



**Kabue v Kurui & another (Civil Appeal E006 of 2023)
[2025] KEHC 1695 (KLR) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CIVIL APPEAL E006 OF 2023
E OMINDE, J
FEBRUARY 5, 2025**

BETWEEN

SIMON MAINA KABUE APPELLANT

AND

NANCY CHEPKEMOI KURUI 1ST RESPONDENT

UFRA MOTORS BAZAAR 2ND RESPONDENT

JUDGMENT

1. The appeal is both on quantum and liability. In the trial Court the 1st Respondent had sued the Appellant and 2nd Respondent claiming general damages, special damages plus costs and interest of the suit arising from road accident that occurred on 4/12/2021, wherein it is alleged that the 1st Respondent was a lawful passenger onboard of motor vehicle registration number KDC 635B when the said motor vehicle was involved in a road traffic accident as a result of which the 1st Respondent sustained injuries.
2. In opposing the claim, the Appellant filed his Amended Statement of Defense dated 28/7/2022, denying the occurrence of the accident but instead pleaded volenti non fit injuria. Alternatively, he blamed the 1st Respondent for being negligent and also pleaded fraud on the part of the 1st Respondent.
3. After trial Judgment was delivered on 28/10/2022 and the Appellant and the 2nd Respondent were found 100% liable and damages assessed as hereunder: -
 - a. General Damages..... Kshs.180,000/=
 - b. Special Damages..... Kshs.6,550/=
 - c. Plus, costs and interests



4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (6) grounds: -
 1. The Learned Trial Magistrate erred in fact and in law in holding and finding that the Respondent herein proved that she had sustained the injuries alleged following the suit accident despite the 1st Respondent's failure to prove injuries by way of adducing treatment notes.
 2. The Learned Trial Magistrate misdirected himself in fact and in law, when he failed to properly or at all evaluate and/or analyze the evidence on record as to proof of injuries allegedly sustained cumulatively and or exhaustively, thus the Learned Trial Magistrate reached an erroneous conclusion insupportable by the evidence on record as to the alleged injuries sustained.
 3. That the Learned Trial Magistrate erred in law and fact by disregarding and failing to appreciate the fact that the treatment notes adduced by the Plaintiff were revoked as having not emanated from Eldama Ravine County Referral Hospital thereby reaching a decision that is erroneous in the circumstances and connotes an erroneous analysis.
 4. That the Learned Trial Magistrate erred in law and fact by disregarding and failing to appreciate judicial authorities on revocation and/or falsifying of treatment notes cited by the Appellant in the written submissions thereby reaching a decision that is erroneous in the circumstances and connotes an erroneous analysis in view of the failure by the 1st Respondent, to adduce treatment notes of alleged injuries.
 5. That the Learned Trial Magistrate misdirected himself by failing to take into account the well-established principle requiring comparable awards to be made for comparable injuries sustained thereby falling into an error by awarding Kshs.180,000/= which award is manifestly excessive.
 6. That the judgments and/or decision of the Learned Trial Magistrate is contrary to the weight of the evidence on record.
5. The appeal was canvassed vide written submissions. Both the Appellant and the Respondent filed their respective submissions on 4/11/2024.

The Appellant's Submissions

6. Counsel submitted that the 1st Respondent failed to adduce evidence as proof of the alleged injuries yet it was paramount upon her to avail and/or adduce evidence in terms of documentary evidence as proof of her allegations. Counsel made reference to the provisions of Sections 107, 108 and 109 of the [Evidence Act](#) CAP 80 LOK.
7. Counsel submitted that the Appellant did call a witness by the name of D. Chirchir as DW1 who he submits confirmed in her testimony that the treatment notes produced by the 1st Respondent were revoked by the Eldama Ravine County Referral Hospital where the 1st Respondent testified that she was treated. That the witness testified that said treatment notes were revoked by the facility for being fraudulent and a revocation letter duly issued to that effect.
8. Counsel further submitted that DW1 confirmed on oath that the Plaintiff did not appear in the Register of 4/12/2021 being the material date of the accident and that the letter revoking the treatment notes was adduced as DEx1. That the revocation letter is dated 22/6/2022 and was stamped, signed



and bears the letter head of the facility. Counsel submitted that conversely, the said treatment notes were not signed nor stamped by the alleged treating facility.

9. Counsel further submitted that in the judgment, the trial court opines that there is documentary evidence that shows the Plaintiff was treated at the facility, being Eldama Ravine County Hospital. Counsel however contends that the Trial Court did not expound or outline which particular document he relied on since it is on record that the treatment charts allegedly issued by the treating facility were revoked as having not emanated from Eldama Ravine County Hospital.
10. Counsel further urged that it is trite law that a party who wishes the Court to rule in their favour must prove their case in order to succeed and that the Appellant pleaded particulars of fraud in his Amended Statement of Defence which particulars he has fully proved to court as regards the treatment notes as herein above demonstrated in his submissions.
11. He thus he urged the Court to uphold the appeal by finding that the trial Court erred in failing to hold that the 1st Respondent's case as instituted was clearly based on fraud and dismiss the suit against the Appellant. Counsel cited the case of *Grace Kanini Muthini vs Kenya Bus Service Ltd and Another HCC 4708 of 1989* in support of this submission.
12. Counsel submitted that Courts have held that for failure to prove injury, then a suit of such nature will fail. He relied on the various decisions of the High Courts in *Timsales Ltd-vs-Wilson Libuywa NKU HCC No. 135 of 2006*; *Buds & Bloons Ltd-vs-James Sawani Sikinga Nku HCCA No.126 of 2005*; *Eastern Produce (K) Ltd-vs-James Kipketer Ngetich Eldoret HCCA No. 85 of 2002* and *Kesi Jindwa Karuku v Steel Makers Ltd [2019]eKLR*. Counsel urged further that based on the fact that the subject of this Appeal, is anchored in the tort of negligence, then the holding of the Court in the case of *Stephen Kanjabi Wariari v Dennis Mutwiri Muriuki & another [2022] eKLR*, is relevant. The Court therein held as follows;

“The Court has analyzed the pleadings and evidence before the trial Court, and has considered the grounds of appeal filed herein and the appellant's written submissions. As I have already noted, the appellant's case (as was before the trial Court) was premised on the tort of negligence. That being the case, the appellant had a duty to prove that the accident was caused by the negligence of the respondents herein. In so doing, the appellant had a duty to prove the elements of negligence. The elements of the tort of negligence which must be proved for an action in negligence to succeed are (a) there was a duty of care owed to him, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage (See *Donoghue v Stevenson (1932) A.C.562.*)”
13. Counsel further relied on the findings of various High Courts in the cases of *Timisales Ltd-vs-Wilson Libuywa NKU HCC No. 135 of 2006*, *Buds & Bloons Ltd-vs-James Sawani Sikinga Nku HCCA No.126 of 2005* and *Eastern Produce (K) Ltd-vs-James Kipketer Ngetich Eldoret HCCA No. 85 of 2002* which precedents were cited with approval by the learned Judge R Nyakundi in the case of *Kesi Jindwa Karuku v Steel Makers Ltd [2019] eKLR (Supra)*
14. Guided by the above authorities, Counsel urged this Court to hold that the trial Court erred, proceed to uphold the Appeal and dismiss the suit with costs for want of proof.
15. On the damages awarded at Ks.180,000/- Counsel reiterated that the 1st Respondent failed to adduce treatment documents as proof of the injuries sustained. H further submitted that the injuries sustained were soft tissue injuries. H faulted the trial Court for not citing any precedent in support of its decision to make an award of Ks.180,000/- as general damages.



16. Counsel further submitted that even as the 1st Respondent is alleged to have sustained soft tissue injuries, in submissions they relied on the holding in *Elizaphen Mokaya Bogonko vs Fredrick Omondi Ouna* [2022] eKLR, and prayed for the award of Ks. 600,000/- yet the Plaintiff in the cited precedent suffered more severe injuries being head injury with loss of consciousness, fracture of the right zygoma (facial bone), multiple facial lacerations and multiple blunt injuries. That in this regard, this precedent was not applicable to the case herein.
17. Counsel further submitted on the authorities cited by the Appellant to wit
 - a. *Manase & another v Muga* (Civil Appeal E040 of 2020) [2022] KEHC 10487 (KLR) (28 July 2022)
 - b. *Edward MMutevu Maithya & another v Edwin Nyamweya* [2022] eKLR
 - c. *; LNK (A Minor Suing Through CNK As Next Friend) & 2 others v Simon Gatuni Njukia* [2022] eKLR
 - d. *Losagi Insurance Brokers Limited & another v Josephat Achesa Chumbali* [2022] eKLR
 - e. *Francis Omari Ogaro v IAO* (minor suing through next friend and father GOD) [2021] eKLR,
18. He urged the Court to consider that in all these case that involved soft tissue injuries that were more severe than the ones sustained by the 1st Respondent herein, the Court reduced the initial awards given to amounts that range between Ks. 100,000/- to Ks. 80,000/-.
19. Counsel therefore submitted that all these precedents were applicable, bearing in mind that the nature of injuries are similar to those allegedly sustained by the 1st Respondent and further, the court should note that the precedents were very recent.
20. Counsel therefore submitted that in the unlikely event the Court agrees that injuries allegedly sustained by the 1st Respondent were proven, then an award of Kshs.80, 000/ would suffice. Reference is placed on the following precedents;
 - a. *Makami V Obong'o* (Civil Appeal E062 of 2021) [2023] KEHC 922(KLR) where the Court substituted the award of Kshs.100,000/-with Kshs.80,000/-for marked swelling and bruises on the forehead, marked neck and chest pain, cut wound on the right elbow joint and right knee joint
 - b. *Rege V LA (Minor suing through her father and next friend GAA) (Civil Appeal E111 of 2021)* [2022] KEHC 16634 (KLR) where an award of Ks.400,000/- was substituted with that of Kshs.80,000/-for bruises on the right hand, blunt trauma to the right hand and chest contusion,
 - c. *Manase & another v Muga* (Civil Appeal E040 of 2020)[2022] KEHC 10487 (KLR) where an award of Kshs. 200,000/= was substituted with an award of Kshs.100,000/- for a cut wound on the forehead, tenderness of the neck, chest, back, left elbow and left hand and bruises on both knees.
 - d. *Edward Mutevu Maithya & another v Edwin Nyamweya* [2022] eKLR where an award of Kshs.550,000/- was reduced to that of Ks.100,000/= for cut wounds on the scalp (head region), bruises to the back, right upper limb and the left lower limb.



The Respondent's Submissions

21. Counsel for the 1st Respondent submitted that the 1st Respondent aptly and adequately proved her case to the required evidentiary standards, being that of on a balance of probabilities. That the 1st Respondent's case was that she suffered personal injuries as a result of road traffic accident occasioned by the negligence of the Appellant and the 2nd Respondent herein. That at the hearing, she availed witnesses who testified in her favor and that further, she produced documentary evidence to wit, treatment chits, medical report, receipts for special damages, demand letter, P3 and police abstract which uncontrovertibly proved the occurrence of the said accident and the resultant injuries suffered by the 1st Respondent.
22. Counsel maintained that the learned trial Magistrate was rightfully guided by the evidence on record which was uncontroverted by the Appellant and the 2nd Respondent during the trial in the lower Court. Additionally, Counsel submitted that the treatment chits were not the only proof that the 1st Respondent herein suffered personal injuries as a result of the accident. He submitted that the 1st Respondent also produced a P3 Form which indicated the injuries that she sustained and that in itself a P3 is a Medical Examination Report which is valid.
23. Counsel further submitted that in proving the injuries suffered by a person, the evidence need not be in the form of documents only but may also take the form of oral or object evidence. Counsel relied on the holding in the case of *Carolyne Indasi Mwonyonyo v Kenya Bus Service Ltd (2012) eKLR* in which the Court held as follows:

The Black Law Dictionary defines the term evidence as:

Any species of proof, or productive matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete object etc for the purpose of inducing belief in the minds of the Court or jury as to their contention It is clear from the above definition that evidence can be by way of oral, documents or objects. I do find that the trial Court erroneously dismissed the Appellant's suit for no apparent reasons. The trial Court's suspicions on the injuries sustained by the Appellant blinded its objectivity and corrupted its mind.....The oral evidence was sufficient to find in favour of the Appellant. There is no written rule that injuries suffered by a victim of a road traffic accident must be formed by documentary evidence by way of treatment notes"

24. As such, Counsel urged that the Appellant failed to adequately disapprove the oral and documentary evidence adduced by the 1st Respondent and that save for the treatment notes, he did not move to impeach the credibility of the witness statements and P3 form. Counsel submitted that he Appellant's defence remained mere allegation/denials not proved by an iota of evidence as required under Sections 107 and 108 of the *Evidence Act* and thus the trial Court's decision was just and right having been informed by the evidence on record.
25. In regard to general damages awarded to the 1st Respondent, Counsel submitted that the assessment of damages is an exercise of discretion by the trial Court. It has been restated from time to time that for an Appellate Court to interfere with trial finding, it must be proved that the trial Court took into account irrelevant factors or gave an inordinately high/low amount as was held in the case of *Kemfro Africa Limited-vs-Lubia & Another (No.2) [1987] KLR 30* as follows;

“The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the judge in assessing



the damages, took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage".

26. Counsel maintained that the nature and/or severity of injuries sustained by the 1st Respondent should be the primary consideration and/or guide to the Court in determining the quantum of damages for pain and injuries sustained. Counsel submitted that the general damages awarded by the learned Trial Magistrate indeed corresponded with the severe injuries sustained by the Plaintiff/Respondent. Counsel added that as it can be noted from the 1st Respondent's pleadings and documents/exhibits/evidence, the 1st Respondent sustained the following injuries which were confirmed by Doctor Sokobe's medical report;
 - a. Blunt injury to the head
 - b. Blunt injury to the chest
 - c. Blunt injury to the back
 - d. Blunt injury to both hands
27. Counsel submitted that the above injuries were also supported by the P3 form, treatment notes and the Medical Report tendered as the 1st Respondent's evidence. Counsel added that the 1st Respondent relied on the case of Elizaphen Mokava Bogonko vs Fredrick Omondi Ouna (2022) eKLR where the plaintiff was awarded Kshs. 500,000 for injuries similar to the Respondent's herein.
28. That the learned Trial Magistrate did not misdirect himself when he awarded general damages of Kshs. 150,000/=, since the same was in fact, based on the nature and severity of injuries sustained. That the award was indeed on the lower side considering recently decided and/or comparable cases on quantum and high inflation. Counsel further submitted that the 1st Respondent herein proposed a figure of Kshs. 500,000/= as compensation for general damages but the trial Court having considered the pleadings, testimonies and documents/exhibits/evidence rightly held bearing in mind the high inflationary rates and the nature of the grievous injuries sustained by the 1st Respondent that an award of Kshs.150,000/= would be adequate compensation for general damages.
29. Counsel further added that in the assessment of damages, comparable injuries should, as far as possible, be compensated by comparable awards, keeping in mind the correct levels of awards in similar cases which was observed by Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR.
30. Counsel submitted that an Appellate Court is not justified in substituting a figure of its own different from that awarded by the Trial Court simply because it would have awarded a different figure if it had tried the case at the first instance. He submitted that this is a well-established legal principle pronounced in the case of Kisumu-vs-Sophia Achieng Tete, Civil Appeal No. 284 of 2001[2004]2KLR 55 and Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR HCCA No.72 of 2019
31. To further buttress his submissions, Counsel for the 1st Respondent also relied on *Otieno v Mwea County Medical Centre Ltd & 2 others (Civil Appeal 49 of 2021)* [2023] KEHC 22474 (KLR) and *George & another v Babu (Civil Appeal E130 of 2023)* [2024] KEHC 5986(KLR)



Analysis & Determination

32. Being a first appeal the Court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“...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 into account of particular circumstances or probabilities materially to estimate the evidence.”

33. The two limbs to this appeal are quantum and liability. I will handle the issue of liability first and then proceed to quantum.

Liability

34. The appellant has argued that the trial Court misdirected itself at apportioning liability against the Appellant at 100% despite overwhelming evidence to the contrary. At the point of filing suit, by dint of Section 107(1) and 108 of the *Evidence Act* CAP 80 Laws of Kenya, the burden of proof lay with the Plaintiff who had sought the relief of this Court. She then tendered her evidence and blamed the Appellant for the accident. The burden of proof then shifted to the Appellant to rebut the plaintiff’s case.

35. On the other hand, the Appellant in the Amended Statement of Defense apart from contending therein that the accident is attributable to the Negligence of the 1st Respondent also alleged fraud on the part of this Respondent. The particulars of the alleged fraud are laid out at Paragraph 8 of the said Defense.

36. The Law on fraud is that the first principle is that an allegation of fraud must be specifically pleaded and proved. See *Vijay Morjaria -V- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently.

It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

37. In *R.G Patel -V-Lalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa stated as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”



38. The second principal is that the burden of proof of an allegation of fraud is on the person alleging. In *Ndolo -V-Ndolo* [2008] 1KLR (G &F) 742 the court stated that:

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

39. The third principal is that the burden of proof of allegation of fraud is higher than that required in civil cases being proof on a balance of probabilities; and lower than that required in criminal cases being proof beyond reasonable doubt. In *Ndolo -V-Ndolo* [2008] 1KLR (G &F) 742 (Supra) the Court further stated that:

“.....Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”

40. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR, the Court of Appeal observed as follows:

“..... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.....”

41. From a perusal of the pleadings, the facts are that an accident did occur on 4/12/2021, involving motor vehicle registration number KDC 635B belonging to the Appellant and the 2nd Respondent was its driver. The 1st Respondent was a lawful fare paying passenger in the said motor vehicle. That as a result of the accident, the 1st Respondent sustained injuries.

42. The 1st Respondent testified on 19/4/2023, she stated that on 4/12/2021, she was a lawful passenger in motor vehicle registration number KDC 635B along Kapsaos -Kocholwa road when the Defendant's and or their agents so negligently drove and or controlled the vehicle which was speeding causing it to lose control, veered of the road and rolled as a result she was injured. The 1st Respondent blamed the Appellant and the 2nd Respondent for the accident. The 1st Respondent also produced her treatment notes, a medical report by Dr. Sokobe, receipts, P3 Form, a demand letter and a police abstract.

43. The 1st Respondent was treated at Ravine Sub-County Referral Hospital by W. Oburi a clinical officer and according to him the 1st Respondent was injured on both legs, neck and back. The 1st Respondent was later examined by Dr. Sokobe and she produced the Medical report and receipt for KShs. 6,000/= . This evidence on how the accident occurred, in what capacity the 1st Respondent was travelling in the accident motor vehicle, that is as a fare paying passenger was not rebutted.

44. What the Appellant rebutted is that the 1st Respondent sustained injuries and was treated as she claims. This they did by calling one witness namely DW1 Dorothy Chirchir, who testified that she works as a Health Information Officer at the Eldama Ravine County Hospital. She testified that the 1st Respondent did not visit their facility on 4/12/2021 and was not treated in therein for injuries sustained in a Road Traffic Accident. She further testified that she issued the letter to this effect dated 28/6/2022 marked as Dexh1



45. In alleging fraud on the part of the 1st Respondent, the court notes that Appellant heavily relied very heavily and almost entirely and exclusively on the testimony of DW1. The issue then is whether the Appellant has ably satisfied the evidentiary burden with regard to fraud.
46. Upon a perusal the proceedings of the lower Court, I noted that upon cross-examination, DW1 conceded that indeed an accident occurred on the date alleged and that persons who sustained injuries from that accident were treated at their Hospital. She stated that she did not have the Register of the patients that were attended to on that date.
47. Further, she admitted that their Registered is not numbered and that some treatment notes do not have serial numbers whereas some have. She also conceded that she did not have any treatment notes and cards in Court. She did confirm that she is a health records and information officer at the facility but she did not report any issue of forgery at their hospital.
48. She also told the Court that on 4/12/2021 victims of an accident were treated at their hospital but she did not know what number of the victims were treated and lastly, she conceded that on the material date she was not on duty and so she did not know if the Plaintiff was treated at their facility or not.
49. The Court notes that despite the denials as averred by the defendant in his defense denying ownership of the accident motor vehicle and that the accident occurred at the trial, save to avail DW1 whose testimony was solely on the allegation of fraud, the defendants did not avail any witnesses to disprove the occurrence of the accident and the ownership of the vehicle.
50. I also note that in his judgement, the Hon Magistrate observed that apart from the plaintiff testifying orally she also availed documentary evidence to prove her case to wit copy of a police abstract dated 8th December 2021- see PExh9 and evidence of ownership of the motor vehicle-see PExh6. The Hon Magistrate observed that this evidence was not controverted in any way and was therefore of the finding that the evidence it proved without question the twin issues of the occurrence of the accident and the ownership of the motor vehicle in favor of the plaintiff.
51. The record of proceedings shows that the plaintiff testified by adopting her witness statements and List of Documents and closed her case and the defendant called one witnesses who testified as DW1 and then closed their case. In this regard, the Appellant's Statement of Defense on the issue of ownership of and the occurrence of the accident remained as mere allegations unsupported by any evidence as was held in the case of Janet Kaphiphe Ouma & another v Maries Stopes International (Kenya), Kisumu HCCC No 68 of 2007
52. Further to the above, having appreciated DW1's testimony at the Trial Court, I am of the very well-considered opinion that Appellant did not satisfy the onus of proof with regard to their allegation of fraud. DW1 in the first instance is not a medical doctor but rather a health records and information officer as such her evidence with regard to treatment notes is of no probative value. The said DW1 herself conceded in cross examination that on the material date when the accident occurred she was not on duty and as such she was not better placed verify whether the 1st Respondent had been treated in the said facility or not.
53. Turning to her letter dated 28/6/2022 alleging that the said treatment notes were not from the Medical Facility, the court notes that DW1 from her introduction is not a Medical Doctor or Medical Officer and as such she cannot attest to allegations of fraud simply because she does not treat patients in the said facility. Further, the Medical Report by Dr. Joseph Sokobe, which was not contradicted and or controverted in any way and the P3 Form whose contents were also not at all rebutted stated that indeed the 1st Respondent herein was involved in an accident and as a result of which she sustained injuries.



54. The above said, I am satisfied that the 1st Respondent's testimony remains uncontroverted in absence of any other evidence to the contrary and in this regard, I find no basis upon which this Court can interfere with the learned trial Magistrate's finding on liability.
55. Lastly the averment by the 1st Respondent that she was a fare paying passenger in the accident motor vehicle has not at all been denied and or controverted by the Appellant and the 2nd Respondent. As a passenger who was merely sitting in the car being transported from one point to another for a fee paid as fare, it is clearly apparent that the 1st Respondent was a passive participant in the occurrence of the accident.
56. This being the case, I do not see how she can be blamed for causing the accident by apportioning liability to her in any way or at all. I therefore find the holding of the Trial Court on liability at 100% as proper, I see no justifiable reason for disturbing the same and it is now hereby upheld.

Quantum

57. On whether the award of Ks.180,000/- was excessive in light of the injuries sustained as herein above summarized to warrant the Court to interfere with the same, the Court is guided by the decision of the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR (supra) wherein it stated that "comparable injuries should attract comparable awards".
58. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial Court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors- see *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] (Supra)
59. In this case, the injuries suffered by the 1st Respondent in this case and as listed in the treatment notes, the P3 form and the Medical report by Dr. Joseph Sokobe are as already herein above indicated. The Court is alive to the fact that one person's injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible the injuries are comparable.
60. From Dr. Joseph Sokobe's medical report it is clear that the Respondent herein sustained soft tissue injuries which she was recovering well. While appreciating that money cannot renew a physical frame that has been shattered or battered, the 1st Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards and of course with the emphasis that an award of damages is not meant to enrich the victim but to compensate them for the injuries sustained.
61. In the trial Court, the Appellant proposed Kshs.80,000/= while the 1st Respondent proposed Kshs.600,000/= for the award of general damages, with each party citing authorities in support of their proposal as already herein summarized.
62. In Considering the injuries sustained by the 1st Respondent and keeping in mind the fact that that no injuries can be completely similar, I note that the Appellant has cited the case of *Francis Omari v JAO (Minor suing through next friend and father GOD)* [2021 eKLR wherein the Court substituted an award of Ks. 230,000/- with Ks. 180,000/- for injuries comparable to the ones sustained by the plaintiff herein even though just slightly more widespread but soft tissue nonetheless and has urged that the Court finds this authority and others cited by him applicable bearing in mind that the nature of the injuries are similar to those sustained by the 1st Respondent and further, that the authorities are fairly recent.



63. Given this submission by the Appellant and relying on the authority cited by the said Appellant, I am satisfied that the Trial Magistrate too was properly guided by the authorities cited before him in arriving at the award of Ks. 180,000/- which in my opinion is a fair and reasonable compensation to the 1st Respondent. It is neither too low nor too high in the circumstances and I see no reason to disturb this finding. The same is accordingly upheld
64. On special damages, Ks. 9,600/- was pleaded and but only Ks. 6,550/=- was strictly proved through receipts this being money spent on the motor vehicle search and medical report and P3 form.
65. As was held in the case of Hahn vs. *Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, by the Court of Appeal;
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
66. In this regard, Special Damages are now hereby upheld as awarded at Ks. 6,550. In light all the above, the upshot is that I am of the finding that the Appeal lacks merit and the same is dismissed in its entirety with costs to the 1st Respondent.

READ DATED AND SIGNED AT ITEN ON 5TH FEBRUARY 2025

E. OMINDE

JUDGE

