



REPUBLIC OF KENYA



**Nzuki v Njeru & 3 others (Civil Appeal E042 of 2024)
[2025] KEHC 11341 (KLR) (1 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E042 OF 2024
RM MWONGO, J
AUGUST 1, 2025**

BETWEEN

CHRISTINA KAMENE NZUKI APPELLANT

AND

BENARD MWANIKI NJERU 1ST RESPONDENT

VICTOR KEMBOI 2ND RESPONDENT

ANTHONY BUNDI NGARI 3RD RESPONDENT

CAROLINE KANYUA MBUNGU 4TH RESPONDENT

*(Appeal arising from the decision of Hon. D. Endoo in Embu
CMCC No. 50 of 2019 delivered on 12 th March 2024)*

JUDGMENT

The Memorandum of Appeal

1. Through a memorandum of appeal dated 05th April 2024, the appellant is seeking the following orders:
 - a. That this Appeal be allowed with costs;
 - b. That the judgment of Hon. D Endoo dated 12th March, 2024 in Embu – CMCC No. 50 of 2019 and Order dismissing the suit therein be set aside and/or varied as the Court may deem fit;
 - c. That this Honourable Court be pleased to set aside the judgment of Hon. D. Endoo dated 12th March, 2024 in Embu - CMCC No. 50 of 2019 in its entirety and substitute it with this Honourable Court’s judgment; and
 - d. That the costs of this appeal be provided for.



2. The appeals are premised on the grounds that:
 1. The learned trial Magistrate erred in law and fact by awarding liability at 50:50 which is not clear on whom it is apportioned;
 2. The learned trial Magistrate erred in both law and fact in holding that the Plaintiff had not proved that she was travelling onboard motor vehicle registration number KCJ 115G;
 3. The learned trial Magistrate erred in law and in fact by majoring on non-issues which is not a fact on issue thus dismissing the Plaintiff's suit;
 4. The learned trial Magistrate erred in law and in fact by failing to assess any awardable general damages;
 5. The learned trial Magistrate erred in law and in fact by misdirecting herself by failing to consider all the Submissions made before her by counsel for the Plaintiff thereby reaching an erroneous finding on liability;
 6. In all the circumstances of the case, the finding of the learned trial Magistrate on liability was characterized with misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion thus erroneously proceeded to dismiss the suit in Embu - CMCC No. 50 of 2019;
 7. The learned trial Magistrate erred in law and in fact by applying a very high standard beyond reasonable doubt instead of on balance of probability hence dismissing the case herein; and
 8. The learned trial Magistrate erred in law and in fact by not addressing the issue of special damages otherwise awardable to the Plaintiff.

Background

3. Though a plaint dated 25th March 2019 and amended on 06th February 2020, the appellant sought judgment against the respondents for general and special damages, damages for loss of future earning capacity and costs of the suit with interest. Her claim was that on 31st December 2016 she was travelling as a passenger onboard motor vehicle registration number KCJ 115G along Embu-Meru Road when it collided with motor vehicle registration number KAQ 714F, occasioning the appellant serious bodily injuries.
4. The appellant alleged negligence on the part of the driver of the motor vehicle registration number KCJ 115G in which she was travelling and which is registered to the 4th respondent. In fact, the 1st respondent was the registered owner of the motor vehicle registration number KAQ 714F, whilst the 2nd respondent was its actual beneficial owner who had taken out insurance over it. The 3rd respondent was the driver of that vehicle at the material time.
5. The respondents filed a statement of defense in which they denied the averments made in the plaint and attributed negligence to the driver of the motor vehicle registration number KCJ 115G.

Summary of the Evidence in the trial court

6. PW1 was the appellant. He stated that the 3rd respondent, who was the driver of the motor vehicle she was travelling in attempted to overtake another vehicle but collided with the 1st and 2nd respondents' motor vehicle which was on the oncoming lane. Following the accident, the appellant was rushed to Runyenjes Hospital where she was treated and then referred to Jordan Hospital Kitui for further



- treatment. As a result of the injuries sustained, she could not continue working and her employment was terminated on medical grounds.
7. The accident was reported at the police station and she was issued with a police abstract. She stated that she was earning Kshs.8,000/= from her job as a house-help. She blamed the drivers of both vehicles for the accident. In cross-examination, she said it was the driver of the vehicle she was in who tried to overtake. Because of the injuries she sustained, she cannot do any work by herself.
 8. PW2, PC Noor Adan produced a police abstract made out to the appellant after the accident. This witness was stood down.
 9. PW3 was Sgt. Calvince Ogutu who testified on behalf of the investigating officer. He stated that the vehicle that the appellant was travelling in was being driven towards the direction of Meru while the respondent's vehicle was being driven towards Embu direction. He stated that the 2 vehicles collided under unknown circumstances, resulting in injury of the occupants thereof. He produced the police abstract in the case.
 10. DW1 was PC Samuel Irungu who produced the OB under which the accident was reported. The O.B indicated that motor vehicle registration number KAQ 714F lost control and knocked motor vehicle registration number KCJ 115G which rolled and passengers got injured. He stated that the list of passengers in motor vehicle registration number KCJ 115G was availed but the appellant was not one of them. He was not the investigating officer in the case and he did not know why an abstract was issued to the appellant. He was positive that the investigating officer visited the scene and there was no indication of whether a further abstract was issued.
 11. In cross-examination, he stated that he did not visit the scene, and neither did he have the sketch map to ascertain the point of impact. From his records, motor vehicle registration number KAQ 714F was to blame for the accident. The court recorded the names of the people who were in the motor vehicle registration number KCJ 115G and there was a name of one Christine Karimi which appeared to be the closest to the appellant's name.

Findings of the Trial Court

12. The trial court found that the drivers of both motor vehicles were to equally blame for the accident. The trial Magistrate noted that the names of the passengers in motor vehicle registration number KCJ 115G were given but the appellant's was not one of them even though it was somewhat similar to Christine Karimi aged 27 years. The Magistrate noted that the P3 form produced by the appellant indicated that she was 58 years old while the medical examination report indicated that she was 56 years old. The discrepancies led the court to believe that the appellant was not a passenger in the motor vehicle registration number KCJ 115G. On that basis, the appellant's claim for damages was dismissed, leading to this appeal.

Parties' Submissions on the appeal

13. The appellant submitted that it was not an uncommon practice for an injured person in a road accident to sue after sometime like the appellant did. She relied on the cases of *Kinyanjui Kamau v George Kamau* [2015] eKLR and *Mordekai Mwangi Nandwa v Bhogal's Garage Limited* Court of Appeal No. 124 of 1993 [1993] KLR 4448 and stated that the court should have awarded her damages. It was also her submission that the respondents should have been held responsible wholly for the accident and she relied on the cases of *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 and *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* (2015) eKLR.



14. The 4th respondent relied on section 107 of the *Evidence Act* and the case of *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) and argued that the appellant failed to prove that she was indeed a passenger in his motor vehicle. That it was not possible for the trial court to award the appellant damages for of Kshs.500,000/= based on the case of *Mutonde v Kyalo (Civil Appeal 4 of 2020)* [2024] KEHC 1796 (KLR) because the injuries sustained in that case were far more severe than those she sustained.

Issues for Determination

15. The issues for determination are:
- a. Whether the trial court's finding on liability should be set aside or reviewed;
 - b. Whether the appellant should be awarded damages.

Analysis and Determination

16. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of *Coghlan v. Cumberland (1898) 1 Ch. 704*, where the Court of Appeal (of England) stated as follows:

“Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

17. Section 107 (1) of the *Evidence Act* provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

18. The evidential burden is further established under sections 109 and 112 of the *Evidence Act*. In the case of *Evans Nyakwana v Cleophas Bwana Ongaro (2015) eKLR* the evidential burden was discussed and the court stated that:

“As a general proposition 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 (i) 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 law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as



Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

19. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v Minister of Pensions (1947) 2 All ER 372* discussing the burden of proof the court 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden 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...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”
20. Liability is a matter of fact; hence this court must re-evaluate the evidential material on record and the circumstances under which the accident in question occurred. Matters of fact are determined from evidence, and the burden of proof lies on the party alleging the facts to prove them. PW1 alleged that she was a passenger onboard the 4th respondent’s motor vehicle which was driven carelessly thus leading to the accident that resulted in the appellant’s injuries.
21. Other than the plaintiff/appellant, none of the witnesses, either in support of the appellant’s or respondents’ cases witnessed the accident. The investigation officer was also not present to testify on the accident scene. PW3, a police officer did not know the circumstances under which the accident occurred. DW1 stated that the accident was blamed on the driver of motor vehicle registration number KAQ 714F who lost control of his vehicle. So, this was a case with no eyewitnesses at all, which poses serious evidential challenges as to the verifiable facts.
22. Further, none of the police witnesses went to the scene or could provide a sketch plan of the accident scene which would have assisted the Court appreciate what occurred. PW1 said that the accident occurred when the driver of motor vehicle registration number KCJ 115G tried to overtake but collided head on with the motor vehicle registration number KAQ 714F. She said that it appeared to her like none of the 2 drivers could escape the collision.
23. Given the standard of proof to be applied, it is most probable that both drivers were to blame for the accident. Therefore, the trial magistrate cannot be said to have erred in finding liability equally between the 2 drivers. A 50%:50% liability ratio means that both parties are equally to blame. As such, it was not necessary for the trial court to say which aspect of liability should be borne by which party. They share equal blame.
24. The trial Magistrate did not find a reason to assess quantum because she was not persuaded that the appellant was a passenger in the motor vehicle registration number KAQ 714F. She noted that the name and age of the appellant as stated in the OB, the P3 form and the medical examination report all differed. The plaintiff did not ensure these discrepancies were resolved prior to prosecuting the case. Thus, it instantly became doubtful that the appellant was the occupant of the said vehicle. It is true that the name of the appellant herein differs from the name of the passenger called Christine Karimi as named by DW1.
25. The OB indicated that Christine Karimi who was a passenger in the motor vehicle was 27 years old. The police abstract produced by PW1 as evidence was obtained from OB No. 19/31/12/2016 and it is dated 15th May 2018. That Abstract shows the name of the appellant as Christina Kamene Nzuki and not Christine Karimi as was stated in the OB from which the abstract was extracted.



26. Even subjecting this to the standard of proof, it is likely that the 2 people are not one and the same person. If they were, the discrepancy in names would not be obvious and the appellant would have alerted the court, for instance through an affidavit of names, that the 2 names refer to the same person that is her. This would have helped especially because she was represented by an advocate all along.
27. Christine Karimi as recorded in the OB is 27 years old while the appellant Christina Kamene Nzuki who was examined by Dr. Cyprianus Okoth Okere was 56 years old. It is also Christina Kamene Nzuki who was examined by Dr. Stephen Maina who filled the P3 form. The appellant also produced a payslip from Tamarind Management Limited which belongs to Christine K. Nzuki for October 2000 and it does not indicate her age. From this evidence, it appears as though the Christine Karimi that was involved in the accident and whose name was entered in the OB does not exist beyond that OB and Christina Kamene Nzuki appeared immediately afterwards to institute the suit. There is no evident connection between the two persons.
28. As a result, there was no point in the trial Court assessing quantum since it is evident that the appellant could not prove that she is the same person as Christine Karimi who was a passenger in the 4th respondent's vehicle.

Disposition

29. Ultimately, the plaintiff/appellant's case could not be proved on a balance of probabilities as required by law due to the sharp inconsistencies in the evidence she presented.
30. In the result, the trial Magistrate's decision cannot be impugned. Accordingly, the appeal is hereby dismissed with costs to the 4th respondent.
31. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 1ST DAY OF AUGUST, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

Khafumi for the Appellant

Njuguna for Respondents 1 - 4

Francis Munyao - Court Assistant

