alleged to have been involved in an affray in which both of them were charged vide Siaya CMC Criminal case number E712 of 2021. It was further contended that the Appellant denied the charges and went through all the motions in the trial and was later acquitted under section 210 of the Criminal Procedure Code. It was further contended that despite availing evidence of injuries and calling the doctor to testify, the trial court rubbished his evidence and dismissed his case. The Appellant now seeks this court to overturn the trial court’s verdict.

17. It is noted that the Appellant's claim was based on negligence and damages. Indeed, the Appellant has faulted the trial court for not dealing with the issue of liability and apportionment of the same as between the Appellant and the Respondent. As regards the issue of liability, the point of reference should be the Appellant's encounter with the Respondent at the grazing fields at Boro where the alleged assault took place and which generated into an affray and in which both of them were issued with P3 forms. Apparently, the Respondent pleaded guilty to the charge of affray vide Siaya CM Cr case No. E712 of 2021 and was subsequently sentenced while the Appellant denied the charges and went ahead with the trial leading to his acquittal under section 210 of the Criminal Procedure Code. During the hearing of the civil case in the trial court, the Appellant availed his P3 form and called the doctor who examined him and filled it as a witness (PW2) while the Respondent did not avail any documents but relied on the criminal proceedings. It is also noted that the trial court relied on the criminal proceedings to which the Appellant herein is not happy about. I have perused the proceedings aforesaid (P-Exhibit 2) and note that it was the Appellant who firsts approached the Respondent at the grazing field and confronted him, whereupon a fight ensued, and that the Respondent was the first to lodge a report to the police before the Appellant did so, and that they were both issued with P3 forms and which

were produced as exhibits in the criminal proceedings. The Appellant has faulted the trial court for not finding the Respondent solely liable, as the Appellant was eventually acquitted of the charge, and further, that the Respondent pleaded guilty to the charge. It would appear that the Appellant was thus of the view that the coast was clear for him. However, since the Appellant was the first person to confront the Respondent, then it became obvious that he was the aggressor and that any injuries suffered thereby were due to voluntary assumption of risk. The plea of guilty by the Respondent only affected the charge of affray to the extent of the Respondent fighting in public. Again, the acquittal of the Appellant by the trial court was not evidence that his guilt had been absolved since other witnesses were not called to testify before the prosecution was forced by the trial court to close its case. I find that being found innocent in a criminal trial does not ipso facto imply innocence or culpability in a civil case where the burden of proof is lower than in a criminal case. The circumstances would have been different had all the witnesses been called to testify. Hence, his acquittal was not enough to attribute liability to the Respondent. In any case, it was the Appellant who kicked off the fight in the first place, and thus I find that he was the author of his own misfortune. I am inclined to agree with the finding by the learned trial magistrate. The Respondent's plea of guilty was in respect of the charge of affray (fighting

in public), and not assault, and hence the Appellant cannot cling to it as an admission of liability on the part of the Respondent. To that extent, I hold the Appellant wholly liable in the circumstances and that the Respondent did not contribute to the same. The Appellant's grounds of appeal on liability against the Respondent must fail. Hence, the finding by the learned trial magistrate was proper and must be upheld.

18. As regards the issue of damages, it is noted that the Appellant had sought the same in addition to a sum of Kshs 450,000/ for future medical expenses. The Appellant called the doctor (PW2) who had filled the P3 form. However, the said doctor did not provide evidence regarding the Appellant's need for future medical expenses. It was necessary for the said doctor to have prepared a comprehensive medical report for the Appellant and to justify the said sum. Indeed, the claim for future medical expenses is a special claim that must be specifically pleaded and proved. I find that the Appellant did not present documents in support of the same. It is noted that the Appellant is reported to have lost three teeth. Had the suit succeeded, I would have awarded a sum of Kshs 100,000/ as general damages for pain, suffering, and loss of amenities as being reasonable compensation in the circumstances.

19. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

**Dated and delivered at Siaya, this 8<sup>th</sup> day of May 2026**

**D.KEMEI  
JUDGE**

**In the presence of:**

**N/A Ochieng.....for Appellant**

**N/A Ochanyo.....for Respondent**

**M/s Mourine.....Court Assistant**