Nabende & another v Mega Wholesalers Limited & another (Civil Appeal E095 of 2023 & E155 of 2024 (Consolidated)) [2025] KEHC 13532 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13532 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E095 OF 2023 & E155 OF 2024 (CONSOLIDATED)

RN NYAKUNDI, J

SEPTEMBER 30, 2025

BETWEEN

ROSE NALIAKA NABENDE .... APPELLANT

AND

MEGA WHOLESALERS LIMITED .... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E155 OF 2024

BETWEEN

MEGA WHOLESALERS LIMITED .... APPELLANT

AND

ROSE NALIAKA NABENDE .... RESPONDENT

(Being an Appeal from the Judgement of Hon. D. Mikoyan CM delivered on 17th May 2023 in Eldoret CMCC No. E006 of 2021)

JUDGMENT

Background

1. The brief background of this Consolidated Appeal is that Mega Wholesalers Limited was sued in the following case dockets: 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. Rose Naliaka Nabende, the Appellant herein in CMCC No. E006 of 2021 claimed to have gotten injuries on the head, neck, left hand, right ankle and suffered a cut named on the left leg. From the record, she issued statutory notices as well as the motor vehicle NTSC records.

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 after a full hearing, judgment was entered on 17th May, 2023 as follows: -

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

   b. General Damages................................. Kshs. 245,000.00/=

   c. Special Damages.................................. Kshs. 10,308.00/=

   Total...Kshs. 255,308.00/=

   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 judgment 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 4 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 in failing to award Kshs. 13,977/= as special damages as opposed to Kshs. 10,390/=.

   d. 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. An order be made awarding the Appellant Kshs. 13,977/= as special damages.

   d. 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 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. Learned Counsel further added that the Learned trial Magistrate failed to award the special damages that was proven by the Plaintiff and that the record is very clear that the Plaintiff produced receipts totaling to Kshs. 13,977/= which they urge this Court to award.

Respondent's Submission on Appeal HCCA No. E095 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 in failing to award Kshs. 13,977 as special damages as opposed to Kshs. 10,308/=.

    d. 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 continued stating 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.

11. On special damages, the Learned Counsel submitted that the law on special damages is that they must not only be specifically pleaded but also strictly proved, suffice it to quote from the Court of Appeal holding in Hahn Vs Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716. Counsel also submitted that the Respondent in its pleadings, specifically claimed special damages in the sum of Kshs. 10,308/= and it is now apparent that the Respondent is departing from its pleadings by seeking an increased amount of Kshs. 13,977/= on appeal without having amended its pleadings in accordance with the law and it is trite law that parties are bound by their pleadings.

12. Counsel further submitted that the principles behind the awarding of special damages is supposed to reimburse actual expenditure from the Respondent as a result of the accident and ought not to be abused to claim for fictitious expenses and no receipts were produced to back the expense of Kshs. 200/= and Kshs. 2,000/= allegedly incurred obtaining the Police Abstract and filing the P3 Form respectively. Counsel urged the Court to cancel the award of Kshs. 10,308/= in special damages and only award Kshs. 6,000/= for the medical report in special damages. It was the Counsel's final submissions that the trial Magistrate erred in the assessment of quantum and prayed that their appeal HCCA No. E155 of 2024 be allowed with costs to the Appellant and dismiss the Appeal No. E095 OF 2023 with costs to the Respondent.

13. Mega Wholesalers Limited on another hand also aggrieved by the Judgement/decree of Hon. D. Mikoyan (CM) delivered on 17th May 2023 in Eldoret CMCC No E006 of 2021 appealed to this High Court vide a Memorandum of Appeal dated 29th July 2024 based on 5 grounds of appeal 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.

14. 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 Respondents.

15. The appeal was equally canvassed by way of written submissions.

Appellant's Written Submissions

16. 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.

17. 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 as 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.

18. 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.

19. The Counsel furthermore submitted that the injuries sustained by the Respondent were: head injury with loss of consciousness for 2 hours, blunt injury to the neck, multiple bruises on the left upper limb, bruises on the left leg anteriorly, cut wound on the left leg mid anteriorly, cut wound on the left ankle joint. 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

20. The Respondent's Counsel Mr. Okara submitted that in Civil Appeal No E155 of 2024, the Appellant was aggrieved by the award that was given terming it inordinately high. 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.

21. The Learned Counsel further submitted that the Plaintiff sustained the following injuries: head injury with loss of conscious for 2 hours, blunt injury to the neck, multiple bruises on the left upper limb, bruises on the left leg anteriorly, cut wound on the left leg mid anteriorly and cut wound on the left ankle joint. 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.

22. 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. E095 of 2023 be allowed with costs to the Appellant therein whereas the Civil Appeal No. E155 of 2024 be dismissed with costs to Respondent herein.

Analysis and Determination

23. 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 demeanor 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).

24. As can be gleaned from both appeals as raised by the parties, both liability and quantum are questionable and parties demands of this Court to address the issues so that they can find justice from their perspective.

25. 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 carrying the Appellant and its rider was allegedly overtaking carelessly, resulting in the collision.

26. 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. 245,000/= and special damages of Kshs. 10,308/=, together with interest as specified in the judgment.

Liability

27. 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.

28. 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."

29. At the trial Court, PW5 testified that a vehicle entered the main road from outside and caused the accident. She blamed he 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.

30. The trial Court in arriving at 30%:70% regarding liability underscored that DW5, 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.

31. 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.

32. 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:

    > " 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."

33. 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.

34. 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, DW1, 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 statement of claim 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."

35. 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 the 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 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.

36. 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.

37. 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

38. 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.

39. 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.

40. 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.

41. 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).

42. 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. 245,000/= as general damages were 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

43. 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."

44. 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.
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> 2. The award should be commensurable with the injuries sustained.
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> 3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
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> 4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
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> 5. The awards should not be inordinately low or high."

45. 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."

46. 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.

47. 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."

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

a. Head injury with loss of consciousness for approximately two hours;

b. Blunt injury to the neck;

c. Multiple bruises on the left upper limb;

d. Bruises on the left leg anteriorly;

e. Cut wound on the left leg mid anteriorly;

f. Cut wound on the left ankle joint.

49. In assessing whether the award of Kshs. 245,000/= 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.

50. 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.

51. In Mary Vivi John v Nethcom Containers Solutions Limited & Another (Civil Appeal E246 of 2023) [2025] eKLR, the appellant suffered mild head injury with loss of consciousness, blunt trauma to the chest, abdomen and pelvis, and bruises and abrasions on both knees. The High Court found that an award of Kshs. 300,000/= would be sufficient as general damages. This case bears closer similarity to the present case in terms of the head injury with loss of consciousness and multiple soft tissue injuries.

52. In Odinga Jactone Ouma v Moureen Achieng Odera [2016] KEHC 2922 (KLR) the appellant suffered Head injury (concussion); Cut wound on the right mandible; Neck muscle contusion; Chest pain on the left side and lacerations; Cut wound on the right shoulder blade region; Multiple lacerations over the left shoulder and upper arm; Cut wounds and lacerations over right forearm; Painful swollen 4th left finger. The trial Court awarded Kshs. 400,000/= as general damages and this award was substituted with an award of Kshs. 180,000/= on appeal.

53. Having considered the authorities cited by both parties and the comparative awards in similar cases, I am of the view that the trial Court's award of Kshs. 245,000/= as general damages fall within range for injuries of the nature sustained by the Appellant. The head injury with loss of consciousness for two hours elevates these injuries beyond simple soft tissue injuries and bruises. Loss of consciousness for such a duration indicates a significant head trauma that required medical observation and treatment. When this is combined with the blunt injury to the neck, multiple bruises on the left upper limb, bruises on the left leg, and cut wounds requiring medical attention, the cumulative effect represents substantial pain, suffering, and loss of amenities that warrant adequate compensation.

54. I am not persuaded by the submission of Counsel for Mega Wholesalers Limited that an award of between Kshs. 100,000/= to Kshs. 150,000/= would be sufficient. Such an award would be inordinately low and would fail to adequately compensate the Appellant for the injuries sustained, particularly the head injury with loss of consciousness. The trial Court's award of Kshs. 245,000/= properly reflects the severity of the injuries and is consistent with contemporary awards for similar injuries when inflation and current economic realities are taken into account. I find no error in principle in the trial Court's assessment, nor do I find that the trial Court misapprehended the evidence

in any material respect. The award is neither inordinately high nor inordinately low, and represents a fair and reasonable estimate of damages.

55. Accordingly, I uphold the trial Court's award of Kshs. 245,000/= as general damages. The appeal by Mega Wholesalers Limited on quantum therefore fails.

56. I now turn to address the issue of special damages. The trial Court awarded Kshs. 10,308/= as special damages based on what was pleaded by the Plaintiff in the trial Court. The Appellant, Rose Naliaka Nabende, contends that this award was erroneous as the receipts produced on record total Kshs. 13,977/= and submits that she is entitled to the full amount supported by documentary evidence. On the other hand, Mega Wholesalers Limited submits that the award should be reduced to Kshs. 6,000/ = being the cost of the medical report only, arguing that no receipts were produced to support the expenses of Kshs. 200/= and Kshs. 2,000/= allegedly incurred in obtaining the Police Abstract and filing the P3 Form respectively.

57. The principle behind the award of special damages is to reimburse the Claimant for actual expenditure incurred as a direct result of the injury or loss suffered. It is equally trite that parties are bound by their pleadings, and a party cannot depart from what has been pleaded without first amending the pleadings in accordance with the law.

58. From the record before me, the Appellant pleaded special damages in the sum of Kshs. 10,308/= in her plaint. This is the figure that formed the basis of the trial Court's award. The Appellant now seeks to depart from her pleadings by claiming an enhanced amount of Kshs. 13,977/= on appeal without having amended her pleadings at the trial Court. This departure is impermissible. While it may well be that receipts totaling a higher amount were produced in evidence, the Appellant remains bound by what she specifically pleaded. To allow a Claimant to claim an amount in excess of what was pleaded would be to permit a departure from pleadings and would occasion prejudice to the Respondent who was required to meet the case as pleaded. This Court cannot sanctify such an oversight or procedural irregularity.

59. The award of Kshs. 10,308/= as special damages is therefore maintained and upheld.

60. In the final analysis, the appeals as lodged by both parties are dismissed with each party bearing their own costs, given that both appeals have failed and each party sought to vary the judgment in their favor.

61. Orders accordingly.

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

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R. NYAKUNDI

JUDGE