

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL APPEAL NO. E093 OF 2023**

**ERICK OCHIENG OTIENO .....**  
**.....APPELLANT**

**VERSUS**

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

*(Being an Appeal from the Judgement of Hon. D. Mikoyan CM  
delivered on 17<sup>th</sup> May 2023 in Eldoret CMCC No. E017 of 2021)*

**AS CONSOLIDATED WITH**  
**CIVIL APPEAL NO E157 OF 2024**

**MEGA WHOLESALERS LIMITED.....**  
**APPELLANT**

**ERICK OCHIENG OTIENO .....**  
**RESPONDENT**

**Coram: Justice R. Nyakundi**  
**M/s G.K. Okara & Co Advocates**  
**M/s Mahida & Maina Co. Advocates**

**JUDGMENT**

**Background**

**1.** The brief background of this Consolidated Appeal is that Mega Wholesalers Limited was sued in the following case dockets: Erick Ochieng Otiemo 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. Erick Ochieng Otieno CMCC No. E017 of 2021 claimed that the said motor vehicle registration number KCJ 165Q Mitsubishi emerged from a feeder road then hit the motorcycle registration number KMDS 327 U while he was riding. With respect to the above Claimant, Dr. Paul Rono (PW1) confirmed injuries to include fracture of the left tibia fibula which required admission and removal required kshs. 250,000/= to remove metal implants. The witness produced PEXH 1- Discharge Summary; PEXH 2- Prescription Form; PEXH 3- Invoice inpatient and PEXH 4- Receipt of Kshs. 15,000/=. PW2 Dr. Sokobe charged kshs. 6,000/= to prepare medical report as PEXH 5 (a) and PEXH 5 (b) receipt and produced PEXH 6 as a P3 form. It was submitted that that the Respondent's driver is blamed for the reason that the rider was on the highway and ought to have given way.
3. The Respondent herein filed its Statement of Defence dated 20<sup>th</sup> 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 is 30% to 70% in favour of the Plaintiff against the Respondent in all three suits.*
- b. *General Damages..... Kshs. 840,000.00/=*
- c. *Special Damages..... Kshs. 21,000.00/=*
- Total.....**Kshs. 861,000.00/=***

***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 17<sup>th</sup> day of May 2023 by Hon D. Mikoyan (CM) on liability and special damages preferred this appeal vide a Memorandum of Appeal dated 31<sup>st</sup> 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 Future Medical Expenses which expenses were not contested by the Respondent.*
  - 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. 200,000/= as Future Medical Expenses.*
  - 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 filed written submissions dated 14<sup>th</sup> July 2025. The learned counsel Mr. Okara submitted that Erick Ochieng Otieno (the Appellant in Civil Appeal No. E093 of 2023) who was the Respondent in Civil Appeal No. E157 of 2024 was involved in a Road Traffic Accident at Tairi Mbili along Eldoret Webuye Road on 11<sup>th</sup> November 2002 as he was riding a Motor Cycle Registration Number KMES 327U while carrying 2 passengers when he was hit Mitsubishi registration number KCJ 165Q belonging to Mega Wholesalers Ltd (the Respondent in Civil Appeal No. E093 of 2023 and the Appellant in Civil Appeal No. E157 of 2024) from Eldoret general direction towards Webuye general direction. The case was heard by Hon.

Dennis Mikoyan (Chief Magistrate) in Eldoret CMCC No. E017 of 2021 and judgment was delivered on 17th May 2023 where liability was apportioned 70%:30% in favour of the Plaintiff and general damages of Kshs. 1,200,000/= less 30% and special damages of Kshs. 21,000/= were awarded.

8. The learned counsel submitted that the Plaintiff was aggrieved and preferred Civil Appeal No. E093 of 2023 challenging liability and the refusal to award future medical expenses, while the Defendant lodged Civil Appeal No. E157 of 2024 challenging quantum, which appeals were consolidated. He submitted that the trial court erred in apportioning liability and that it should have found the Defendant 100% liable. He further submitted that the court erred in refusing to award Kshs. 200,000/= as future medical expenses which had been specifically pleaded and never challenged.

### **Respondent's Submission on Appeal HCCA No. E093 OF 2023**

9. 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 future medical expenses which expenses were not contested by the Respondent.
  - d. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions.
10. 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.

- 11.** 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.
- 12.** On **Future Medical Expenses**, counsel submitted that the Appellant did not plead any future medical expenses, but only a prayer for kshs. 200,000/= and without pleading for the expense, the award cannot be made. The learned counsel cited the following cases: ***Wanguba Vs Karisa (Civil Appeal 231 of 2019 [2023]; Mbaka Nguru & Anor Vs James George Rakwar [1998] KECA 133, KLR***. Counsel also submitted that without there being a pleading for future medical expenses, simply inserting a prayer thereof in the prayer section of the plaint does not help the Appellant and that the claim can therefore not be allowed. It was the counsel's final submissions that the trial Magistrate erred in the assessment of quantum and prayed that their appeal HCCA No. E157 of 2024 be allowed with costs to the Appellant and dismiss the Appeal No. E093 of 2023 with costs to the Respondent.

- 13.** Subsequently, Mega Wholesalers Limited equally being aggrieved by the Judgement/decree of Hon. D. Mikoyan (CM) delivered on 17<sup>th</sup> May 2023 in the same cause appealed to this Court vide a Memorandum of Appeal dated 29<sup>th</sup> 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. 1,200,000/= 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 17<sup>th</sup> May 2023 be set aside.*
  - b. That costs of this appeal be borne by the Respondents.*
- 15.** The appeal was canvassed by way of written submissions.

### **Appellant's Written Submissions**

- 16.** In this Appeal, the Appellant herein Mega Wholesalers Limited filed its written submissions dated 25<sup>th</sup> 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 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 some hours, blunt injury to the chest, bruises on both upper limbs, fracture of the left tibia, fracture of the left fibula and lacerations on the left knee. 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 are almost analogous to the injuries suffered by the Plaintiffs in the following cases; ***Maina Vs Ngumbi & Another (Civil Appeal E773 of 2022- 2024 KLR); Daniel Otieno Owino & Another Vs Elizabeth Atieno Owour [2020] eKLR*** and ***Munene Vs Mbarire [2023]-Civil Appeal No 488 of 2015***. 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. 400,000/=**.

### **Respondent's written submissions**

**20.** The learned counsel for the Respondent herein Erick Ochieng Otieno Mr. Okara referred to the duty of a first appellate court as laid out in *Jackson Kaio Kivuva v Penina Wanjiru Muchene [2019] eKLR*, *Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR*, *Peters v Sunday Post Ltd [1958] EA 424*, and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*. He submitted that the Plaintiff's evidence was uncontroverted, corroborated by pillion passengers and a police officer who testified that the Defendant's vehicle emerged from a feeder road and hit the Plaintiff's motorcycle. He cited *Tom Obita Ndago & Another v Alfonse Omondi Otieno [2015] eKLR* and *Kennedy Macharia Njeru* to argue that carrying excess passengers or lack of helmet was irrelevant to causation. He further cited *Mary Njeri Murigi v Peter Macharia & Another [2016] eKLR* and *Nester Shikuri v Ibrahim Okwiri Matanji [2020] eKLR* to submit that

lack of prosecution in criminal proceedings does not absolve civil liability. He also cited *Ali Moha Sunkar v Diamond Trust Bank (K) Ltd Misc App No. 427 of 2010*, *Kibathi Gitau v Joseph Kiplagat Maina [2020] eKLR*, and *West Kenya Sugar Company Ltd v Luka Wafula Namasaka [2020] eKLR* to reinforce the position that the Defendant's driver was negligent in joining the highway from a feeder road.

- 21.** The learned counsel submitted that the trial court also erred in failing to award future medical expenses of Kshs. 200,000/= which had been pleaded and supported by uncontroverted medical evidence of Dr. Paul Rono and Dr. Joseph C. Sokobe. He cited *Benson Charles Ochieng & Another v Susan Odhiambo Otieno [2013] eKLR*, *Ali Mohammed Sunkar v Diamond Trust Bank (K) Ltd*, *Onesmus Kimathi Kibiti v Leneck Gitan Njoka [2017] eKLR* and *Lawrence Wairimu Wanyoike & Another v Joseph Letting [2021] eKLR*.
- 22.** On the cross-appeal on quantum, he submitted that the award was not inordinately high considering the injuries sustained: head injury, blunt injury to the chest, bruises, fractures of tibia and fibula, and lacerations. He cited *Jeremiah & Brothers Contractor & Another v Francis Egusangu Kaguli [2020] eKLR*, *Simon Taveta v Mercy Mutitu [2014] eKLR*, *Charles Oriwo Odeyo v Apollo Justus Andabwa & Another [2017] eKLR*, *Savanna Saw Mills Ltd v George Mwale Mudomo [2005] eKLR*, *Loise Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003*, and *Francis Ndungu Wambui & 2 Others v VK (a minor) [2019] eKLR* to support that awards in similar cases ranged from Kshs. 1,000,000/= to Kshs. 1,300,000/=.
- 23.** He thus finally submitted that Civil Appeal No. E093 of 2023 be allowed with costs, liability be placed at 100% against the Defendant, Kshs. 200,000/= be awarded for future medical expenses, and Civil Appeal No. E157 of 2024 be dismissed with costs.

## **Analysis and Determination**

- 24.** 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).
- 25.** As can be gleaned from both appeals as lodged by the parties, both liability and quantum are at question.
- 26.** 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.
- 27.** 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**

- 28.** 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.

29. 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:*

*“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."*

- 30.** 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.
- 31.** 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.
- 32.** *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.***

**33.** 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.”*

**34.** 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.*

**35.** 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 Plea 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 them 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."*

**In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR** said at paragraph 23:

*"In McPhilemy vs Times Newspapers Ltd. [1999] 3 ALL ER775 Lord Woolf MR observed at 792-793:*

*'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.'*

**36.** 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.

- 37.** 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.
- 38.** 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 rashly. 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**

- 39.** 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 ask 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.
- 40.** 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.*

- 41.** 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.
- 42.** 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 care.” (See **Scott v London and St. Katherine Docks Co. [1861-73] All E.R. Rep. 246.***

*“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).***

- 43.** 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. 1,200,000/= 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 of Kshs. 400,000/= would be more appropriate. 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.

- 44.** 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.”*

- 45.** 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.”*

- 46.** 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.”*

**47.** 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.

**48.** 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.”*

**49.** The medical report on record establishes that the Plaintiff sustained the following injuries as a result of the accident:

- a. Head injury with loss of consciousness for some hours;
- b. Blunt injury to the chest;
- c. Bruises on both upper limbs;
- d. Fracture left tibia;
- e. Fracture left fibula;

*f. Lacerations on the left knee.*

- 50.** In assessing whether the award of Kshs. 1,200,000/= 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.
- 51.** In **Joseph Mwangi Thuita v Joyce Mwole (2018) eKLR** where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support and the court awarded Kshs. 700,000 as general damages.
- 52.** In **Pauline Gesare Onami v Samuel Changamure & Another (2017) eKLR** where the plaintiff suffered *fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, Laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft* and the court upheld the trial court's award of Kshs. 600,000.
- 53.** In **Alex Wanjala v Pwani Oil Products Limited & Another (2019) eKLR** where the appellant sustained a closed head injury leading to loss of consciousness for several weeks, closed fracture of the right humerus and closed fracture of the right femur with the court awarding Kshs. 600,000 for general damages.
- 54.** In **EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR** where this court upheld an award of Kshs. 800,000 where the plaintiff had suffered femur fractures and fractures of the tibia fibula.
- 55.** Having considered the authorities cited by both parties and the comparative awards in similar cases, I am of the considered view that an award of Kshs. 800,000/= would be commensurate to the injuries. The

award of Kshs. 1,200,000/= is therefore substituted with an award of Kshs. 800,000/=.

**56.** I now turn to address the issue of future medical expenses. On the said issue, the Court in **Tracom Limited & another v Hassan Mohamed Adan [2009] eKLR**, held:

*“The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of [Kenya Bus Services Ltd vs. Gituma](#) (2004) 1 EA 91, this Court, stated:-*

*‘And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal right should be pleaded.’*

*We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it*

*has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.”*

**57.** Upon perusal of the Plaint, I take note of the fact that the question of future medical expenses was not expressly pleaded but sought as a relief in the Plaintiff’s prayers. In **Bonham Carter - v- Hyde Park Hotel Ltd. (1948) 64 T.R. 177**, it was stated:

*“The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages. They have to provide it. (See Ouma - v- Nairobi City Council (1976) KLR 297, 304)”.*

**58.** The legal position on future medical expenses is well settled as can be gleaned from the above cited cases. The need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof.

**59.** However, I must pause here to consider the circumstances of the present case in light of the medical evidence actually before this Court. In the medical report as prepared by Dr. Sokobe, he made the following remarks regarding future medical expenses:

*“Erick Ochieng sustained soft and bony (fractures) tissue injuries from which he has not recovered. He requires further treatment (removal of implants) at an estimated cost of Kshs. 200,000/=.”*

**60.** This is not speculative, it is a medically necessary procedure arising directly from the treatment of injuries caused by the accident. The metal implants were inserted as part of the emergency treatment of the fractured left tibia and fibula, and their removal is an inevitable continuation of that treatment process. This differs significantly from ongoing medication or rehabilitation where the duration and necessity might be uncertain. The removal of surgical implants is a foreseeable and

quantifiable future medical expense that flows naturally from the initial emergency treatment. The Respondent's counsel submitted that without pleading for the expense, the award cannot be made.

- 61.** The critical question then becomes: does the removal of surgically implanted metal plates and screws constitute future medical care that must be specifically pleaded, or is it part and parcel of the treatment regime for fractured bones that can be anticipated from the nature of the injury itself?
- 62.** I am mindful that modern orthopedic practice commonly involves the insertion of metal implants in the treatment of serious fractures, and that such implants are frequently removed in a planned secondary procedure once healing has occurred. This is not an unusual or unexpected development but rather a standard two-stage treatment protocol.
- 63.** However, against this consideration, I must weigh the well-established principle that a defendant is entitled to know with precision what claims must be met. The purpose of pleading is to give fair notice. Even if the removal of implants is medically foreseeable, it remains a future expense that would occur after the conclusion of the trial, and the defendant is entitled to know whether such a claim is being advanced so that contrary medical evidence might be called if desired.
- 64.** In the present case, there is no equivalent pleading in the body of the plaint. The claim appears only in the prayers. While Dr. Sokobe's evidence was uncontroverted and specific, and while the Respondent did not challenge the medical necessity or cost of implant removal, the absence of pleading means the Respondent was never formally put on notice that this head of claim would be pursued.
- 65.** I find myself in agreement with the Respondent's counsel that without proper pleading in the body of the plaint, the claim for future medical expenses cannot succeed, however compelling the medical evidence may be. The requirement of pleading is not a mere technicality but a

fundamental principle of procedural fairness. To allow a claim that was never pleaded would set a bad practice whereby plaintiffs/claimants could introduce heads of claim through prayers alone, without giving defendants adequate notice in the statement of claim.

**66.** Therefore, for the purposes of the present appeals, I find no reason to award Kshs. 200,000/= claimed for future medical expenses due to the defect in pleading. This ground of appeal therefore fails and is dismissed.

**67.** In the final analysis, the following orders shall abide:

- a. On the question of liability, I have found no basis to disturb the trial court's apportionment.*
- b. On the question of quantum of general damages, I have found merit in the appeal by Mega Wholesalers Limited. The award of Kshs. 1,200,000 is substituted with an award of Kshs. 800,000/=.*
- c. On the question of future medical expenses, I have found that the claim must fail for want of proper pleading.*
- d. The appeal on liability fails and is dismissed. The appeal on future medical expenses equally fails and is dismissed.*
- e. Civil Appeal No. E157 of 2024 filed by Mega Wholesalers Limited succeeds.*

**68.** Orders accordingly.

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

.....  
**R. NYAKUNDI**  
**JUDGE**

