



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoroge v Gakere & another (Civil Appeal E028 of 2024)  
[2025] KEHC 4048 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4048 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E028 OF 2024  
MA ODERO, J  
MARCH 28, 2025**

**BETWEEN**

**MARY WAMBUI NJOROGE ..... APPELLANT**

**AND**

**MATHEW NGUGI GAKERE ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE MAKUMI MAINA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Before this Court is the Memorandum of Appeal dated 22<sup>nd</sup> May 2024 in which the Appellant Mary Wambui Njoroge seeks the following orders:-

- “ 1. That the Appellant’s appeal be allowed.
2. That whole of the judgment delivered on 30<sup>th</sup> April 2024 dismissing the suit be set aside.
3. That the honourable court do find the Appellant proved her case against the Respondents.
4. That the honourable court do award liability at 100% against the Respondents.
5. That the court do proceed to assess damages payable to the Appellant.
6. That the court be pleased to award interest in the damages so assessed.
7. That the costs of the lower court and this Appeal be awarded to the Appellant in any event.



8. That such other and/or further relief as this Honourable Court may deem just to grant.”
2. The Respondents Mathew Ngugi Gakere and George Makumi Maina despite being properly served did not participate in the appeal. The matter was canvassed by way of written submissions. The Appellant filed written submissions dated 23<sup>rd</sup> September 2024 whilst the Respondents did not file any submissions.

### **Background**

3. This Appeal arises from an accident which occurred on 31<sup>st</sup> August 2021 along the Mweiga-Nyeri Road.
4. In a Complaint dated 16<sup>th</sup> December 2021, the Appellant stated that on the material date she was a lawful passenger aboard motor vehicle Registration KCH 032M being driven by the 2<sup>nd</sup> Respondent which vehicle belonged to the 1<sup>st</sup> Respondent.
5. The Appellant averred that the 2<sup>nd</sup> Respondent drove the said vehicle negligently causing a collision with a vehicle Registration KBY 986N. That as a result of this collision the Appellant sustained injuries as particularized in Paragraph 5 of the Complaint.
6. The Appellant in her complaint prayed for judgment to be entered against the Defendants jointly and severally for
  - “(a) General damages for pain and suffering and loss of amenities.
  - (b) Damages for diminished earning capacity.
  - (c) Special damages as pleaded in paragraph 7 above.
  - (d) Costs of the suit.
  - (e) Interest on (a) (b) (c) and (d) above
  - (f) Any other relief that the court may deem fit to grant.”
7. The suit was heard in the lower court and vide a judgement delivered on 30<sup>th</sup> April 2024 by Hon. Lubia, Senior Resident Magistrate, the Court dismissed the Appellants suit in its entirety.
8. Being aggrieved by this decision the Appellant filed the present Memorandum of Appeal which was premised upon the following grounds:-
  1. The learned trial magistrate misdirected herself and erred in law and in fact by dismissing the suit.
  2. The learned trial magistrate misdirected herself and erred in law and in fact by failing to consider the evidence and testimonies of the Appellant and hence arrived at an erroneous judgment.
  3. The Learned trial magistrate misdirected herself and erred in law and in fact by failing to consider that the Appellants evidence was uncontroverted and hence arrived at an erroneous judgment.
  4. Learned trial magistrate misdirected herself and erred in law and in fact by placing a higher standard of proof on the Appellant herein than expected in civil cases.



5. The learned trial magistrate misdirected herself and erred in law and in fact by failing to consider the Appellant's submissions and authorities.
  6. That the learned trial magistrate misdirected herself and erred in law and in fact by considering extraneous issues other than those between the parties hence arriving at an erroneous judgment.
  7. The Learned trial magistrate misdirected herself and erred in law and in fact by failing to consider precedent and the doctrine of stare decisis.
  8. The learned trial magistrate misdirected herself and erred in law and in fact by failing to award the Appellant under the head of loss of earning capacity in view of the evidence adduced.
  9. The learned trial magistrate misdirected herself and erred in law and in fact by applying the wrong principles in failing to award the Appellant under the head of loss of earning capacity.
9. As stated earlier the appeal was not opposed.

### **Analysis and Determination**

10. I have carefully considered this memorandum of appeal, the record of proceedings before the lower court as well as the written submissions filed by the appellant.
11. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424]
12. In SELLE and Another -vs- Associated Motor Boat Company Ltd & Others [1968] 1. E.A 123 it was stated as follows:-
 

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] 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 that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
13. Likewise in Gitobu Imyanyara & 2 Others -vs- Attorney General [2016] eKLR, the court of Appeal stated thus:-
 

“An appeal to this court is by way of a 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.”
14. Therefore the appropriate standard of review in cases of appeal can be summarized in the following three principles:-
  - (1) On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.



- (2) In reconsidering and re-evaluating the evidence of the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.
- (3) It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.
15. The fact that an accident occurred on 31<sup>st</sup> August 2021 along the Mweiga-Nyeri Road involving the two motor vehicles is not in dispute. The Appellant produced a copy of the police Abstract confirming a collision between the motor vehicle Registration KCH 032 M and the vehicle Registration KBY 968N.
16. The Appellant claimed to have sustained serious injuries as a result of the said accident. She produced a medical examination Report dated 21<sup>st</sup> September 2021, which confirmed that the Appellant sustained a fracture of the right arm.
17. However proof that the accident occurred and proof that the Appellant sustained injuries as the result of said accident is not sufficient evidence of liability. The Appellant was required to go ahead and adduce sufficient evidence to prove that it was the 2<sup>nd</sup> Respondent who by his negligent manner of driving caused the accident.
18. It is trite law that he who alleges must prove. In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides as follows:-
- “Burden of Proof
- 107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
19. In the case of Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR, it was held that:-
- “As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the Evidence Act, Chapter 80, Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the law of proof of that fact shall lie on any particular person.....” [Own emphasis]
20. The Appellant in her pleadings had accused the 2<sup>nd</sup> Respondent of causing the accident due to his negligent manner of driving. As such the Appellant was required to prove what was negligent in the 2<sup>nd</sup> Respondents manner of driving. Was the 2<sup>nd</sup> Respondent speeding, did he swerve into the wrong lane etc.



21. In Civil Cases the law requires that a plaintiff prove their claim on a “balance of probabilities Master of the Rolls Lord Denning, in *Miller -vs- Minister Of Pensions* 1947 2 ALL ER in discussing the burden of proof in Civil cases stated as follows:-

“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 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 lose; because the requisite standard will not have been attained.”
22. The question as to what amounts to a balance of probabilities was also discussed in the case of *William Kabogo Gitau -vs- George Thuo & 2 Others* [2010], KLR 526, where Hon. justice Luka Kumaru (as he then was), stated as follows:-

“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.”
23. As stated earlier the Appellant did not avail any evidence at all before trial court to prove that the 2<sup>nd</sup> Respondent caused the accident by driving negligently.
24. In her judgment the learned trial magistrate whilst noting the deficiencies in the plaintiffs case stated as follows:-

“The plaintiff therefore ought to have given evidence that demonstrated the defendant’s negligence for example the evidence of another passenger in the vehicle who witnessed the accident, the evidence of the investigating officer as he must have conducted some investigation, or the proceedings or judgment in the criminal matter or in any other matter in which the defendants have already been sued on the same accident. I therefore find that the plaintiff has failed to establish liability against the Defendants to the required standards. The suit is hereby dismissed with costs to the defendants.....”
25. I am in full agreement with the finding and conclusion of the trial magistrate. The Appellant failed dismally to prove her claim on a balance of probabilities. The suit was for dismissal.
26. Notwithstanding the dismissal of the suit the learned trial Magistrate proceeded to assess quantum. The nature of the injuries sustained by the Appellant were not permanent injuries. In the medical report dated 1<sup>st</sup> October 2021 prepared by Dr. G. Mwaura physician, the Appellant’s permanent degree of incapacity was assessed at 5% on the upper arm. In the circumstances I opine that the award of Kshs. 500,000/- as general damages was appropriate.
27. Regarding special damages the law requires that the same be specifically pleaded and proved. The Appellant availed receipts for an amount of Kshs. 26,645 and thus I find that the award of the sum of special damages was merited.
28. Finally I find no merit in this appeal. The same is dismissed in its entirety. I make no orders on costs.



DATED IN NYERI THIS 28<sup>TH</sup> DAY OF MARCH 2025.

.....

MAUREEN A. ODERO

JUDGE

