



REPUBLIC OF KENYA



**M'Mtwamari v Mburugu & another (Civil Appeal E063 of 2023)
[2025] KEHC 2854 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E063 OF 2023
HM NYAGA, J
FEBRUARY 27, 2025**

BETWEEN

MUTWIRI M'MTWAMARI APPELLANT

AND

JAMLECK MUCHOI MBURUGU 1ST RESPONDENT

EZEKIEL MURIUNGI MUGAMBI 2ND RESPONDENT

(Being an appeal against the judgment and decree of the Hon. T. M. Mwangi (SPM) in the Chief Magistrate's Court at Meru Civil Case No. E250 of 2022, delivered on 30th March 2023)

JUDGMENT

1. The Appellant commenced suit in the Chief Magistrate's Court, Meru vide a plaint dated 4th October, 2022, seeking general and special damages for injuries that he sustained in a road traffic accident that occurred on 5th March 2022 at Maritati, along Meru-Nanyuki road.
2. It was the Appellant's case that he was a lawful passenger aboard motor vehicle registration number KCD 102 S along the said road when the 1st defendant, being the driver of driver of the said motor vehicle so negligently drove the said vehicle that he caused it to hit motorcycle registration number KMFV 120Y and as a result the Plaintiff sustained serious bodily injuries.
3. The Appellant blamed the 1st respondent for causing the accident. The particulars of negligence are set out in the plaint.
4. The 2nd Respondent was sued as the owner of the said motor vehicle registration number KCD 102S and for which the Plaintiff/Appellant held him vicariously liable for the acts/omissions of his driver, the 1st respondent.



5. The Defendant/Respondents did not enter appearance despite service and the Appellant applied for interlocutory Judgment, which was entered on 13th October, 2022. Thereafter, the matter proceeded for formal proof. The appellant adopted his witness statement as his evidence. He also produced several documents marked as exhibits 1 to exhibit 9.
6. On 30th March, 2023, the trial court delivered its judgement, entering judgment against the 1st respondent for ;
 - a. General damages...Ksh.100,000/-
 - b. Special damages.....Ksh. 34,550/-
 - c. Costs and interest from the date of judgment.
7. As regards the case against the 2nd respondent, the trial court found that the Appellant had not proven his case, and proceeded to dismiss the suit.
8. Aggrieved by the said decision, the Appellant filed a memorandum of appeal dated 24th April,2023 but filed on 3rd October 2023. Leave to appeal out of time was granted in High Court Misc. Application No. E48 of 2023.
9. The Appellant set forth the following grounds of appeal;-
 - i. That the learned trial magistrate erred in law and fact by failing to find that the 2nd respondent was the registered owner of motor vehicle registration number KCD 102S which caused the accident.
 - ii. That the learned trial magistrate erred in law and fact by failing to find that the 2nd respondent was vicariously liable for the negligence of his driver(the 1st respondent).
 - iii. That the learned trial magistrate erred in law and fact by awarding a meagre Ksh. 100,000/- as general damages which assessment was inordinately low under the circumstances.
10. The Appellant thus sought orders that:-
 - a. That this Honourable Court be pleased to set aside the trial court's judgment on liability and replace it with a finding that both the 1st and 2nd respondents are jointly and severally liable at 100% for the injuries sustained by the appellant.
 - b. That the Honourable court be pleased to set aside the trial courts judgment on quantum of general damages at Kshs. 100,000/- and replace it with its own higher award of general damages.
 - c. That the Honourable court be pleased to award the appellant the costs of this appeal.

Appellant's submissions

11. It was submitted that the Appellant had produced the requisite documents including the police abstract, the official motor vehicle search that indicated that the 2nd respondent was the current owner of the motor vehicle in question. The appellant urged the court to find that the appellant had proven that the 2nd respondent was thus liable for the acts or omissions of the 1st respondent.
12. It was further submitted that on quantum, even if the court is to find that the appellant suffered soft tissue injuries, the award by the lower court was inordinately low and ought to be set aside and substituted by an award of Ksh. 400,000/-.



13. On costs, the appellant submitted that the same should follow the event as provided for under section 27 of the *Civil Procedure Act*.
14. The Respondent did not file any response.

Analysis and determination

15. Being a first appeal, the court is enjoined to look at the evidence afresh and come to its own independent decision. This was reiterated in the well known case of *Selle and Another v Associated Motor Boat Co. Ltd and others* [1968]EA 123 as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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. 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

16. The issues for determination are;
 - a. Whether the Appellant proved his case against the 2nd respondent, on a balance of probability.
 - b. Whether the award of damages by the trial court was so low so as to warrant its setting aside.
17. The degree of proof in civil cases is well known that is a balance of probability. In *William Kabogo Gitau v George Thuo and 2 Others* [2010] eKLR the court held that...

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

18. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the judges of Appeal held that:

“Denning J. in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say;-

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



19. When the Plaintiff filed his claim in the lower court, he also filed documents as required under the Civil Procedure Act and Rules. All the trial he produced them as follows:-
- a. Police Abstract as EXH 1.
 - b. P3 report as EXH 2.
 - c. Medical report and receipt as EXH 3(a) and (b) respectively.
 - d. Treatment notes and receipts as EXH 4(a) and (b) respectively.
 - e. Motor vehicle search and receipt as EXH 5 (a) and (b) respectively .
 - f. Statutory Notice as EXH 6.
 - g. Demand notice to the 1st respondent as EXH 7.
 - h. Demand notice to the 2nd respondent as EXH 8.
20. In his Judgment, the trial magistrate found that the motor vehicle search records did not indicate who the owner of the motor vehicle registration number KCD 102S was at the time of the accident, that is on 5th March, 2022. It is for this reason that the court dismissed the suit against the 2nd respondent.
21. The law is quite clear on proof of ownership of a motor vehicle. Section 8 of the Traffic Act provides that:-
- “ The person in whose name a vehicle registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
22. The section provides the general rule with regard to ownership of the motor vehicle but there may be circumstances where this may vary. Registration of a person is prima facie evidence of ownership but the contrary may be proved.
23. By producing the copy of records, which showed that prior to filing suit, the 2nd respondent was the registered owner, the Appellant complied with the law on the proof of ownership. In my view, to ask the Appellant to avail other proof of ownership was erroneous. The records show that the 2nd Respondent was the registered owner as at the time of the search, just two months after the accident. The time is to be calculated backwards, meaning that he was, on a balance of probability, the owner at the material time. There was no evidence adduced to rebut that document, thus it has to be taken that this was the case at the time of the accident.
24. It is also to be remembered that the Respondent did not enter appearance and interlocutory Judgment, on liability had been entered by the same court. In my opinion, the learned magistrate raised the degree of proof to a higher level than is expected on a civil matter, on a balance of probability.
25. It is my finding that the Appellant, having produced the copy of records, had tendered prima facie evidence of ownership, which was not rebutted.
26. There are many authorities on the issue including Joel Muga Opinjav-East African Sea food Limited [2013] eKLR quoted in the case of; Ignatius Makau Mutisya v Reuben Musyoki Muli where the Court of Appeal stated that;
- “ We agree that the best way to proof ownership wouldbe to produce to the court a document from the Registrar of Motor-vehicles to show who the registered owner is.....



27. It is acknowledged that there may be occasions when the registered owner rebuts the evidence of ownership. In that case any other evidence may suffice.
28. Having considered the matter, I am inclined to set aside the orders of the trial court and substitute it with an order that the Appellant had proven his case on a balance of probability as against the 2nd respondent.
29. On quantum, the appellant is aggrieved by the award of damages, terming the same as inordinately low.
30. It is well settled law that this court, as an appellate court will not set aside an award of damages by the trial court, unless it is shown that the trial court applied the wrong principles, or that the damages are excessively high or low. These Principles were laid in *Butt v Khan* [1978] eKLR where it was held that;
- “An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”
31. Similarly, in the case of *Savanna Saw Mills Ltd v Gorge Mwale Mudomo* [2005] eKLR the court stated as follows: -
- “It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ...”
32. The appellant sustained the following injuries;
- a. Loss of consciousness, headache, frontal with dizziness,
 - b. Nasal bridge tenderness, with lateral shift
 - c. Peri-cranial soft tissue swelling around the occipital region.
33. According to Dr. Macharia’s report dated 22nd May, 2022, the injuries were managed and the soft tissue injuries had healed. He found that the patient had post trauma pains which were expected to ease with time.
34. In supporting his case for an enhanced award, the appellant cited;
- a. *Telkom Orange Kenya Ltd v S.O. (Minor suing through his next friend and mother J.N.)* [2018] eKLR where the plaintiff had suffered a head injuries occasioning a depressed skull, fracture of the skull loss of consciousness, scars on the left tempo-parietal area and bruises on the leg. The High Court awarded the plaintiff Ksh.500,000/- as general damages.
 - b. *Specialised Aluminium Renovators Ltd v Stephen Mutuku Musyoka* (2021) eKLR where the plaintiff suffered a fracture of the frontal nose bones, fracture nasal bones, fracture of right orbit, frontal lobe haemorrhage contusion and bleeding into sinuses.
35. I have looked at the cited authorities. The injuries suffered by the claimants therein were very severe as compared to the appellant. The award by the trial magistrate cannot be said to be inordinately low. The appellant had recovered at the time he was examined by Dr. Macharia, save for post trauma pains. I do not see any ground to set aside that award.



36. In conclusion the appeal partially succeeds and the court issues final orders are as follows:-

- a. The Plaintiff/Appellant has proven his case on a balance of probability and judgment is entered against the 1st and 2nd respondents jointly and severally.
- b. The award of general damages by the lower court is upheld.
- c. There shall be no orders as to costs on this appeal.

SIGNED, DATED AND DELIVERED AT MERU THIS 27TH DAY OF FEBRUARY, 2025.

H. M. NYAGA

JUDGE

