Mass Investments Limited v Ngugi & 2 others (Civil Appeal E279 of 2023) [2025] KEHC 10813 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10813 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E279 OF 2023

J NGAAH, J

JULY 24, 2025

BETWEEN

MASS INVESTMENTS LIMITED ..... APPELLANT

AND

GEORGE NJOROGE NGUGI ..... 1ST RESPONDENT

KENNEDY KINYANJUI NJOROGE ..... 2ND RESPONDENT

MOTREX LIMITED ..... 3RD RESPONDENT

JUDGMENT

1. On 1 February 2015, a road traffic accident involving three vehicles occurred along Mombasa-Malindi highway at Shauri Moyo area. The vehicles involved in the accident were all lorries two of which had trailers. The vehicles were respectively registered as, KBT 104 whose trailer was registered as 104 R ZE 0960 [which for ease of reference shall henceforth be also referred to as simply "KBT"]; KBK 560W with a trailer registered as ZD 9406 [hereinafter referred to as "KBK"]; and KBJ 601 B [Mitsubishi Fuso] [hereinafter "KBJ"].

2. As a result of the traffic accident two suits were filed, one in this Honourable Court and the other in the magistrates' court for damages, both special and general. In the suit that was filed in the magistrates' court, Mass Investment Limited, the appellant in this appeal and the registered owner of KBT sued Motrax Limited, the 3rd respondent in this appeal and the registered owner of KBK.

3. The appellant's suit was basically a material damage claim and was registered in the magistrates' court as civil suit no. 284 of 2016. In that suit, the appellant claimed for Kshs. 1,668,181.00 being compensation for the loss particularised in the plaint as follows:

> " Pre-accident value of Motor Vehicle
>
> KBT 104R/ZE 0960 Kshs. 2,000,000.00

Less salvage Kshs. 400,000.00

Kshs. 1,600,000.00

Add:

Towing charges Kshs. 30,000.00

Assessment fees Kshs. 14,473.00

Investigation charges Kshs. 16,208.00

Tracing charges Kshs. 7,500.00

TOTAL Kshs. 1,668,181.00"

4. The suit filed in this Honourable Court was by George Njoroge Ngugi and Kennedy Kinyanjui Njoroge who are respectively the 1st and 2nd respondents in this appeal. Their suit was registered as civil suit no. 127 of 2015. They pleaded in the plaint that at the time of the accident, the 1st respondent was legal and registered owner of KBJ while the 2nd respondent was the driver of the vehicle. In their plaint amended on 2 February 2016, they sued the owners of KBT and KBK, jointly and severally, for:

> " 1. Special damages of Kshs. 1,358,000.00 being the value of the 1st plaintiff's motor vehicle registration number KBJ 601 B.
>
> 2. Special damages of Kshs. 624,865.00 being the medical costs incurred by the 2nd plaintiff as enumerated in paragraph 11 hereinabove.
>
> 3. Special damages for loss of earning at Kshs. 9,000.00 per day from 1st February, 2015 till 31st January, 2016 being the approximate dated of recovery.
>
> 4. General damages for loss of earning capacity as pleaded in paragraph 12, loss of amenities as pleaded in paragraph 14, future medical expenses as pleaded in paragraph 15 and general damages for pain loss and suffering as pleaded in paragraph 16 hereinabove.
>
> 5. Interest on [1], [2] & [3] above at commercial rates of 19% per annum from 1st February, 2015 till payment in full.
>
> 6. Interest on [4] above at court rate from the date of judgment till payment in full.
>
> 7. Costs of the suit and interest at court rates from the date of judgment till payment in full."

5. This suit was transferred to the magistrates' court on 20 July 2016 and registered as no. 1721 of 2016. On 26 February 2018, the suit was eventually consolidated with the appellant's suit and retained as the lead file.

6. Upon hearing of the suit, the Honourable Mr. Kalo, Chief Magistrate, allowed the 1st and 2nd respondents' claim but, in the same breath, dismissed the appellant's suit. The learned magistrate identified the question of liability and quantum as the only issues for determination. As far as liability is concerned, he held as follows:

> " On liability, the testimony of the witnesses is that the driver of the lorry failed to give way to oncoming traffic when he turned right at the Mombasa Cement junction. As a result, the

lorry collided with the benz which was oncoming. The impact caused the Benz to swerve to the right lane and collide with the Fuso, which caused injuries to the 2nd plaintiff. The 2nd defendant nor its driver neither testified nor called any witness. Based on the evidence on record, the court finds and holds the driver of the lorry for the accident. Had he given way to oncoming traffic, the accident would not have occurred. The collision between the Benz and the Fuso was as a result of the Benz colliding with the lorry and losing control mand [sic]swerving to the right lane on which the Fuso was being lawfully driven. The driver of the Benz cannot be blamed for the said collision since the trigger of the chain of events that led to the said collision was caused by the driver of the lorry. The 2nd defendant is held vicariously liable for the negligence of its driver."

7. And on quantum, the learned magistrate held:

> " On quantum, the court has considered the evidence on record, the submissions by counsel for the parties and the authorities relied on. Judgment is entered for the plaintiffs against the 2nd defendant as follows:
>
> a] Liability 100%
>
> b] Special damages being the value of
>
> M/vehicle KBJ 601B.....Ksh 1,358,000
>
> c] Special damages [medical expenses]
>
> for 2nd plaintiff.....Ksh 624,865
>
> d] Loss of earning capacity.....Ksh 2,340,000
>
> e] Future medical expenses for 2nd plaintiff.....Ksh 1,000,000
>
> f] General damages for 2nd plaintiff.....Ksh 800,000
>
> g] Costs of the suit
>
> h] Interest at court rates, on b], d], e], f] and g] from the date hereof until payment in full and on c] and c] [sic] from the date of filing suit until payment in full."

8. As for the appellant's suit against the 3rd respondent, the learned magistrate held:

> " Based on the finding on liability hereinabove, wherein the plaintiff's driver was held wholly liable for the accident and the defendant vicariously liable for the negligence of its driver, the court finds and holds that the plaintiff has failed to prove its case against the defendant herein.
>
> Consequently, the plaintiff's suit against the defendant is hereby dismissed with costs to the defendant."

9. It is this decision that the appellant is aggrieved by and consequently appealed to this Honourable Court. In the memorandum of appeal amended on 19 December 2023, the appellant has raised the following grounds:

> " 1. That the learned trial magistrate improperly exercised his discretion and or duty by taking into account matters which he ought not to have taken into

account and failing to take into account matters he should have taken into account.

2. That the learned trial magistrate erred in law and fact in rendering a decision which was against the Constitution of Kenya, the *Evidence Act*, the *Traffic Act*, and the *Civil Procedure Act* and the applicable common law.

3. That the learned Magistrate erred in law and fact in apportioning liability for the accident the subject matter of the above suits at 100% against the Appellant.

4. That the learned Magistrate erred in failing to understand, appreciate and determine the circumstances under which the accident occurred on the basis of the evidence tendered at the trial.

5. That the learned trial magistrate erred in rendering a judgement that had contradictions on the evidence as tendered at the trial.

6. That the learned trial magistrate erred in rendering a judgment that confused and misapprehended the circumstances of the accident and the rights and liabilities of the parties before court and the evidence tendered by the [sic] to appreciate find that at all times the burden of proof rested upon the 1st and 2nd Respondents.

7. That the learned Magistrate erred in failing to consider and adopt the consistent and conclusive evidence tendered on the circumstances of the accident in question in his determination of liability which exonerated the Appellant and or the Appellant's driver from any blame for the accident, the subject matter of the above primary suits.

8. That the learned Magistrate erred in reaching a conclusion of liability which was directly in contrast from and against the weight of the evidence tendered at the trial adopting a selective and biased approach to the evidence tendered in this case.

9. That the learned Magistrate erred in shifting the burden of proof and imposing upon the Appellants a standard of proof which is higher than that relevant and applicable for cases of this nature.

10. That the learned Magistrate erred in failing to list and determine all issues arising from the pleadings and evidence tendered before him.

11. That the learned Magistrate erred in making awards with respect to special damages, future medical expenses and loss of earning capacity in favour of the 1st and 2nd Respondents which were inordinately excessive on[sic] the ircumstances of this case and contrary to the principles applicable to and trend of awards of this nature.

12. That the learned Magistrate erred in making awards of special damages, future medical expenses and loss of earning capacity in favour of the 1st and 2nd Respondents which are not supported by the applicable law and facts.

13. That the learned Magistrate erred in failing to take into consider and apply the principles of facts and law relevant and applicable in assessment and award of

special damages, future medical expenses and loss of earning capacity in favour of the 1st and 2nd Respondents.

14. That the learned trial magistrate erred in dismissing the Appellant's case as against the 3rd Respondent."

10. Based on these grounds, the appellant has asked this Honourable Court to allow the appeal and dismiss the 1st and 2nd respondents' case against the appellant with costs to the appellant. It has also prayed for judgement on liability to be entered against the 3rd respondent [erroneously stated in the particular prayer to be the 1st respondent] in favour of the appellant, the 1st and 2nd respondent. The appellant also wants its claim against the 3rd respondent to be allowed. On costs, the appellant prays that the respondents should bear the costs of the appeal and the primary suit.

11. Whether the appellant's appeal is meritorious or not is a question that can only be answered by this Honourable Court after fresh evaluation of the evidence at the trial and the court coming to its own conclusions. In *Mwanasokoni v Kenya Bus Services Ltd* [1985] eKLR it was held that although an appellate court on appeal will not lightly differ from the judge at first instance on a finding of fact, it is undeniable that the appellate court has the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. In so holding, the Court of Appeal followed the decision of the House of Lords in *Sotiros Shipping v Sauviet Sohold*, The Times, March 16, 1983 where it was held:

> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

12. Again, in *Peters v Sunday Post Ltd* [1958] EA 424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:-

> "It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."

13. Thus, this Honourable Court has the obligation, in exercise of its appellate jurisdiction, to evaluate the evidence at the trial and make its own factual findings that may either be consistent with or vary from those conclusions reached by the lower court. Regardless of the conclusions this court reaches, it is bound to bear in mind that the lower court had the advantage, which this Court does not have, of seeing and hearing the witnesses. On this last point, I note that not all witnesses who testified were heard by Honourable Kalo and, therefore, as far as those witnesses the learned magistrate did not see and hear are concerned, he was as much disadvantaged as this Honourable Court.

14. As noted, three vehicles were involved in the accident and it is common ground that two of these vehicles were following each other, travelling from Mombasa direction towards Kilifi or Malindi. The third vehicle was travelling in the opposite direction, towards Mombasa. It is also common ground that KBJ was one of the two vehicles that was travelling towards Kilifi or Malindi and that at the time of the accident, it was immediately behind the other vehicle travelling in the same direction.

15. The only question of fact which this appeal turns on as far as liability is concerned is, of the other two vehicles involved in the accident, which one was ahead of KBJ and which vehicle was coming from the opposite direction. This is the crux of the evidence upon which the learned magistrate relied to find

that the vehicle ahead of the KBJ was solely to blame for the accident because it made an abrupt turn to the right and, in attempt to avoid colliding with this vehicle, the oncoming vehicle swerved to its right and ended up colliding with KBJ.

16. To find the answer to this question and indeed to establish whether the learned magistrate correctly appreciated the evidence before him as to the identity of these vehicles, it is necessary to lay bare the evidence tendered at the trial on these issues.

17. For starters, Kennedy Kinyanjui Njoroge [PW3] was the driver of KBJ. He testified that on fateful day, he was driving towards Kilifi immediately behind a trailer. To quote him, the witness testified as follows:

> "...I was driving on Mtwapa-Kilifi road. A trailer was ahead. Another trailer approached heading the opposite direction. The trailer ahead of me instructed [sic] to the right towards Mombasa Cement-co. Suddenly the oncoming trailer veered onto my lane colliding with my lorry. I later so [sic] the registration nos of the trailers on photos taken during investigations into the accident. I lost consciousness immediately after the collision..."
>
> At this juncture the 1st and 2nd respondent's learned counsel asked the court to stand the witness down "so that our documents are put in order."

18. When the witness resumed testifying, several months later, he went on as follows:

> "When the accident occurred, I was driving my motor vehicle registration no. KBJ 601 B, a lorry, behind a lorry registration no. KBT 104 R pulling a trailer. I lost consciousness after the accident. I blame motor vehicle registration no. KBT 104R for the accident for knocking my motor vehicle."

19. Upon cross-examination he testified that:

> "I was driving from Mombasa to Kilifi motor vehicle registration no. KBT 104 R was infront of me heading in the same direction. Motor vehicle KBK 560 W was moving towards Mombasa. My motor vehicle collided with KBK 560W. The motor vehicle ahead of the [sic] had suddenly turned to the right towards Mombasa Cement Co. I personally said [sic] the motor vehicle making the turn. The motor vehicle had flashed indicator lights signalling intention to turn. At the time motor vehicle KBK 360 W was approaching moving towards Mombasa. If the motor vehicle was close, then the driver of motor vehicle KBT 104 R should have waited for the oncoming motor vehicle to pass. It was KBK 560W which knocked motor vehicle KBT 104 R's at the rear side. The motor vehicle's front was not hit. I had not seen motor vehicle KBK 560 W before the collision. I myself saw it when it suddenly knocked my motor vehicle and motor vehicle KBT 104's trailer."

20. The witness continued:

> "The collision occurred before motor vehicle registration no. KBT 104R finished crossing the road. I was keeping the required distance between me and the motor vehicle in front. I was not driving close to motor vehicle registration no. KBT 104R...motor vehicle KBK 560W was avoiding the trailer of motor vehicle KBT 104R when it veered into my lane."

21. On his part police constable Eric Mutuma [PW5] from Mtwapa police station testified that a report on the accident was entered in the occurrence book at the station as OB No. 26/1/2015. Like Njoroge

[PW3], he testified that motor vehicle KBJ 601 B Mitsubishi FH lorry was being driven by Njoroge [PW3] from the general direction of Mombasa towards Kilifi. Ahead of the vehicle was motor vehicle registration no. KBT 104 R with trailer ZE 0960 of Mann make. Coming from the opposite direction was motor vehicle registration no. KBK 560 W. The driver of motor vehicle registration no. KBT 104 made a right turn. The driver of KBK 560 W swerved to avoid colliding with the trailer and, in the process, collided with motor vehicle registration no. KBJ 601 B.

22. As on who was possibly liable for the accident, the officer testified as follows:

> " KBT 104 R/ZE 0960 turned to the right side. The driver who wanted to turn right was to wait until the road was cleared. The driver of KBK 560/ZD 960 tried to swerve. The accident could have been avoided if the driver who was turning right had stopped and waited."

Nonetheless, the information in the police abstract which he produced indicated that motor vehicle KBK 560 W was to blame for the accident.

23. The appellant's driver, Said Ali Said testified that at the time of the accident, he was driving from Kilifi towards Mombasa. Two other vehicles were travelling towards Kilifi and of the two vehicles, the 3rd respondent's vehicle was ahead. According to Said, the 3rd respondent's vehicle turned right without giving way. Said swerved to his right to avoid hitting it and, in the process collided with KBJ. It was his evidence that he could not avoid colliding with KBJ and, according to him, the driver of KBJ was to blame for the accident since "he was speeding".

24. Except for the KBK's role in the accident, Said's evidence was consistent with his witness statement which he adopted as evidence in court and in which he stated as follows:

> " 1. On or about February 1 2015 at about 9.00 a.m, I was driving the Plaintiff's Motor Vehicle Registration Number KBT 104R ZE 0960 MANN Trailer with the permission of the Plaintiff in Shauri Moyo area heading to Mombasa carrying salt along Kilifi -Mombasa Road and on reaching Mombasa Cement junction, the Defendant's Motor Vehicle KBK 560W / ZD 9406 Mercedes Benz Trailer which was oncoming from the opposite lane suddenly left it's lane and entered my lane with a view to enter the junction on its right.
>
> 2. That I swerved the Plaintiffs vehicle to avoid ahead on collision but in the process the Defendant's Motor Vehicle KBK 560W /ZD 9406 Mercedes Benz Trailer knocked and ripped my cabin off resulting into extensive damage to the Plaintiff's vehicle.
>
> 3. That the incident was reported at Mtwapa police station and traffic police officers attended to the scene and after investigations the Plaintiff's aforesaid vehicle was towed to Bombolulu yard for inspection and the driver of Motor Vehicle Registration Number KBK 560W / ZD 9406 Mercedes Benz Trailer was blamed as the sole author of the collision."

25. Police constable Ismael Adan [DW2] was one of the officers who investigated the accident. It was his testimony that KBK was travelling towards Kilifi from Mombasa and behind it was KBJ. KBK suddenly turned to the right without giving way to the oncoming traffic as a result of which it collided with KBT. The driver of KBT tried to avoid the collision by swerving to the right lane on which KBJ was travelling. The driver of KBK did not stop. He drove to Mombasa cement and escaped. He testified further that the driver of KBK was to blame for the accident for failing to give way to the oncoming traffic.

26. Thus, there is a glaring contradiction between the evidence of Njoroge, the driver of KBJ and police constable Mutuma, on the one hand, and the testimony of Said, the appellant's driver and constable Adan, on the other hand, on the aspect of the evidence of the vehicle ahead of KBJ at the time of the accident. While Njoroge and constable Mutuma testified that the vehicle which was ahead of KBJ was KBT, Said and constable Adan testified that the vehicle was, in fact, KBK.

27. Of the two police officers who testified on this question, I would believe constable Adan because he was one of the officers who not only went to the scene immediately after the accident but was also one of the officers who investigated the accident. It is not clear from constable Mutuma's testimony the source of his information considering that he was not even at Mtwapa police station at the time the accident occurred.

28. As for the KBJ's driver's testimony, there is doubt as to whether he was certain of the vehicle ahead of him. He testified that "I later so [sic] the registration nos of the trailers on photos taken during investigations into the accident. I lost consciousness immediately after the collision." This statement would suggest that the driver might not have been conscious of the registration number of the vehicle ahead of him at the time of the accident. But even if he was, he still testified that "I blame motor vehicle registration no. KBT 104R for the accident for knocking my motor vehicle." If the KBT was not only ahead of his vehicle and had turned right but also "...the collision occurred before motor vehicle registration no. KBT 104R finished crossing the road", it is not logical, from the driver's own evidence, that KBT could have possibly knocked KBJ that was travelling behind it.

29. But to clear the air on which of the other two vehicles involved in the accident was ahead of KBJ, the 3rd respondent admitted, in the submissions filed on its behalf in the magistrates' court, that indeed it was its own vehicle KBK that was ahead of KBJ.The learned counsel for the 3rd respondent submitted on this issue as follows:

> " During the plaintiff's testimony, the plaintiff confused and or interchanged the registration number of both the 1st and 2nd Defendants motor vehicles. The 1st Defendant motor vehicle registration number is KBK 560W ZD 9482 while the 2nd Defendant motor vehicle registration number is KBT 104R ZE 0960.
>
> All witnesses have testified and/or confirmed that the plaintiff was trailing the 1st Defendant KBK 560Y ZE 9 while the 2nd Defendant was the oncoming motor vehicle from the opposite direction."

30. Paragraph 4 of the appellant's plaint in the suit against the 3rd respondent in the magistrates' court is consistent with this statement. It reads as follows:

> " 4. On or about February 1, 2015 at about 8.00 a.m, the plaintiff's aforesaid motor vehicle KBT 104 ZE 0960 Mann Trailer was lawfully and carefully being driven at Shauri Moyo area along Kilifi Mombasa Highway heading to Mombasa..." [Emphasis added].

31. Finally, although KBJ's driver testified at the trial that KBT was ahead of KBJ, it has been conceded in the submissions filed on behalf of the 1st and 2nd respondents that, in fact, it was KBK that was ahead of KBJ. The learned counsel for the 1st and 2nd respondents has submitted that:

> " 15. Before we turn to that evidence, we agree with Mass that the evidence before the trial court established, unequivocally, that it was Motrex's vehicle that took the right turn off the highway and it was Mass' vehicle that was oncoming."

32. Motrex's vehicle is, of course, KBK. There shouldn't have been any dispute, therefore, that the motor vehicle ahead of KBJ was KBK and, accordingly, if it was the learned magistrate's conclusion that it is the vehicle that was ahead of KBJ which was solely responsible for the accident, then that vehicle was KBK and not KBT. KBT was the oncoming vehicle travelling from Malindi to Mombasa and which collided with KBJ as it swerved to its right to avoid colliding with KBK or KBK's trailer.

33. It is clear and, as a matter of fact, both the appellant and the respondents agree, that the learned magistrate misdirected himself on evidence and reached the wrong conclusions which obviously include the conclusion that the appellant did not call any evidence and that the appellant was solely responsible for the accident. In the same breath, he proceeded to dismiss the appellant's suit.

34. Contrary to the learned magistrates' findings, the appellant called the driver of its vehicle and a police officer who both testified that the third respondent's driver was responsible for the accident. All the witnesses were in agreement that had the driver of the vehicle ahead of KBJ, which has been established to have been KBK, stopped to give way to the oncoming traffic including motor vehicle KBT, the accident would not have arisen. As far as the driver of KBT was concerned, he tried all he could to avoid the accident but ended up colliding with KBJ. Based on these facts, and considering that the 3rd respondent did not call any evidence to controvert the appellant's evidence, I would hold the 3rd respondent wholly liable for the accident.

35. In any event, the 3rd respondent admitted in its pleadings that the driver of its vehicle at the time was not authorised to drive. In paragraph 7 of the 3rd respondent's defence in the suit against it, the 3rd respondent pleaded:

> " Without prejudice to the foregoing the defendant, in response to paragraph 5 of the plaint avers that motor vehicle registration number KBK 560/ZD 9406 was being driven by unauthorised person at the time of the alleged accident and consequently denies that it was vicariously liable."

36. No evidence was led by the 3rd respondent to demonstrate the circumstances under which its driver was unauthorised or how its vehicle found itself in the hands of "unauthorised" driver. Neither did the 3rd respondent raise any claim or indemnity against the purported unauthorised driver. Either way, in the absence of any evidence to the contrary, the 3rd respondent's averment demonstrates the 3rd respondent's negligence that culminated in the road traffic accident.

37. On the question of quantum, having found that the 3rd respondent was solely responsible for the accident, it is a question that the appellant would be less concerned about. On its part, the 3rd respondent has submitted on this issue as follows:

> " We fully and wholly rely on the appellant's submissions on quantum."

38. The implication of this submission is that the appellant's claim against the 3rd respondent is not disputed. The appellant's submissions on this claim and which the 3rd respondent has expressly declared in unambiguous and no uncertain terms that it is bound by are as follows:

> " 47. With respect to the Appellant's suit against the 3rd Respondent, the evidence tendered by the Appellant's witnesses against the 3rd Respondent were never controverted by any other evidence from the 3rd Respondent. As held in the Nkuene Dairy case [supra], there being no evidence to the contrary, the Appellant proved it's case against the 3rd Respondent and also proved that the sums of Kshs. 1,600,000/= arrived at after deduction of the salvage of Kshs 400,000/= from the pre accident value of Kshs. 2,000,000/= of Motor Vehicle KBT 104R/ ZE 0960, the towing charges of Kshs, 30,000/=, Assessment fees of Kshs. 14,473/=, Investigation charges of Kshs. 16,208/= and tracing fees of Kshs. 7,500/= making in total Kshs. 1, 668,181/= were justified and proved. Judgement should thus be entered for the Appellant as against the 3rd Respondent for the sum of Kshs. 1, 668, 181/= with costs and interests from the date of filing of the Appellant's suit until the date of payment in full."

39. Thus, the order dismissing the appellant's suit is overturned and substituted with the judgment for the appellant against the 3rd respondent for the sum of Kshs. 1, 668, 181/= with costs and interests.

40. As far as the damages payable to the 1st and 2nd respondents are concerned, the appellant acceded to the award to the 2nd respondent of Kshs. 800,000/= as general damages and the special damages incurred on account of medical expenses. The 3rd respondent is also bound to pay these sums on account of being bound by the appellant's submissions.

41. The appellant's bone of contention is with regard to the award of Kshs. 1,358,000/= on account of material damage claim in respect of KBJ. The appellant has also contested the award of Kshs. 2,340,000/= under the head of loss of earning capacity and Kshs. 1,000,000/= awarded as future medical expenses.

42. On the material damage claim, the argument is more arithmetic than legal. According to the appellant, the 1st respondent's assessor assessed the pre-accident value of the vehicle to be Kshs. 1,500,000/= while the salvage value was assessed at Kshs. 450,000/=. Since the 1st respondent retained the salvage, the net loss suffered was Kshs. 1,050,000/= made up of the pre-accident value less the salvage value. Accordingly, the sum of Kshs. 1, 358,000/= which the learned magistrate awarded was mathematically erroneous.

43. The 1st and 2nd respondents' submissions in the lower court are consistent with the appellant's submissions that all that the 1st respondent was entitled to in terms of material damage was Kshs. 1,050,000/=. To quote the 1st and 2nd respondents' learned counsel:

> " 33. The loss assessor gave a pre-accident value of Kshs. 1,500,000.00 and a salvage value of Kshs. 450,000.00. Consequently, George can only claim Kshs. 1,050,000.00. To that, we add the Kshs. 8,000.00 paid to the loss assessor. George's special damages therefore are 1,058,000.00."

44. In his evidence, the loss assessor testified that he had been paid Kshs. 10,000/= as his fees and Kshs. 3,000/= as court attendance costs. However, since the 1st and 2nd respondents pleaded and have stated in their submissions that they only paid Kshs. 8,000/= to the assessor, they can only be compensated

what they paid. Accordingly, the special damages in respect of the loss of KBJ is Kshs. 1,058,000/=. There was no basis whatsoever for the award by the learned magistrate of Kshs. 1,358,000/ as the value of the 1st respondent's vehicle.

45. On the loss of earning capacity, the learned magistrate awarded Kshs. 2,340, 000/= under this head and, at the same time awarded Kshs. 800,000/= as general damages to the 2nd respondent.

46. The appellant has submitted that following the decision in Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR, loss of earning capacity is only justifiable where there is a risk of disability which has exposed the victim to either losing his job in future or in case he loses the job, his diminution of chances getting an alternative job in the labour market and is awarded as part of general damages for pain, suffering, and loss of amenities.

47. In *Tayab v Kinanu* [1983] eKLR , these principles were set out and have also been reiterated in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR that while assessment of general damages is a discretion of the court, the court should not only take cognizance of the recent trend of awards for similar and or comparable injuries but also note that high and excessive awards of damages is against public policy since it leads to high insurance premiums which are passed to the public. In the words of Hancox JA in the *Tayab case* [*supra*], high awards can only in the end have a deleterious effect on the very class of persons whom the court is trying to protect.

48. According to the appellant, no evidence was tendered on the nature of incapacity the 2nd Respondent suffered which diminished his earning capacity. None of the medical reports the 2nd Respondent's doctor, Dr. Hassan Mohamed Kheri tendered before the trial court disclosed any degree of permanent disability the 2nd Respondent sustained and the extent of such disability. To this extent, the award by the learned trial magistrate under this head was neither based on any expert evidence nor any evidence whatsoever. It was mere speculation and, for this reason, the Honourable Court has been urged to set it aside.

49. In any event, the learned trial magistrate having made an award for general damages, an award for loss of earning capacity was thereby not available. In making this award, the learned trial magistrate made double compensation to the 2nd respondent which is tantamount to unjust enrichment.

50. Even if such an award was available, it has been urged, the learned trial magistrate was enjoined to consider and apply the relevant principles for such an award including considering and applying the recent trend of awards for comparable claims as was held in advised in the Mumias Sugar case [*supra*], the *Tayab case* [*supra*] and the *Mbaka Ngurus case* [*supra*]. In the present case, the learned trial magistrate made neither any mention of any justification for such an award nor mention of any comparable or trend or range of awards he considered appropriate or relevant before he arrived at such an exorbitant award.

51. In the case of *Ali v Muhozozo* [1983]1 KLR 602 Kneller, JA held that a court's decision in assessment of damages that does not take into account awards for similar injuries in previous cases amounts to an error in principle which an appellate court should set aside and that this is one such award Kneller, JA, had foreseen and which should be set aside. According to the appellant, the sum awarded of Kshs. 2,340,000/= was simply plucked from nowhere.

52. Dr. Kheri Hassan's report dated 14 April 2015 showed that the 2nd plaintiff sustained multiple bruises on the face and right lower limb; cuts on the right knee with medial lateral injury and dislocation of the right knee. There were also multiple pelvic fractures with dislocation of the 2nd respondent's right hip joint. The 2nd respondent also sustained what the doctor described as "acetabulum fracture with inferior rami". He underwent surgical toilet and debridement with repair of the medial collateral

ligament and skin. He was put on traction for three weeks and discharged on 15 March 2015 to continue with physiotherapy and dressing. As at the time the report was written, he was assessed to be doing well with physiotherapy.

53. A report dated 23 July 2015 by the same doctor showed that the 2nd respondent was admitted in hospital on 6 February 2015. The patient is said to have sustained soft tissue injuries on the face and upper limbs with fracture dislocation of the actebulum right hip and pelvic fracture with tendon injuries of the knee on the medial side. The patient underwent reduction of the hip with repair of the medial tibial ligaments, surgical toilet debridement and stitching.

    He was put on traction up to 5 March 2015 while still undergoing physiotherapy.

54. When the doctor testified, the patient was still being followed up through "sope and physiotherapy" and needed further specialized treatment abroad. The doctor recommended a hip replacement; a process that would cost between Kshs. 1,000,000 and Kshs. 2, 000,000/=.

55. In his testimony, the 2nd respondent stated that he lost consciousness after the accident and that he was admitted at Bamburi Hospital for a month. He also testified that he suffered knee and hip dislocations. As at the time he testified, he could not "effectively step on brakes or pedals". On his earnings, he testified that he would be paid Kshs. 9,000/=per every trip he made for transportation of construction materials. Nonetheless, he admitted that he was not engaged on regular basis and that out of the payments he received, he would pay some levies to the County Government.

56. Contrary to this testimony, it was pleaded in the plaint that the 2nd respondent earned Kshs. 9,000 per month. At paragraph 14 of the plaint, it was pleaded as follows:

    "

    " 13. The 2nd plaintiff avers that prior to the aforesaid accident he used to earn on average Kshs. 9000.00 per month from his employment of motor vehicle registration number KBJ 601B. The 2nd plaintiff was unable and still is unable to earn the said amount or any amount at all since 1st February, 2015 to date. The 2nd plaintiff therefore claims damages for loss of earning."

    Yet in the prayers in the plaint, the 2nd respondent prayed for, inter alia:

    " 3. Special damages for loss of earning at Kshs. 9,000.00 per day from 1st February, 2015 till 31st January, 2016 being the approximate dated [sic] of recovery.

    4. General damages for loss of earning capacity as pleaded in paragraph 12, loss of amenities as pleaded in paragraph 14, future medical expenses as pleaded in paragraph 15 and general damages for pain loss and suffering as pleaded in paragraph 16 hereinabove."

57. Thus, there is inconsistency between what was pleaded within the 1st and 2nd respondents' own pleadings and also the 2nd respondent's testimony on his earnings. In any event, according to the 2nd respondent, the earnings were irregular and subject to deductions of levies payable to the County Government. In these circumstances, the figure of Kshs. 9000/= could not have possibly been adopted as the base figure for calculation of loss of earnings. It is also apparent that the 2nd respondent sought for damages for both loss of earning and loss of earning capacity.

58. Damages under the head of loss of earnings or future earnings are different from damages for loss of earning capacity. The former are based on ascertained figure representing actual earnings while the

award on the latter would ordinarily be made without any proof that the claimant was in gainful employment or has a regular income. This distinction was explained in *SJ v Francesco Di Nello & another* [2015] eKLR and *Mumias Sugar Limited v Francis Wanalo* [2007] eKLR which were cited with approval in *Nyatogo v Mini Bakeries Limited* [2023] KEHC 1593 [KLR]. In *SJ v Francesco Di Nello & another* the court held that:

> " Claims under this [sic] heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award of general damages once proved..."

59. And in *Mumias Sugar Limited v Francis Wanalo* the court held thus:

> " The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification of the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market, while the justification for the award where the plaintiff is not employed at the date of the trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future..."

60. The Court of Appeal also had occasion to address the distinction between loss of future earnings and compensation for diminution of earning capacity in *William J Butler v Maura Kathleen Butler* [1984] KECA 34 [KLR]. The court held as follows:

> " Now, there was no evidence of what the respondent had earned before the accident either as an unqualified nurse or the wife of a farmer at Nakuru, so this was not a claim for 'loss of future earnings'. It was, as the learned judge described it, for a 'loss of earning capacity' which she suffered and this should be part of the general damages for her disabilities and not compensation, for future loss of earnings. The respondent would be at a considerable disadvantage or, indeed, without any hope in the labour market because of her injuries. There are no reported decisions of any court in this part of the world for all this.
>
> The English law on the issue is this: The respondent brought this action for damages and she had to prove her damages. Lord Goddard CJ in *Bonham Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177.
>
> Sometimes it is impossible, though the justice of the case requires some award to be made or as Holreyd LJ said, in *Daniel v Jones* [1961] 1 WLR 1103, 1109:
>
> "…. Arithmetic has failed to provide the answer which common sense demands."
>
> A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The English Court of Appeal made an award under this head in *Ashcroft v Curtin* [1971] 1 WLR 1731, and by now, it is not a new principle in that jurisdiction.
>
> Ashcroft was a skilled precision engineer who, at the age of 57, was injured by Curtin in a traffic accident. He was left with tinnitus and disturbance of his balance for the rest of his

life. 'He was no man at keeping accounts' so he could not quantify his private company's loss but had he had to find work outside his company, for which he had been trained since he was 14, which was a real risk, he would be greatly handicapped and he was entitled to compensation, which was put by the Court of Appeal, in late July, 1971, at Pound Sterling 2,500.

It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way:

"... compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages."

Lord Denning MR in *Fairley v John Thompson [Design and Contracting Division] Ltd* [1973] 2 Lloyd's Rep 40, 42 [CA].

These sums used to be included as an unspecified part of the award of damages for pain and suffering and loss of amenity. The figures were 'plucked from the air'. Later, in England, damages under this head had to be separately quantified: *Jefford v Goe* [1970] 2 QB 130, and no interest is recoverable on them: *Clark v Rotax Aircraft Equipment Ltd* [1975] 1 WLR 1570.

Guidance on the principles for assessing such damages were given by the same Court of Appeal in *Moeliker v Reyrolle & Co* [1977] 1 WLR 132 by Brown LJ in this form.

The question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own [where the plaintiff had not worked before the accident] or in addition to another [where the plaintiff was in employment then and or at the date of trial]. The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible, but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can." [Emphasis added].

61. Logically, and taking cue from these passages in the cited decisions, if the amount which a claimant claims is ascertainable for an estimated period of his working life, and therefore, entitled to an award of loss of earnings or future earnings, he would not be eligible for compensation under the head of loss of earning capacity. An award under the head loss of earning capacity is only resorted to in the absence of any proof of regular earnings or income that ordinarily would inform the calculation of loss of earnings or future earnings.

62. Against the foregoing legal background, and in the absence of proof of any regular income, the 2nd respondent would only be entitled to damages for loss of earning capacity, of course as a component of general damages. Chesoni, JA in *William J Butler v Maura Kathleen Butler* [*supra*] did not rule out the possibility of these damages being awarded under a separate and distinct head but it has to be borne in mind that they are always general damages. The learned judge held:

> " Loss of earning capacity or earning power may and should be included as an item within general damages, Lord Denning MR in *Fairley v John Thomson* [1973] 2 Lloyd's Rep 40 at 42 [CA] but where it is not so included, it is not improper to award it under its own heading as the learned judge in this case did. Indeed, the judge should have said "general damages" for pain, suffering including loss of earning capacity, Kenya Pounds 44,000, a figure, in view of

the result of the injuries suffered in this case, I would not consider too excessive as to justify this court's interference."

63. Going by the medical reports by Dr. Heri, there is no doubt that the 2nd respondent sustained injuries some which can be said to have been severe. The 2nd respondent fractured his pelvis and dislocated his hip and right knee. These cannot be said to be superficial injuries. As a matter of fact, the doctor recommended a hip replacement and specialised treatment abroad. No doubt, with these injuries, the 2nd respondent must have endured considerable pain. He was admitted in hospital for treatment for a little over a month. It was his evidence at the time of the trial that he could not drive as effectively as he used to before the accident.

64. The appellant has disputed the award of loss of earning capacity for the reason that the doctor did not indicate in any of his reports the degree of the 2nd respondent's disability as a result of the injuries he sustained.

65. Looking at decisions cited above, there is nothing there which suggests that unless a particular degree of physical or bodily impairment is ascribed to the injuries, a claimant would not be entitled to damages under the head of loss of earning capacity. On the contrary, in making an award under this head, courts have proceeded on what one would describe as a common sense rather than a mathematical approach, influenced by circumstances specific to any particular case. It certainly is on this understanding that Lord Goddard CJ in *Bonham Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 said:

> " sometimes it is impossible, though the justice of the case requires some award to be made or as Holreyd LJ said, in *Daniel v Jones* [1961] 1 WLR 1103, 1109:
>
> "…. Arithmetic has failed to provide the answer which common sense demands."

66. This is also what the court in *William J Butler v Maura Kathleen Butler* [*supra*] meant when it held:

> " Mathematical calculation may not be possible, but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can".

67. The 2nd respondent was relatively young, aged 26, at the time of the accident. Taking this factor into account and considering that both the appellant and the 2nd respondent are satisfied with the award under general damages of Kshs. 800,000; considering this award did not include the element of loss of earning capacity, and, doing the best I can in the circumstances, I would enhance the amount to Kshs. 1,500,000/= being a global sum of general damages for loss of earning capacity, loss of amenities, future medical expenses and for pain and suffering.

68. Kshs. 624,865 being the amount awarded under the head of special damages for medical expenses has not been contested.

69. As far as future medical expenses are concerned, the circumstances under which damages can be made under this head is a question that was discussed by the Court of Appeal in *Tracom Limited & another v Hasssan Mohamed Adan* [2009] KECA 48 [KLR]. In that case, the Court of Appeal relied on medical reports as sufficient proof of the need of future medication and, therefore, future medical expenses. An award can be made on this basis. To quote the learned judges of the Court of Appeal:

> " It is clear to us that all the medical reports agree that the respondent would require future medication. Two reports i.e, that prepared by Kenyatta National Hospital and that prepared by Dr. Wangai suggest the estimated amount whereas others are silent on that but that he will

need future medication is not in our mind in dispute. Of the two reports suggesting amounts needed, the Kenyatta Hospital report which suggests approximate figure of Ksh.100,000/= per year was prepared on 23rd December 1999. It is instructive that Dr. Shah's report made about three months later said the left hip was fusing and Osteomyelitis was settling down such that in his mind respondent was unlikely to need any further operation. Dr. Wangai's report made three years later suggested only Ksh.50,000/= for future medical expenses. Thus there was some evidence of progressive drop in the need for future medication. The amount of Ksh.50,000/= that the learned Judge of the superior court used as the amount that would be required every year was an amount suggested by the respondent's counsel in her submission. The learned Judge referred to it as a reasonable and fair amount in the circumstances. He, with respect did not consider that that was the amount as at the time the report was made in May 2003. He also did not consider that it reflected a 50 per cent decrease from the amount in Kenyatta Hospital report made in December 1999. In law, sitting on appeal, we are duty bound to be slow in interfering with the assessment made by the trial Judge as in doing so the trial Judge is exercising discretionary powers. We can, however, interfere only where the trial Judge either considered matters that he ought not to have considered or did not consider what he should have considered or misapprehended certain aspects of the case, or on looking at the award in itself the award is either too low or too high that it must have reflected improper award – see the case of *Henry H. Ilanga v M. Manyoka* [1961] EA 705 at page 713. In this case, as we have stated, the learned Judge failed to consider what he should have considered. Hence we are entitled to interfere with the award of Ksh.50,000/= per year on this head. We reduce it to Ksh.40,000/= per year."

70. Dr. Heri recommended hip replacement and specialised treatment abroad. He opined that the cost of hip replacement ranges from Kshs. 1,000,000/= to Kshs. 2,000,000/=. Taking cue from the decision in *Tracom Limited & another v Hasssan Mohamed Adan* [*supra*], and considering the evidence by Dr. Heri, I would not interfere award of Kshs. 1,000,000/=made by the learned magistrate under this head. There is no evidence that the learned magistrate improperly exercised his discretion in making the award under this head.

71. To be precise, I am not convinced that the learned magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low [see *Butt v Khan* [1978] KECA 24 [KLR]]. I would also not dismiss the award for the reason that it was not pleaded when it is clear that, in fact, it was pleaded. In paragraph 15 of the plaint, this claim was pleaded as follows:

> " The 2nd plaintiff avers that he is still undergoing physiotherapy and will need to continue with the physiotherapy for an indefinite time. The 2nd plaintiff has been recommended to seek specialized treatment abroad. The 2nd plaintiff therefore claims for future medical expenses."

72. A claim under the head of future medical expenses is ordinarily a claim in the nature of special damages but considering that at the time of filing suit the details of the treatment and the exact attendant expenses are unknown and, in any event, yet to be spent, particularisation of the details of damages under this head is unnecessary. In the absence of any specific details of the treatment a claimant may require in the future, it should be sufficient to plead and seek damages for future medical expenses in general terms.Addressing this issue in *Forwarding Company Limited & another v Kisilu; Gladwell*

[Third party] [Civil Appeal 344 of 2018] [2022] KECA 96 [KLR] [4 February 2022] [Judgment], the Court of Appeal said:

> " 62. In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

73. In the final analysis, except for the awards that are not in dispute, the judgment of the learned magistrate has to be set aside. In particular, and for the avoidance of doubt:

    a. The 1st and 2nd respondents' claim against the appellant in the lower court is hereby dismissed with costs to the appellant.

    b. The appellant's claim against the 3rd respondent in the lower court is allowed to the extent that judgment is hereby entered for the appellant against the 3rd respondent in the sum of Kshs. 1, 668, 181/= with costs and interests from the date of judgment in the lower court until the date of payment in full.

    c. Judgment is entered for the 1st and 2nd respondents against the 3rd respondent as follows:

        i. Kshs. 1,058,000/= being special damages in respect of loss of motor vehicle KBJ 601 B.

        ii. Kshs. 624,865.00 being special damages for the medical expenses incurred by the 2nd respondent.

        iii. Kshs. 1,000,000/= payable to the 2nd respondent on account of future medical expenses.

        iv. Kshs. 1,500,000.00 general damages payable to the 2nd respondent for loss of earning capacity, loss of amenities, and for pain and suffering.

        v. The 1st and 2nd respondents shall have costs of the suit in the lower court and interest on the awards made shall be based on court rates calculated from the date of the judgment in the lower court till payment in full. The costs will be borne by the 3rd respondent.

    d. The appellant will have costs of the appeal and, of course, the costs in the lower court to be paid by the 3rd respondent.

    e. The appeal is allowed in those terms. Orders accordingly.

SIGNED, DATED AND POSTED ON THE CTS ON 24 JULY 2025

NGAAH JAIRUS

JUDGE