**Moit v Mega Wholesalers Limited (Civil Appeal E094 of 2023)**
**[2025] KEHC 13540 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13540 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL APPEAL E094 OF 2023**

**RN NYAKUNDI, J**

**SEPTEMBER 30, 2025**

**BETWEEN**

**LYDIA ANGOLA AMENE MOIT ..... APPELLANT**

**AND**

**MEGA WHOLESALERS LIMITED ..... RESPONDENT**

***(Being an Appeal from the Judgement and Decree of Hon. D. Mikoyan CM delivered on 17th May 2023 in Eldoret CMCC E009 of 2021)***

**JUDGMENT**

Representation:

M/s G.K. Okara & Co Advocates

M/s Mahida & Maina Co. Advocates

## Background

1. The brief background of this Consolidated Appeal is that the Appellant sued the Respondent herein Mega Wholesalers Limited in the case dockets as listed hereunder: Erick Ochieng Otieno in CMCC No. E017 of 2021; Lydia Angola Amenemoit in CMCC No. E009/2021 and Rose Naliaka Nabende in CMCC No. E006 of 2021. The facts at the trial Court were that the Respondent was the registered owner of motor vehicle registration number KCJ 165Q Mitsubishi which was involved in a road traffic accident (RTA) at Tairi Mbili along Eldoret- Webuye Road.

2. Lydia Angola Amenemoit, the Appellant here in CMCC No. E009 of 2021 claimed that while being a pillion passenger, she sustained injuries to the head, chest, both hands and lower legs which also required admission. From the record, she provided demand letters and statutory notice as PEXH 6 (a) and (b) and 7(a) and (b) respectively. Dr. Paul Rono (PW1) from Moi Teaching and Referral Hospital produced medical documents as evidence including discharge summary, invoice dated 13/11/2020,

invoice dated 14/11/2020 and PEXH 3 receipt of Kshs 30,976/=. Dr. Sokobe produced medical reports and classified the injuries therein.

3. The Respondent herein filed its Statement of Defence dated 20th January 2021 denying the allegations set out in the plaint by the Appellants herein. The matter was set for a full trial and judgment was entered as follows: -

    a. Liability

        Liability is 30% to 70% in favour of the Plaintiff against the Defendant in all the three suits.

    b. General Damages

        a. Lydia Angola Amenemoit Kshs. 350,000/= less 30%

            245,000/=

            Special damages Kshs. 39,176/=

            Total Kshs. 284,176.00/=

            All plus interest from the date of filing suit for special damages and interest from date of judgement on general damages at Court rates.

4. The Appellant herein being aggrieved and dissatisfied with the judgement and decree delivered on 09/01/2024 by Hon D. Mikoyan (CM) on liability and special damages preferred this appeal vide a Memorandum of Appeal dated 31st May 2023 based on 3 grounds as follows: -

    a. That Learned Trial Magistrate erred in law and fact in holding the Appellant 30% liable without any basis and contrary to the evidence on record.

    b. The Learned Trial Magistrate erred in law and fact in failing to find that the Respondent was solely to blame for the accident.

    c. The Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions.

5. The Appellant sought the following prayers from his memorandum of appeal;

    a. The Judgement of the Lower Court be set aside.

    b. An order be made finding the Respondent 100% liable for the accident herein.

    c. Costs of this appeal be awarded to the Appellant.

6. The Appeal was canvassed by way of written submissions.

**Appellants Written Submissions.**

7. The Appellant herein Lydia Angola Amenemoit filed written submissions dated 14th July 2025 where the learned Counsel Mr. Okara submitted on liability that the decision of the Learned Trial Magistrate be set aside and just like in Eldoret HCCA No. E093 of 2023- Erick Ochieng Otieno Vs Mega Wholesalers Ltd, the Respondent in Civil Appeal No. E095 of 2023 be held 100% for the occurrence of the accident herein. Counsel also submitted that in Civil Appeal No E094 of 2023, they only pleaded against liability.

**Respondent's Submission on Appeal HCCA No. E094 OF 2023**

8. The learned Counsel submitted that from the grounds of Appeal encapsulated in the Memorandum of Appeal at page 1 of the Record of Appeal, the issues of determination are: -

    a. That the Learned Trial Magistrate erred in law and fact in holding the Appellant 30% liable without any basis and contrary to the evidence on record.

    b. That the Learned Trial Magistrate erred in law and in fact to find that the Respondent was solely to blame for the accident.

    c. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions.

9. On liability, Counsel submitted that one of the Appellant's grounds for appeal is that the Learned Magistrate erred in law and fact in holding the Appellant 30% liable without any basis and contrary to the evidence on record and that a review of the evidence on record supports the trial Court's findings and also that the Respondent's witness, Kitune Musila (DW1) testified that he entered the highway ensuring it was safe to do so. Counsel submitted that the witness stated that other motorists on the road had yielded and given him the right of way and it is also evident from the circumstances and testimony that the motorcycle on which the Plaintiff was a pillion passenger was overtaking carelessly at the material time. Counsel noted that the trial Court correctly observed that the Plaintiff failed to tender any evidence to demonstrate that the rider of the motorcycle attempted to avoid the accident.

10. Counsel also submitted that the Appellant failed to establish the Respondent's negligence and the evidence on record falls short of holding the Respondent wholly liable and decisions are not to be made based on mere presumption of facts and further in the circumstances, the apportionment of liability at 70:30 in favour of the Plaintiff by the trial Court was reasonable. It was the Counsel's final submissions that the trial Magistrate erred in the assessment of quantum and prayed that their appeal HCCA No. E156 of 2024 be allowed with costs to the Appellant and dismiss the Appeal No. E094 OF 2023 with costs to the Respondent.

11. The Appellant Mega Wholesalers equally being aggrieved by the Judgement/decree of Hon. D. Mikoyan (CM) delivered on 17th May 2023 in Eldoret CMCC No E009 of 2021 appealed to this High Court vide a Memorandum of Appeal dated 29th July 2024 based on 5 grounds of appeal enumerated as follows:

    a. That the Learned Trial Magistrate misdirected himself in awarding the Judgement amount as the Court failed to take into consideration the evidence given by the Defendant in the suit while making its final finding.

    b. That the Learned Trial Magistrate misdirected himself in awarding Kshs. 350,000/= in general damages.

    c. That the Learned Trial Magistrate erred in law by failing to take into consideration the evidence given by the Defendant in the suit while making its determination on quantum.

    d. That the Learned Trial Magistrate erred in law in failing to consider and take into account the statements made by the Defendant in their testimonies before Court as regards the manner in question so as to arrive at a just and fair decision.

e. That the learned Trail Magistrate erred in law in failing to consider and take into account the issues raised by the defense touching on pertinent and substantial points of law and facts as regards the injuries allegedly sustained by the Respondent.

12. The Appellant sought the following orders;

a. That the Judgement /decree of the Honourable Court dated 17th May 2023 be set aside.

b. That costs of this appeal be borne by the Respondent.

13. The appeal was canvassed by way of written submissions.

**Appellant's Written Submissions**

14. In this Cross Appeal, the Appellant here-in Mega Wholesalers Limited filed its written submissions dated 25th July 2025 through the representation of the firm of Mahida & Maina Co. Advocates where the Learned Counsel submitted that the Appellant was aggrieved with the trial Court's finding on quantum hence preferred this instant appeal impugning the trial Court's finding on quantum. Counsel listed one issue for determination; whether the Court's award on damages was excessive.

15. The learned Counsel submitted that the trial Court's award on damages was manifestly in excess in juxtaposition to the injuries suffered and stated that the assessment of damages IS those set out in the following cases: West (H) & Son Ltd Vs Shepherd (1964) Ac; Lim Poh Choo Vs Camden and Islington Area Health Authority (1979) 1 All ER. Counsel submitted that Courts at first instance are prone to compensate generously and it would be absurd to shut one's eyes to the fact that because in these days of third party and personal insurance, loss almost always falls on a large financial corporation there may be a tendency to extravagance. Counsel also submitted that as large sums are awarded, so premiums for insurance rise higher and higher and cited the case of Hassan Vs Nathan Mwangi Kamau Transporters & 5 Others Nairobi CACA No. 123 of 1985.

16. Counsel further submitted that the appellant herein has sought to highlight this as the first ground of the appeal and the award in this case was inordinately high in that the large sum was awarded unaccompanied by reason. He went ahead and submitted that this contention is informed by the fact that the lower Court's award reflects that the principles applicable in the award of damages were not adhered to and that the first principle of compensation requires that the Plaintiff receives no more or no less than his actual loss such that compensation is fair to both the Plaintiff and the Defendant.

17. The Counsel furthermore submitted that the injuries sustained by the respondent were: blunt injury to the head, blunt injury to the neck, bruises & blunt trauma to the lower jaw, blunt injury to the chest, bruises on the left elbow, bruises on the left fingers, bruises on the right hand, cut wound on the left knee and multiple cut wounds on the left leg. Counsel continued by stating that the treatment notes from MTRH, discharge summary, P3 Form and medical report from Dr. Sokobe confirmed the injuries aforementioned and that the injuries sustained by the Respondent in their opinion was soft tissue injuries and further they are almost analogous to the injuries suffered by the Plaintiffs and cited the following cases; Board of Management Stanley Godia Secondary School Vs Akuku (Civil Appeal 4 of 2024); Kyoga Hauliers Vs Okoddi (Civil Appeal 57 of 2022-[2022] KLR; Rigia Investment Limited Vs Jones (Civil Appeal E010 of 2020-[2022] KLR and Cindano & Another Vs Ndwiga (Civil Appeal E012, E010 & E011 of 2022 (Consolidated 2022-KLR). It was Counsel's final submission urging this Court to be persuaded by the Appellant's authorities which were delivered in contemporaneous economic context and find that the quantum of damages awarded by the trial Court was inordinately high and based on erroneous principles and substitute it with a sum of kshs. 100,000 to kshs. 150,000/=.

**Respondent's Written Submissions**

18. The Respondent's Counsel Mr. Okara submitted that the Appellant herein was aggrieved by the award of quantum. Counsel cited the following cases: Jeremiah & Brothers Contractor & Another Vs Francis Egusangu Kaguli [2020] eKLR; Simon Taveta Vs Mercy Mutitu [2014] eKLR; Charles Oriwo Odeyo Vs Appollo Justus Andabwa & Another [2017] eKLR; Savanna Saw Mills Ltd Vs George Mwale Mudomo [2005] eKLR; Loise Wanjiku Kagunda Vs Julius Gachau Mwangi CA 142/2003.

19. The Learned Counsel further submitted that the Plaintiff sustained the following injuries: injury to the head, blunt injury to the neck, bruises & blunt trauma to the lower jaw, blunt injury to the chest, bruises on the left elbow, bruises on the left fingers, bruises on the right hand, cut wound on the left knee and Multiple cut wounds on the left leg. He furthermore submitted that the Learned Trial Magistrate awarded kshs. 350,000/= as general damages before contribution and cited the following authorities: Catherine Wanjiru Kingori & 3 Others Vs Gibson Theuri Gichubi [2005] eKLR; Vincent Cheruiyot Rono Vs Mombasa Maize Millers, Nakuru HCCC No. 109 of 2005; Poa Link Services Co. Ltd & Another Vs Sindani Boaz Bonzemo [2021]; Francis Ochieng & Another Vs Alice Kajimba [2015] eKLR; Issac Katambani Iminya Vs Firestone East Africa [2015] eKLR; Samuel Muthama Vs Kenneth Maundu Muindi MKS HCCA 102 OF 2008 and Ochieng & Another Vs Kariuki [2024] KLR.

20. It was the Learned Counsel's submission that using the authorities above and given the nature of the injuries that the Plaintiff sustained herein, the award of Kshs. 350,000/= cannot be said to be inordinately high. Counsel finally urged this Honourable Court that Civil Appeal No. E094 of 2023 be allowed with costs to the Appellant therein whereas the Civil Appeal No. E156 of 2024 be dismissed with costs to the Respondent herein.

**Analysis and Determination**

21. This being a first Appeal, this Court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (see Peters vs Sunday Post Limited [1958] EA 424 and Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123).

22. As can be gleaned from both appeals as lodged by the parties, both liability and quantum are at question.

23. The circumstances surrounding the occurrence of the accident formed the crux of the dispute on liability. According to the evidence adduced by the Respondent's witness, Kitune Musila (DW1), who was the driver of the motor vehicle at the material time, he was entering the highway from a side road. He testified that he ensured it was safe to enter the highway and that other motorists on the road had yielded and given him the right of way. However, at that very moment, the motorcycle rider was allegedly overtaking carelessly, resulting in the collision.

24. The trial Court, after evaluating the evidence before it, found that both parties bore some responsibility for the occurrence of the accident. Liability was apportioned at 30% against the Appellant (attributable to the conduct of the motorcycle rider) and 70% against the Respondent. On the question of damages, the trial Court awarded general damages of Kshs. 1,200,000/= and special damages of Kshs. 21,000/=, together with interest as specified in the judgment.

**Liability**

25. To establish negligence in Kenya Road traffic accidents, a Claimant or a plaintiff must prove duty, breach, causation, and injury which is capable of being compensated by an award of damages. Evidence is crucial with Courts assessing the credibility of witnesses and the cogency of facts presented by both the plaintiff's testimonies and the defendant's answer to the claim. The burden of proof rested on the Claimant or plaintiff to prove negligence on a balance of probabilities. It is well settled that in a claim for negligence, in order for the Claimant to succeed, he must provide evidence to satisfy the Court on a balance of probabilities that the defendant owed him a duty of care at the material time, that there was a breach of that duty and it resulted in damage to him. It is also the law that a driver of a motor vehicle on a public road owes a duty of care to other road users to so manage and/or control his vehicle to prevent, hurt, harm or damage to each other. If he breaches this duty of care and an accident occurs, he is responsible in law to the person who has been wronged.

26. The question of liability in road traffic cases was discussed by the Court of Appeal in the case of Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR thus;

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
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> > "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a Court of law this question must be decided as a properly instructed and reasonable jury would decide it...
> >
> > "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

27. At the trial Court, the Plaintiff testified that a vehicle entered the main road from outside and caused the accident. He blamed the driver of the vehicle. DW1 on the other hand denied joining the highway from a feeder road and admitted that the rider was on the highway. DW2 Sylvance Oyoo Otieno who was on board the motor vehicle alleged that the motorcycle was overtaking a trailer before the accident. He however admitted on cross examination that they had entered from a feeder road.

28. The trial Court in arriving at 30%:70% regarding liability underscored that the driver of the vehicle in question bears a larger portion of liability for failing to ensure that the road was clear before joining the highway. The Court also noted that the Plaintiffs are categorical that they had right of way, however none also took any precaution to avoid the accident.

29. In an action for negligence the Plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course

of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants. See Henderson v Henry E Jenkins and Sons [1970]AC 232 at 301.

30. Apportionment of liability should be according to the degree of fault. In Kenya Power & Lighting Company Ltd v JWK (Suing as father and next-friend of JKW) & another (Civil Appeal E012 of 2021) [2023] KEHC 1642 (KLR), LN Mugambi J posited as follows:

> In apportionment of liability, I am guided by the case of Khambi and Another vs. Mahithi and Another [1968] EA 70, where it was held that:
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> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate Court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

31. What are the requirements of negligence which must be concisely proved by the plaintiff or Claimant in consonant with section 107 (1), 108, and 109 of the *Evidence Act*? The answer is to be found in the learned Authors book Clerk and Lindsell on Torts in which they state as follows:

    a. The existence in law of a duty of care situation.

    b. Careless behavior by the defendant.

    c. A casual connection between the defendant's careless conduct and the damage.

    d. Foreseeability that such conduct would have inflicted on the particular Claimant the particular damage of which he complains; (Once (a) to (d) are satisfied the defendant is liable in negligence and only then the next two factors arise).

    e. The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible.

    f. The monetary estimate of that extent of damage.

32. Having examined the evidence on record and the circumstances surrounding this accident, I find myself in agreement with the trial Court's assessment of liability. The evidence reveals a situation where both parties contributed to the occurrence of the accident, albeit in different degrees. On the one hand, the driver of the Respondent's vehicle, admitted through the testimony of DW2 Sylvance Oyoo Otieno that they had entered the highway from a feeder road. I am of the considered view that a driver entering a main highway from a feeder road bears a duty of care to ensure not only that the road appears clear at the moment of entry, but also to anticipate and account for the movements of other road users already lawfully on the highway, including motorcycles that may be overtaking slower vehicles. The evidence suggests that the Respondent's driver, while claiming to have checked that it was safe, failed to adequately discharge this heightened duty of care. On the other hand, the evidence also discloses that the motorcycle rider was engaged in an overtaking maneuver at the material time. While the motorcycle had the right of way being already on the highway, there is no evidence that the rider took any evasive action or attempted to avoid the collision when the Respondent's vehicle entered the highway. As a road user, the motorcycle rider also owed a duty to maintain proper lookout and to take reasonable steps to avoid an accident when it became apparent that another vehicle was entering the highway.

I find as a fact that the appellant and the respondents drivers giving the regard to the circumstance of the accident the Learned Trial Magistrate assessment of the evidence based on the facts in that case the issue of liability very unlikely could be at a total of 100%. The respondent's evidence did not controvert evidential material on the collision for one to conclusively rule out contributory negligence. Why do I make these findings? This was a case the respondent had to meet from the pleadings as clearly particularized in the plaint. Though some of the particulars of negligence crucial to the case seems not to have been specifically included in the Plaint one cannot say that this was an arid pleading point. Hence for purposes of this appeal I rely on the principles in the case of Nada Fadi Al Medenni vs. Mars UK Limited [2005] EWCA Civ 1041:

> " It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting then in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome maybe unattractive, but any other approach leads to uncertainty and potentially real unfairness."
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> In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:
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> "In Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER775 Lord Woolf MR observed at 792-793:
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> 'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

33. In this very case reviewing and examining the evidence in detail, it is very clear on the circumstances in which this collision occurred between the motor cycle which was carrying pillion passengers along the highway and the respondent's motor vehicle driven from the feeder road headed to the highway. The issue was whether the appellants adduced evidence to discharge the burden of proof on negligence resulting in damage calling for their assessment of compensation. That to me is very clear on PW2, PW3, and PW4. In the circumstance therefore, the appellants put up a strong case on liability but the evidence in rebuttal which then resolved the question of the contributory liability. In all the circumstances having considered the evidence before the lower Court I find that the Learned Trial Magistrate exercised judicial discretion on the manner in which the accident occurred based on contributory negligence apportioning liability at 30%-70% respectively.

34. In the circumstances of this case, I am satisfied that the trial Court properly applied its mind to the evidence and arrived at a fair and reasonable apportionment of liability. The principle enunciated in Khambi and Another vs. Mahithi and Another [1968] EA 70 is that an appellate Court should not interfere with apportionment of liability unless there is an error in principle or the apportionment is manifestly erroneous. I find no such error to necessitate review of the decision on liability by the Learned Trial Magistrate.

35. The apportionment is neither arbitrary nor unreasonable, and it fairly distributes liability according to the respective degrees of fault. Accordingly, I uphold the trial Court's finding on liability at 30%

against the Appellant and 70% against the Respondent. Suffice to observe that the exposition in the impugned judgment already adverted to by the appellants and the respondent, there is prima facie evidence on more culpability towards complicity on the part of the respondent driver in driving the vehicle negligently and rushly. It is true that the trial Court had looked into the oral and documentary evidence in connection with the accident in question. Therefore, on appeal a holistic view of the evidence has to be taken into consideration on proof of the accident as was caused by a particular offending motor vehicle in a particular manner so as to apportion liability. This is not a case to be proven beyond reasonable doubt, it is on the touchstone of preponderance of probabilities. Thus, there can be no dispute with respect to the position that the question regarding the main appeal on liability based on the evidence fails.

**Quantum**

36. From a law and economics perspective, the threshold question of the appropriateness or desirability of pain and suffering damages is not yet settled. A rule of thumb for conceptualizing the problem within the framework of law and economics is to as whether awarding pain and suffering damages contributes to the two objectives of tort law: adequate incentives for potential tortfeasors to exercise due care (the "deterrence" rationale); and the efficient spreading of victims' losses to a larger pool (the "insurance" rationale). Scholars who support pain and suffering damages argue that, from an optimal deterrence perspective, defendants should bear the full social cost of their conduct, which includes pain and suffering costs. According to this view, pain and suffering damages actually compensate for a concrete loss: disfigurement, emotional trauma, extended physical discomfort, and loss of normal life-enhancing capacities. These are all very real things, not any less real than loss of potential future income. This view rejects the idea that pain and suffering is simply not a serious component of a Plaintiff's loss.

37. It should be borne in mind under the tort of negligence in which a victim in an accident claim suffers pain and suffering and loss of amenities there is no medium for happiness. It is also true that there is no market for expectation of life for the monetary evaluation of non-pecuniary losses when it comes to compensation to accurately restore one to his or her original state is a philosophical and policy exercise more than a legal or logical one. In my considered view, the restitutio in integrum doctrine in relation to personal injury has always been a legal fiction. The assessment of damages for pain and suffering in particular cases ignores certain fundamental aspects which fails to provide compensation in a quantifiable model. Sometimes in the real sense of the compensation scheme notwithstanding guidelines from past awards pain and suffering as a limb refers to features of physical, emotional, trauma, mental discomfort etc. and yet trial Courts have no scientific instruments to differentiate the measure of pain and intensity from one victim to another. To say the least, award of damages will remain a subject of controversy because of its complexity to come up with the proper yardstick of assessment of damages save for reference to the past cases and awards assessed by various Courts within our legal system. The persuasive dicta in Kurrie v Azouri (1998) 28 MVR 406 must have had this in mind as reflected in the following statement:

> "A court considering the question will need to contemplate what in practical terms is embraced by "a most extreme case". Immediately one considers such a case, one thinks of cases of quadriplegia, perhaps some serious cases of paraplegia, cases of serious brain damage and, perhaps some cases of extremely serious scarring and disfigurement caused, especially to young children, by scalding or burning. No doubt there are others.

38. Having had a considerate experience in presiding over adjudication of civil claims under the total negligence I hold the view that the assessment of general damages is an evaluative process in respect

of which Judges and Magistrates minds may reasonably differ even on the same set of facts on circumstances of the claim.

39. In so far as the impugned judgment is concerned, at an appellate level, still the burden of proof in a claim of negligence which is generally a civil case remains vested with the Plaintiff to prove it on a balance of probabilities that the Defendant breached the duty of care to warrant a claim of compensation. In Barkway v South Wales Transport Co. Ltd. [1950] 1 All ER 390 this statement of principle will mirror in the determination of liability as between the Appellant and the Respondent:

> " There must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant, or his servant, and in the accident is such, as in the ordinary course of things, does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of car." (See Scott v London and St. Katherine Docks Co. [1861-73] All E.R. Rep. 246.
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> "The doctrine is dependent on the absence of explanation, and although it is the duty of the defendants, if they desire to protect themselves, to give adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not." (See Barkway v South Wales Transport Co. Ltd (Supra).

40. I now turn to consider the question of quantum as raised by Mega Wholesalers Limited challenging the general damages awarded by the trial Court. Mega Wholesalers Limited contends that the award of Kshs. 350,000/= as general damages was inordinately high given the nature of the injuries sustained by the Appellant. Counsel for Mega Wholesalers Limited submitted that an award ranging between Kshs. 100,000/= to Kshs. 150,000/= would be more appropriate, arguing that the injuries were primarily soft tissue injuries. On the other hand, the Appellant submits that the award was commensurate with the injuries sustained and should not be disturbed. Before addressing the specific contentions raised by the parties, it is necessary to set out the legal principles that govern an appellate Court's intervention in matters of quantum of damages.

41. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 a wholly erroneous estimate of damages."

42. The principles which guide the Court in the assessment of damages were laid in In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR of damages in a personal injury case. The considerations include but not limited to; -

> " 1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
>
> 2. The award should be commensurable with the injuries sustained.

3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5. The awards should not be inordinately low or high."

43. According to the Court of Appeal in Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR: -

> " An appellate Court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge 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."

44. Put simply, it is not sufficient for this Court to substitute its own figure merely because it might have awarded a different amount had it been the trial Court. There must be a demonstrable error in principle or a manifestly erroneous assessment.

45. In the case of Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55:

> " It is trite law that the assessment of general damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate Court can justifiably interfere with the quantum of damages awarded by the trial Court only if it is satisfied that the trial Court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

46. The medical report on record establishes that the Appellant sustained the following injuries as a result of the accident:

a. injury to the head,

b. blunt injury to the neck,

c. bruises & blunt trauma to the lower jaw,

d. blunt injury to the chest,

e. bruises on the left elbow,

f. bruises on the left fingers,

g. bruises on the right hand,

h. cut wound on the left knee

i. Multiple cut wounds on the left leg

47. In assessing whether the award of Kshs. 350,000/= was appropriate, I must consider comparable awards made in similar circumstances while bearing in mind that no two cases are exactly alike and that awards must reflect current economic realities including inflation. Both parties have cited various

authorities in support of their respective positions, and I have carefully considered these authorities alongside others that I find relevant to the assessment.

48. In Marube & another vs. Nyamboga [2024] KEHC 3395 (KLR) (Chigiti, J), the Claimant had sustained a head injury, deep cut wounds on the occipital region, chest contusion, blunt trauma to the back, bruises on the right upper limb, bruises on the left upper limb, bruises on the left lower limb, bruises on the right lower limb and cut wounds on the right lower limb, and the Court awarded Kshs. 350,000.00.

49. In the case of Joshua Onsongo Mose & another v Gladys Moraa & another (Civil Appeal 133 of 2021) [2024] eKLR, the plaintiff sustained a cut wound on the scalp, cut wound on the upper back, degloving injury on the shoulder, deep cut wound on the right hand, and deep cut wound on the ankle. The trial Court awarded Kshs. 300,000/= as general damages and this award was upheld on appeal.

50. In Anthony Nyamwaya vs. Jackline Moraa Nyandemo [2022] eKLR (F. Ochieng, J), the Claimant suffered rugged cut wounds on the temporal region of the head, tenderness on the neck, tenderness on the anterior chest, tenderness on the lower back, tenderness on the shoulders, swelling and tenderness on the right hand, bruises on right index finger and swelling tenderness and bruises on both legs, and Kshs. 250,000.00 was awarded.

51. In the case of Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR an award of Kshs 180,00.00 was given for the following injuries:

    i. Multiple cut wounds on the right lower limb.

    ii. Bruises on the right lower limb.

    iii. Bruises on both elbows.

    iv. Bruises on the right iliac region.

    v. Bruises on the frontal region.

    vi. Bruises on the temporal region.

    vii. Lacerations on the frontal region.

    viii. Cut wounds on the left iliac region.

    ix. Cut wounds on the frontal region.

    x. Cut wounds on the temporal region.

    xi. Blunt trauma to the abdomen.

52. The decisions that I have reviewed above demonstrate considerable variations in the exercise of judicial discretion in the assessment of general damages for similar injuries. While some Courts have made relatively modest awards for severe soft tissue injuries, others have awarded substantially higher sums for injuries that could be characterized as less serious. Having carefully considered the nature and extent of the injuries sustained by the Appellant herein, I am persuaded that while these injuries cannot be dismissed as trivial, they fall within the category of soft tissue injuries that did not result in permanent disability or require prolonged medical intervention. In my assessment, and taking into account the comparative awards cited by both parties as well as current economic realities, I find that an award of Kshs. 350,000.00 is somewhat excessive in the circumstances of this case. Accordingly, I reduce the general damages to Kshs. 250,000.00, which in my view fairly compensates the Appellant for the pain, suffering, and inconvenience occasioned by the injuries sustained.

53. In the premises, I find that the appeal on quantum by Mega Wholesalers Limited has succeeded. The award of general damages of Kshs. 350,000.00 made by the trial Court is hereby set aside and substituted with an award of Kshs. 250,000.00. The special damages awarded by the trial Court remain undisturbed.

54. Each party shall bear their own costs of this appeal.

55. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA EMAIL AND CTS AT ELDORET THIS 30TH DAY OF SEPTEMBER, 2025**

**.....**

**R. NYAKUNDI**

**JUDGE**