

KENYA / JUDGMENT

Kavai v Oguso & another

[2026] KEHC 13707 (KLR)

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COURT

High Court

CASE / FILE NUMBER

Civil Appeal E053 of 2025

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SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 1 REPUBLIC OF KENYA IN THE HIGH COURT
OF KENYA AT SIAYA CIVIL APPEAL NO. E053 OF 2025 IAN

KAVAI.....APPELLANT VERSUS MARTIN OTIENO

OGUSO.....1ST RESPONDENT FRANCIS

MAGERO.....2ND RESPONDENT (Being an appeal from the judgement
and resultant decree of the Small Claims Court at Siaya in SCCC Case No. E048 of 2025 (Hon. J.P
Mkala, (Adjudicator) dated 21st July 2025) BETWEEN MARTIN OTIENO

OGUSO.....CLAIMANT VERSUS IAN KAVAI.....1ST
RESPONDENT FRANCIS MAGERO.....2ND RESPONDENT

JUDGEMENT

SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 2

1. This is an appeal arising from the Judgment and Decree of the Small Claims Court at Siaya in SCCC Case No. E048 of 2025 delivered on 21st July 2025 wherein he found the Appellant 100% liable for the accident and awarded the Respondent Kshs. 300,000/- in general damages, Kshs. 17,550/- in special damages and Kshs. 200,000/- for future medical expenses, plus assessed costs of Kshs 40,000/- and interest.
2. Aggrieved by the aforesaid decision of the trial court, the Appellant moved this Court via a Memorandum of Appeal dated 21st July 2025 wherein he raised the following grounds of appeal namely; -
 - a) THAT the Honourable Magistrate erred in law by arrogating to himself geographical and territorial jurisdiction contrary the provisions of the Small Claims Court Act. SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 3
 - b) THAT the Honourable Magistrate erred in law by finding the Appellant 100% liable for the accident despite clear evidence that the Respondent's own negligent conduct was the proximate cause of the accident.

- c) THAT the Honourable Magistrate erred in law by failing to consider and properly apply the doctrine of contributory negligence in light of the Respondent's admitted conduct of walking while intoxicated, staggering in the middle of a poorly lit road at night and failing to use pedestrian pathways.
 - d) THAT the Honourable Magistrate erred in law by disregarding the Appellant's evidence and submissions, particularly the testimony that reasonable evasive action was taken and that the point of impact was minimal, indicating no recklessness on the part of the Appellant. SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 4
 - e) THAT the Honourable Magistrate erred in law by applying a standard of strict liability to the Appellant without establishing any breach of duty of care.
 - f) THAT the Honourable Magistrate erred in law by awarding Kshs. 200,000/= for future medical expenses without the same having been specifically pleaded and proven as required by law.
 - g) THAT the Honourable Magistrate erred in law by awarding general damages of Kshs. 300,000/= which were manifestly excessive in view of the minor nature of the injuries sustained and the comparable judicial authorities.
 - h) THAT the Honourable Magistrate erred in law by awarding special damages of Kshs. 17,550/= without proper scrutiny of the receipts tendered and in disregard of evidence that a significant portion of the medical costs was settled by a third party. SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 5
 - i) THAT the Honourable Magistrate erred in law by failing to evaluate the totality of the evidence before the court and by failing to give reasons for rejecting the Appellant's defence.
3. This being the first Appellate court, its duty is to re- evaluate the record of the lower court and subject it to an independent analysis so as to reach its own conclusion as to whether or not to uphold the decision of the trial court. See *Selle vs Associated Motor boat Co. Ltd* [1968] EA 123.
4. The 1st Respondent (then Claimant) filed a claim against the Appellant (1st Respondent in the lower court) and the 2nd Respondent (2nd Respondent in the lower court) arising from a road traffic accident that occurred on 12th January 2025 at around 2300 hours along Mwiki Road near the Maternity Area. SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 6
5. The 1st Respondent averred that he was lawfully walking along the road when the Appellant driving motor vehicle registration number KBH 820D (Subaru Impreza) registered in the name of the 2nd Respondent negligently knocked him down, causing him grievous harm and soft tissue injuries.
6. The matter proceeded by way of viva voce evidence.

7. No. 65435 Corporal Joseph Mande (CW1) testified that he was officer attached to the Mwiki traffic base. He stated that he had issued police abstract for the accident which had occurred on 12th January 2025 at approximately 2300 hours along Mwiki Road at a place known as Maternity. That the accident involved motor vehicle registration number KBH 820D a Subaru Impreza which was being driven by Ian Kawai. He testified that the vehicle hit a pedestrian named Martin Oguso who was crossing the road from left to right. He testified that as a SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 7 result of the accident, the victim sustained soft tissue injuries and was rushed to Radiant Hospital where he was left undergoing treatment. The scene was visited and the motor vehicle was taken to Mwiki Police Station awaiting inspection. The motor vehicle was subsequently inspected and statements were recorded. He stated that the driver of the motor vehicle Ian Kawai was blamed for the accident. The victim was later issued with a P3 form as well as a police abstract. Both copies were returned to the police station and the case was referred to the insurance company for compensation. He testified that paragraph 9 of the abstract indicated grievous harm. He stated that he did not confirm the legitimacy of the insurance and produced the police abstract as Exhibit CEX-1. On cross examination, he testified that his name was on the police abstract and that he was the investigating officer of the case. He admitted that it SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 8 might have been an oversight that he did not indicate the name of the victim on the abstract. He stated that he did not go to the scene himself but that PC Murithi was the officer who had visited the scene. He confirmed the accident happened at 2300 hours on a Sunday. He noted that PC Murithi had indicated that the pedestrian victim sustained injuries on the face but had not indicated that the victim was drunk. He testified that he knew the road where the accident occurred and that there was a sharp bend. He stated there were no speed bumps but there was a pedestrian stage and that traffic was minimal at 2300 hours. Both sides of the road had stages and a driver had to navigate the bend before reaching the stage. He stated that the motor vehicle had an insurance sticker and he went by that sticker but did not confirm whether the insurance was genuine. He stated that he had relied on the statements of the driver, his colleague SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 9 and the victim. He reiterated that the injuries were stated as grievous harm. He further testified that he had referred the case to Pioneer Insurance Company. During re-examination, he testified that he was not in a position to ascertain whether the victim was intoxicated. He reiterated that the P3 form was filled out and indicated grievous harm.
8. Dr. Stella Lutta Were (CW2) testified that she was a general practitioner. She testified that she had examined the 30-year-old male claimant Martin Otieno Oguso whose ID number was 31425648. She stated that she had gone through his medical records which included a discharge summary from Kenyatta National Hospital, a filled-out P3 form and review documents from Migori Referral Hospital. She reported that the claimant had been involved in a road traffic accident four months prior to her examination, sustaining a head injury, loss of SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 10 consciousness and a soft tissue injury to his right ankle. She testified that the claimant complained of slow mentation

(processing things more slowly than he did prior to the accident), headaches, poor vision, neck pain, stiffness, chronic fatigue and difficulty standing for long periods. She stated that he was in good general condition, alert and oriented but had slurred speech, poor distant vision, mild neck tenderness and right ankle abrasions that were healed at the time of her examination. She concluded that the injuries sustained had negatively impacted his health and productivity noting that he had not fully recovered and required prescription medication. The witness listed the required medication and stated that the claimant needed close follow-up by a neurologist. She estimated the costs of the follow-up, medication and treatment to be approximately Kshs. 200,000/-. She classified the injuries as grievous SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 11 harm and produced her medical report as Exhibit CEX-2. During cross examination, she testified that she had obtained a history of the matter, examined the patient and looked at the records. She stated that the claimant had been attended to by three doctors at the Kenyatta National Hospital and the discharge diagnosis was moderate head injuries. She confirmed that he had presented to the hospital with a loss of consciousness and vomiting. She admitted that she did not explicitly write "moderate" or "serious" head injury on her report nor did she indicate reduced motor neuron coordination, chest wall contusions or multiple bruises on the head. She confirmed that the soft tissue injuries were only to the ankle. She agreed that the discharge summary from Kenyatta National Hospital indicated neuro-conservative management and neuro-monitoring and that he was subsequently discharged. She confirmed that the CT scan SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 12 was normal, that she had compiled her report in May and that she had not seen the patient since that examination. The witness testified that the future medical expenses were estimated from routine hospital visits and medication. She stated that she was not being paid to attend court that day as she had already been paid for the medical report itself. During re-examination, the witness testified that she did not see the patient immediately after the accident, but reiterated that the patient would need a follow-up by a neurologist.

9. Martin Otieno Oguso (CW3), testified that he lived in Ugenya and did building work. He identified himself as the claimant in the matter and wished to adopt his witness statement. The Court adopted his witness statement dated 29th June 2025 as his evidence-in-chief. The witness then produced his documents into evidence as follows: PEX-3: ID card of the Claimant; PEX-4: Copy of SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 13 the motor vehicle search record; CEX-5: Remand Certificate; CEX-6: P3 Form ;CEX-7: Medical report from Kenyatta National Hospital; CEX-8: Copy of medical records including the discharge summary ;CEX-9: Copy of the CT Scan ;CEX-10: Copy of the list of prescribed drugs ;CEX-11: Letter to Mwiki Police Station;CEX-12: Copy of bus tickets and travel expenses ;CEX-13: A bundle of receipts. The witness testified that he blamed the motor vehicle driver for the accident stating that he could no longer work after the accident, had to use very expensive medication and prayed for compensation. He stated that he was not drunk at the time the accident occurred. During cross examination, he testified that he did not have his physical ID card before the court. He stated that in January he was living in Fedha Estate Pipeline and

was working within the Nairobi CBD. He confirmed that 12th January 2025 was a Sunday and he SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 14 was in Kasarani because he had taken a notebook to a friend in Mwiki named Kennedy. He stated that on that day, there was a football match between Manchester and Chelsea which they watched at his friend's house. He denied going to a bar and stated he was with his friend David Opiyo. He testified that he does not drink alcohol. He denied walking beside the road stating that he was crossing the road. He explained that while crossing, he had remained behind because he was texting his boss and that this was before he crossed the road. He testified that he was hit when his phone was already in his pocket stating that the driver did not care for his safety and hit him in the middle of the road. He stated that he did not know how he got to the hospital because he lost consciousness. He testified that before he started crossing the road, he had checked and there was no car. Because he was hit by the motor vehicle, he did not know SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 15 how the respondent was driving. He testified that he did not know if the car was defective but stated he knew the driver was drunk because of the hour and where else the driver would have been going at that time. He asserted that the driver did not apply brakes. He denied praying for Kshs. 60,000/- for admission and stated his friend had taken him to the hospital. He reiterated that he was injured on his head and right foot. He blamed the driver and did not blame the 2nd Respondent. He noted that the police abstract showed Ian was the driver of the motor vehicle. He stated he did not know whether Francis had instructed Ian to drive the car but knew Francis was the registered owner of the motor vehicle. On re-examination, the witness testified that the accident occurred in Kasarani which was a residential area and that he was hit in the middle of the road near a bus stop. He stated that the vehicle was being driven at a high SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 16 speed. He testified that he did not know what a salvage motor vehicle was and explained that the Kshs. 60,000/- was for hospital charges and other incidental costs. He stated that he used Kshs. 20,000/- for medicine. He testified that he regained consciousness on the second day and did not know what the relationship was between Francis and Ian. This marked the closed of the Claimant's case 10. Ian Kavai (RW1) testified that he lived in Mwiki and was currently unemployed. He stated that he had filed his witness statement and wished to adopt it. The Court adopted his witness statement dated 1st July 2025 as the 1st Respondent's evidence-in-chief correcting that the accident happened on 12th January 2025 and not 21st January 2025. On Cross examination, he testified that he was the driver of the motor vehicle. He stated that the vehicle was insured under a policy issued by Pioneer SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 17 General Insurance. He testified that he had never met the 2nd Respondent explaining that he had bought the car with cash from Samuel Mwangi. The witness testified that his ID number was 32656173 and confirmed that he had signed and read through his witness statement. He reiterated that the accident occurred on 12th January 2025 and not 21st January 2025. He confirmed that there was a bus stop at the place where the accident occurred and that the motor vehicle was insured by Pioneer Insurance under a third-party policy. He stated that he bought the car from a third party and did not know that it was a salvage vehicle. He admitted that his receipts were not filed in court but stated he possessed the physical receipts. He admitted

that he did not have any document to show that the claimant was drunk at the time of the accident. He stated that he had an M-Pesa statement to show he had paid for some of the claimant's medication. SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 18 He testified that he had been driving for more than one and a half years. During re-examination, he testified that he was not claiming anything from the court and that everything he had stated in his statement was the truth. 11. The Court noted that, by the consent of the parties, the 2nd Respondent's documents as per his list of documents were produced as R2 Exhibit 1-6. Then it marked the close of the Respondent's case. The trial Court after hearing evidence from both sides found the Appellant 100% liable for the accident, exonerated the 2nd Respondent of vicarious liability and awarded the 1st Respondent damages and costs totaling Kshs. 559,029.45/-. 12. The Appeal was canvassed by way of written submissions. Both parties filed their respective

submissions.

SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 19 13. The Appellant submitted that the Respondent's claim arose from an accident that allegedly occurred along Kasarani-Mwiki Road which lies within Nairobi County. He further stated that the Respondent resided in Nairobi, and the Appellant resided and worked in Nairobi meaning the cause of action arose in Nairobi and both parties were domiciled there. To support this challenge to jurisdiction, the Appellant cited Section 15 of the Civil Procedure Act which mandates that: "Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction— (a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or (b) any of the defendants... resides or carries on business... provided either the leave of the court is given, SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 20 or the defendants... acquiesce; or (c) the cause of action, wholly or in part, arises." 14. The Appellant also cited Section 15 of the Small Claims Court Act which limits the right to lodge a claim to instances where:

- (a) such a person ordinarily resides or carries on business within the local limits of the jurisdiction of the Court;
 - (b) the subject matter of the claim is situated within the local limits...;
 - (c) the contract... was made or was intended to be performed within the local limits...;
 - (d) the cause of action arose within the local limits...; or
 - (e) the defendant to the claim resides within the local limits of the jurisdiction of the Court.
- SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 21 15. The Appellant relied on the holding in *Phoenix of EA Assurance Company Limited v. S. M. Thiga T/A Newspaper Service* [2019] eKLR, which established that jurisdiction is primordial, must exist when a suit is filed and a suit filed devoid of jurisdiction is "dead on arrival" and cannot be remedied or conferred by the court onto itself. Additionally, the Appellant cited *Wachuri v. 15 Minutes Logistics*

Limited & 2 others (Civil Appeal E795 of 2022) [2024] KEHC 8929 (KLR) , where the High Court set aside a Small Claims Court decision because the court had acted outside its territorial limits, emphasizing that forcing a defendant to travel to a distant, unrelated court defeats the rationale of the Small Claims Court and violates Article 48 of the Constitution regarding access to justice. 16. The Appellant argued that in this case, none of the statutory conditions connected the matter to Siaya: the SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 22 accident did not occur in Siaya, neither party resided or carried on business there and no part of the cause of action arose within Siaya County. By entertaining the matter, the Siaya Small Claims Court acted outside its territorial jurisdiction. To challenge the claim further, the Appellant cited Ogwari v. Hersi (Civil Appeal 223 of

2022) [2023] KEHC 20111 (KLR) , which held that an unquantified claim is a claim at large and not a small claim. He also referred to Nyambati Nyaswabu Erick v. Toyota Kenya Ltd & 2 others [2019] eKLR, where it was held that general damages are damages at large and comparable injuries should as far as possible be compensated by comparable awards. The Appellant concluded on this issue that the Siaya Small Claims Court lacked jurisdiction making the entire proceedings and resultant judgment a nullity ab initio which ought to be set aside. SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 23 17. The Appellant cited Section 107 of the Evidence Act noting that the burden of proof lies on the person who desires the court to give judgment on any legal right or liability dependent on facts they assert. He cited Christine Kalama v. Jane Wanja Njeru & Martin Kagai (Civil Appeal No. 18 of 2020) , where the court outlined the basic elements of negligence: that the respondents owed a duty of care to the appellant; that they breached that duty of care in the manner of their driving; that the breach caused personal injuries attracting recoverable damages; that the injury was a reasonably foreseeable result of the breach. 18. The Appellant further relied on Elijah Ole Kool v. George Ikonya Thuo [2001] eKLR , which held that there can be no liability unless the damage is the "proximate" result of the negligence and the plaintiff must prove both that the defendant was negligent and SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 24 that the negligence caused or materially contributed to the damage. On the duty of pedestrians, the Appellant cited Patrick Mutie Kimau & another v. Judy Wambui Ndurumo [1997] eKLR , which established that pedestrians owe a duty of care to other road users, must follow the Highway Code and must take care of their own safety rather than running across a road when it is unsafe to do so. He also cited Kenya Power and Lighting Company Limited v. Nathan Karanja Gachoka & another [2016] KEHC 1362 (KLR) to illustrate that an adult's failure to take care of their own safety in obvious circumstances constitutes contributory negligence. The Appellant argued that the trial court erred by holding him wholly liable while disregarding the Respondent's own conduct. He submitted that the evidence showed the Respondent was intoxicated, staggering in the middle of a poorly lit road at night and SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 25 had failed to use designated pedestrian pathways which materially contributed to the accident. 19. The Appellant maintained that he was driving at a moderate speed and took evasive action noting that the point of impact was minimal. He argued that the Respondent's own texting

on his phone while walking in the middle of a poorly lit road was the proximate cause of the accident. 20. Regarding the police abstract, the Appellant argued that it is only prima facie evidence of a report and not conclusive proof of liability citing *Waweru v. Obwogi* (Civil Appeal E832 of 2023) [2024] KEHC 6099 (KLR) and *Florence Mutheu Musembi & Geoffrey Mutunga Kimiti v. Francis Karengi* [2021] eKLR. He argued that the abstract produced did not contain results of any investigations and was insufficient to establish fault meaning the finding of 100% liability was erroneous SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 26 and should be set aside or apportioned appropriately. The Appellant submitted that the Respondent's entitlement to damages was contingent upon proof of liability which had not been established. Relying again on Section 107 of the Evidence Act and *Patrick Mutie Kimau & another v. Judy Wambui Ndurumo* [1997] eKLR, he argued that the Respondent's reckless conduct amounted to contributory negligence which should either reduce or entirely extinguish his entitlement to damages. On special damages, the Appellant cited *George & another v. Babu* (Civil Appeal E130 of 2023) [2024] KEHC 5986 (KLR) and *Joseph Kipkorir Rono v. Kenya Breweries Limited & Another* (Kericho HCCA No. 45 of 2003) asserting that special damages represent precise pecuniary losses actually spent and must be specifically pleaded and strictly proved. The Appellant pointed out that while the Respondent pleaded SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 27 special damages of Kshs. 111,050/-, the receipts produced did not support this figure. He asserted there was a clear discrepancy as evidence showed the actual hospital bill amounted to Kshs. 13,097/- and was settled through SHA making the trial court's award of Kshs. 17,550/- erroneous and unsupported. The Appellant further argued that; the award of Kshs. 200,000/- for future medical expenses was improper because it was neither pleaded nor proved. ; the general damages of Kshs. 300,000/- were manifestly excessive given the minor nature of the injuries (head injury with loss of consciousness and soft tissue injury to the right ankle, where a CT scan showed normal results). The Appellant cited comparable authorities to show the award was excessive; in *Kantara Farm Limited v. Richard Ochoro Osir* [2014] eKLR, where the plaintiff sustained a sprained hand, dislocated wrist, and soft tissue injuries, SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 28 the court awarded Kshs. 80,000/-. In *Timsales Limited*

- v. *Penina Achieng Omondi* [2011] eKLR, where the plaintiff sustained a stitched and dressed left index finger, the court awarded Kshs. 60,000/-. 21. Taking into account the lapse of time, the nature of the injuries and inflation, the Appellant submitted that an award of Kshs. 80,000/- in general damages would be reasonable and sufficient to compensate the Respondent for his pain and suffering. The Appellant concluded that the Respondent's own negligence was clearly established and that the awards of general, special and future medical damages were excessive and unsupported. 22. Consequently, the Appellant respectfully requested the High Court to; allow the appeal; set aside the judgment of the Siaya Small Claims Court in its entirety; find that the Appellant is not liable for the accident, or in the alternative apportion liability appropriately to reflect SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 29 the Respondent's contributory negligence; set aside or substantially

reduce the awards of general, special and future medical damages; award the costs of the suit and of the appeal to the Appellant. 23. The 1st Respondent submitted that under Section 38(1) of the Small Claims Court Act appeals to the High Court from the Small Claims Court lie only on matters of law. Relying on the definition of an "issue of law" and "issue of fact" from Black's Law Dictionary, the 1st Respondent argued that the High Court can only entertain appeals arising from the Adjudicator's interpretation of the law and not from factual findings. To support this distinction, the 1st Respondent cited *JN & 5 others v Board of Management, St. G School Nairobi & another* [2017] KEHC 9629 (KLR) , where the court defined a question of law as one answered by applying legal principles as opposed to a question of fact SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 30 which relies on evidence and specific factual circumstances. The 1st Respondent further argued that the Appellant's grounds concerning whether the Appellant should be held 100% liable and whether the 1st Respondent was to blame for being on the road at night are strictly questions of fact. Citing *Wanjiru v Kiilu* (Civil Appeal 90 of 2023) [2024] KEHC 8881 (KLR) and *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR , the 1st Respondent submitted that an appellate court must accept the factual findings of the trial court unless they are so perverse or unreasonable that no other tribunal could have reached them. 24. The 1st Respondent pointed out that; the Appellant failed to tender any evidence to prove the 1st Respondent was intoxicated which the trial adjudicator confirmed as a finding of fact at page 208 of the record; SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 31 the investigating officer (CW1) produced a police abstract showing the 1st Respondent was knocked down on a sharp bend near bus stops where the driver should have exercised due care.; the 2nd Respondent's witness statement and pleadings showed that the Appellant was driving a faulty vehicle (KBH 820D) that had been written off as salvage in 2011 and was unfit to be insured. Relying on *Fidelity Insurance Co. Ltd v Korir* [2024] KEHC 3365 (KLR) , *Bosire v Njihia* [2026] KEHC 2744 (KLR) , and *Direct line Assurance Co. Ltd v Nyawa*

[2023] KEHC , the 1st Respondent urged the Court to dismiss these factual grounds arguing they were merely questions of fact dressed up as law. 25. Regarding the Appellant's contention that the claim should have been lodged at the Milimani Small Claims Court because the accident occurred in Nairobi, the 1st Respondent vehemently opposed this argument. The 1st SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 32 Respondent submitted that; the Appellant submitted to the jurisdiction of the trial court by failing to elect or dispute the territorial jurisdiction in their Response to the Claim at page 69 of the record.; under Section 15(1)(a) of the Small Claims Court Act, a person has the right to lodge a claim where they ordinarily reside or carry on business; the 1st Respondent had clearly established that he relocated to Siranga in Siaya County after the accident because he had lost his job and could no longer care for himself in Nairobi; section 15(2) of the Act mandates that once a notice of claim is served on a respondent, they become a party to the proceedings regardless of their residence or where the cause of action arose. Citing the High Court's decision in *Ochiel v Okoth* [2026] KEHC 106 (KLR) , the 1st Respondent maintained that territorial jurisdiction was correctly pleaded and established. SIAYA

CIVIL APPEAL E053 OF 2025 JUDGEMENT 33 26. The 1st Respondent submitted that the trial court correctly determined that the 1st Respondent had proved his case on a balance of probabilities under Section 107 of the Evidence Act, whereas the Appellant relied on mere statements without documentary evidence to the contrary. Citing *Butt v Khan* [1981] KLR 349, the 1st Respondent argued that an appellate court should not interfere with an award of damages unless the trial court acted on wrong principles or the award was inordinately high or low. 27. The 1st Respondent supported the specific awards as follows; General Damages (Kshs. 300,000): This award was fair and justified given that the 1st Respondent was knocked down by the Appellant's speeding vehicle on a sharp bend, was left unconscious, was admitted to Kenyatta National Hospital from 13th to 29th January 2025 and suffered a concussion. The trial adjudicator SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 34 took into account inflation, fairness and comparable cases, including *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] KEHC 4800 (KLR) . ; Special Damages (Kshs. 17,550): While the 1st Respondent had sought Kshs. 110,000, the trial court properly capped the award to Kshs. 17,550 based strictly on the payment receipts produced in evidence.; future Medical Expenses (Kshs. 200,000): the 1st Respondent opposed the Appellant's argument that future medical expenses must be specifically particularized, arguing that it is logically impossible to plead future expenses with specificity. The amount was based on an approximation by a medical professional (CW2) to alleviate the 1st Respondent's ongoing disorientation from the concussion. This was pleaded in the statement of claim and backed by a medical report, which the Appellant never contradicted with a second medical opinion. The SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 35 1st Respondent relied on *Kimeu v Mkangombe* (Civil Appeal E032 of 2025) [2026] KEHC 6572 (KLR) to argue that the trial court applied the correct legal principles in assessing quantum. 28. In light of the foregoing, the 1st Respondent prayed that this Honourable Court affirm the decision of the subordinate Small Claims Court and dismiss the Appellant's appeal with costs to the 1st Respondent. The 1st Respondent maintained that the appeal is based on factual grounds contrary to Section 38(1) of the Small Claims Court Act, misapplies the jurisdictional provisions of the Civil Procedure Act and challenges a fair award of damages. In conclusion, the 1st Respondent requested the Court to find support in the holding of *Ngaruiya v Ngwili* (Small Claims Appeal E005 of 2025) [2026] KEHC 7839 (KLR) and dismiss the appeal in its entirety. SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 36 29. I have considered the record of appeal and the rival submissions tendered. I find the issue for determination is whether the Appeal has merit. 30. The Appellant contends that the trial court erred by assuming jurisdiction over a matter that arose in Nairobi where the parties reside. This Court has carefully considered this ground and finds that it lacks merit. Section 15 of the Small Claims Court Act (Cap 10A) provides the jurisdictional basis for the court. It states: (1) A person has the right to lodge a claim before the Court only if—

- (a) such a person ordinarily resides or carries on business within the local limits of the jurisdiction of the Court;

- (b) the subject matter of the claim is situated within the local limits of the jurisdiction of the Court;
- (c) the contract to which the claim relates was either SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 37 made or was intended to be performed within the local limits of the jurisdiction of the Court;
- (d) the cause of action arose within the local limits of the jurisdiction of the Court; or
- (e) the defendant to the claim resides within the local limits of the jurisdiction of the Court. 31. The provision is couched in the disjunctive. A claimant need only satisfy one of the five conditions to vest the court with jurisdiction. The Respondent in this case satisfied Section 15(1)(a) of the Act. 32. The Respondent's Statement of Claim and witness statement indicate that he is a resident of Siranga within Siaya County. In his witness statement dated 29th June 2025, the Respondent stated: "I am MARTIN OTIENO OGUSO, of I.D No. 31425648 a resident of Siaya County... I was also forced to leave my casual employment that I was doing in Nairobi and SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 38 relocated to Siranga back to my maternal grandparents' home." 33. Section 15(1)(a) of the Small Claims Court Act is clear: a person has the right to lodge a claim before the Court if such a person ordinarily resides within the local limits of the jurisdiction of the Court. The Respondent, having relocated to Siranga, Siaya County, was entitled to invoke the jurisdiction of the Siaya Small Claims Court. The purpose of the Small Claims Court Act is to provide a forum that is accessible, expeditious and cost-effective for the resolution of small claims. Requiring a claimant who has relocated to the countryside due to disability to travel back to Nairobi to litigate would be contrary to the spirit and letter of the Act and Article 48 of the Constitution on access to justice. In any case, the concerns of the Appellant's travel from Nairobi to Siaya for the case was taken care of by the virtual court SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 39 proceedings and was thus comfortable to conduct his case from Nairobi and was thus not inconvenienced at all. Hence, the 2nd Respondent's preliminary objection on jurisdiction was properly dismissed by the trial court. The Appellant's ground of appeal on jurisdiction is therefore dismissed. 34. The Appellant argues that the trial court erred in finding him 100% liable without considering contributory negligence. The 2nd Respondent contends that he should not be held vicariously liable as he had surrendered the motor vehicle to his insurer in 2011 after it was written off. The 2nd Respondent produced documentary evidence demonstrating that motor vehicle KBH 820D was involved in an accident in 2011 and was declared a total loss. Heritage Insurance Company Limited paid him Kshs. 538,500/- as compensation and the salvage was sold to one Mohamed Nawab. The 2nd Respondent SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 40 surrendered the logbook and all ownership documents to facilitate the transfer. 35. The principle of vicarious liability is that an owner is liable for the negligence of a driver driving with their consent. However, where the owner has permanently divested themselves of ownership and possession, they cannot be held liable for accidents occurring thereafter. 36. Although the NTSA registry search still listed Francis Magero as the registered owner due to a failure to update the registry, the

presumption of ownership under the Traffic Act is rebuttable. In *DT Dobie & Company (Kenya) Limited v Muchina & another* [1980] KECA 3 (KLR) the court held that liability attaches to beneficial and actual ownership not merely registered ownership where the registered owner has completely parted with possession and control. There was no master-servant or principal-agent relationship SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 41 between Francis Magero and the Appellant (Ian Kawai). Magero had no interest in or control over the vehicle for over 14 years prior to the accident. This Court finds that the 2nd Respondent was not the owner or in control of the motor vehicle at the time of the accident and is therefore not vicariously liable for the negligence of the Appellant. The 2nd Respondent is hereby released from liability. 37. The Appellant argues that the 1st Respondent was walking while intoxicated and was on his phone. During cross-examination, the 1st Respondent admitted that he was either talking or texting on his phone while crossing the road. This distracted crossing directly violated his own duty of care as a pedestrian under the Highway Code. Conversely, the Appellant admitted he was driving at 60kph near a bus stop/stage area at night after navigating a sharp bend. A driver must exercise extra SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 42 caution when approaching designated passenger stages where pedestrians are likely to cross. 38. Under the Law of Reform Act (Cap 26), where a person suffers damage partly as a result of their own fault and partly due to the fault of another, the damages recoverable shall be reduced to such an extent as the court thinks just. Applying the principle in *Patrick Mutie Kimau v Judy Wambui Ndurumo* [1997] eKLR, both road users failed to maintain a proper lookout. This Court finds that the Appellant's failure to slow down adequately at a passenger stage makes him primarily liable but the 1st Respondent's distracted crossing makes him contributorily negligent. Consequently, liability is apportioned at 70% against the Appellant and 30% against the 1st Respondent. 39. As regards the issue of quantum of damages, the general principles governing the award of damages are SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 43 well established. An appellate court will only interfere with an award of damages if it is shown that the trial court acted on a wrong principle, or that the award is so inordinately high or low as to be a wholly erroneous estimate of the damages. See (*Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* [1985] KECA 137 (KLR) 40. The Respondent sustained a head injury with loss of consciousness, and soft tissue injuries to the right ankle. A CT scan conducted was normal. The medical report by Dr. Stella Lutta noted slow mentation, headache, poor vision, neck pain and difficulty standing for long. The discharge summary from Kenyatta National Hospital indicated "moderate head injuries." In *Francis Ndungu Wambui & 2 others v Benson Maina Gatia* [2019] eKLR, the High Court reviewed downwards an award of general damages of Kshs. 400,000 to Kshs. 300,000 for SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 44 head injury with loss of consciousness and soft tissue injuries. In *Johnstone Koech v Ibrahim Abdi Maalim*

- [2021] KEHC 9013 (KLR), the court reduced an award of Kshs. 400,000/- to Kshs. 250,000/- for soft tissue injuries, noting the injuries were not serious. 41. The trial court awarded Kshs. 300,000/- in general damages. This Court finds this award to be fair and reasonable given the nature of injuries sustained, the loss of consciousness and the ongoing symptoms. I find that the trial court acted on the correct principles and that the award is not inordinately high. The same is upheld. 42. It is trite law that special damages, including future medical expenses, must be specifically pleaded and strictly proved. The award of Kshs. 200,000/- for future medical expenses was based on the medical report by Dr. Stella Lutta. However, the trial court noted: SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 45 "It is noted from the Respondent's statement of claim that the prayers sought were in respect of special damages, general damages, cost of the suit and interest. There is no prayer for future medical expenses."
43. In Oracle Engineering Limited & another v Muliro (Civil Appeal E006 of 2024) [2025] KEHC 5409 (KLR), this court held as follows: "It is trite that such kind of expenses are in the form of special damages which must be specifically pleaded and proved. It was incumbent upon the Respondent to specifically plead the claim in order to justify an award in that regard."
44. Despite the trial court's own acknowledgment that the claim was not specifically pleaded, it proceeded to award the sum reasoning that the Respondent had not adduced evidence to disprove the doctor's testimony. This was an error. The burden of proof lies on the claimant to plead and SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 46 prove special damages. The Respondent's failure to specifically plead future medical expenses in the Statement of Claim means that he cannot recover the same. The award of Kshs. 200,000/- for future medical expenses must therefore set aside.
45. The trial court awarded Kshs. 17,550/- as special damages noting that the Respondent had produced receipts totaling that amount. This Court finds no reason to interfere with this award, as the same was specifically pleaded and proved. The award of Kshs. 17,550/- in special damages is upheld.
46. In view of the foregoing observations, it is my finding that the Appellant's appeal partially succeeds. The Judgment and Decree of the trial court delivered on 21st July 2025 in Siaya SCCC No. E048 of 2025 is hereby set aside and substituted with

judgment

as follows:

- i. Liability is apportioned at 70% against the Appellant and SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 47 30% contributory negligence on the 1st Respondent. ii. The 2nd Respondent is hereby released from liability. iii). General damages: Kshs. 300,000/- iv. Special Damages: Kshs. 17,550/-

- v. Total Award (before contributory negligence): Kshs. 317,550/- vi. Less 30% contributory negligence: Kshs. 95,265/- vii. Net Award to the 1st Respondent: Kshs. 222,285/- viii. Costs of the trial court assessed at Kshs. 40,000/- are upheld. IX. Interest at court rates from the date of the trial court's judgment until payment in full. X. Each party shall bear their own costs of this appeal. It is so ordered. SIAYA CIVIL APPEAL E053 OF 2025 JUDGEMENT 48 Dated and delivered at Siaya this 18th day of September 2026 D.KEMEI JUDGE In the presence of:
Ambani.....for the Appellant Ogenga.....for the 1st Respondent
N/A.....for 2nd Respondent Maurine.....Court
Assistant

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Prepared on 28 October 2026 · Esheria