Mwaka v Karua & another (Civil Case E261 of 2022)
[2024] KEMC 29 (KLR) (3 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL CASE E261 OF 2022

CN ONDIEKI, PM

SEPTEMBER 3, 2024

BETWEEN

JUNIOR MWAKA ..... PLAINTIFF

AND

MARTHA WANGARI KARUA ..... 1ST DEFENDANT

JAMES MWANGI ..... 2ND DEFENDANT

JUDGMENT

PART I: Introduction

1. An act of a person which is the immediate cause of harm to another, whether intentionally or not, not being a breach of duty arising from a contractual or personal relationship, and which is either contrary to law or an omission of a specific legal duty or violation of an absolute right, entitles the injured party to maintain a cause against the infringing party for damages.[1] Provided the claimant proves that as a result of the conduct of the Defendant, whether direct or indirect, the harm was the immediate cause of and that the claimant has suffered legal damage (presenting in multiple forms including pain, suffering, loss of amenities, disfigurement, severe emotional distress, loss of consortium, loss of income, loss of future earnings, loss of dependency et alia) and this is where rubber meets the road for claimants.

PART II: The Plaintiff's Case

2. By way of a Plaint dated 3rd August 2022 and filed on 22nd August 2022, the Plaintiff sued the Defendants seeking Judgment for General damages for pain, suffering & loss of amenities; special damages in the sum of Kshs. 34,534.08; costs of this suit; and interest on the foregoing heads.

[1] Sir Fredrick Pollock, The Law of Torts: A treatise on Principles of Obligations Arising from Civil Wrongs in Common Law (4th ed.) (1895), p. 20.

3. The Plaintiff avers that at all material times relevant to this suit, the 1st Defendant was the registered owner of motor vehicle registration number KBM 001P and the 2nd Defendant was the driver thereof.

4. It is claimed that on or about 29th January 2022, the Plaintiff was lawfully riding motor cycle registration number KMFU 105F along Makutano-Machakos Road when near Montenzuma area, the 1st Defendant who was the driver, servant and/or agent of the 2nd Defendant, drove the said motor vehicle so negligently that he permitted the motor vehicle to hit the said motor cycle, thereby occasioning injuries to the Plaintiff.

5. The Plaintiff claims that the said driver was negligent in the following ways: driving at an excessive speed in the circumstances, with no regard to other road users; failing to slow down, brake, swerve and/or stop to avoid the accident; failing to exercise due and reasonable care by failing to take a proper look out or at all; driving an unroadworthy or defective motor vehicle; and driving on the lane which was lawfully in use by the motor cyclist. In this connection, the Plaintiff avers that he will rely on both doctrines of res ipsa loquitor and vicarious liability.

6. The Plaintiff claims that as a consequence of the accident, he suffered severe bodily injuries as follows: (a) a blunt injury on the left upper limb; (b) a fracture of the left clavicle; (c) a blunt back injury with lacerations; and (d) bruises on both legs.

7. The Plaintiff claims that he incurred the following expenses: (a) Filling of P3 Form – Kshs. 1,550; (b) Medical Report – Kshs. 500; (c) Medical Expenses – Kshs. 27,434.08; and (d) obtaining a copy of records of the said motor vehicle – Kshs. 550, totalling to Kshs. 34,534.08.

8. In his Reply to the Statement of Defence dated 17th May 2023 and filed on 5th June 2023, the Plaintiff joined issues with the Statement of Defence and reiterated the substance of the Plaint.

9. In the hearing of the Plaintiff's case, PW1, Police Constable Daniel Chacha stationed at Machakos Police Station, Traffic Records Section, was the Investigating Officer. He recalled that on 29th January 2022 at around 2.30 pm, an accident was reported that one rider, Junior Mwaka, was riding motor cycle registration number KMFU 105F Boxer, from Kyumbi towards Machakos town and upon reaching the Montenzuma bridge, he was knocked down from behind by motor vehicle registration number KBM 001P Toyota Landcruiser which was being driven by James Mwangi Murage, the 2nd Defendant herein. He testified that the scene was visited by police officers and investigations commenced, after both the motor vehicle, the motor cycle and the victims had been removed therefrom. He exhibited the police abstract as the Plaintiff's Exhibit 1. He testified that the insurance sticker revealed the name of the insured as Martha Wangare Karua and the name of the insurer as AIG Kenya Insurance Company Limited. He testified that preliminary investigations blamed the driver of motor vehicle registration number KBM 001P. He stated that the rider, the Plaintiff herein was alone.

10. In cross-examination, PW1 stated that the police abstract was dated 2nd August 2022. He stated that he had issued another abstract to the 2nd Defendant dated 31st January 2022 which states that Inspector of Police Harriet was the Investigating Officer. PW1 conceded that in the police abstract dated 31st January 2022, he did not indicate that the 2nd Defendant was to blame. He stated that there is an Inquest on the accident which has not been determined. He stated that the accident was reported by the 2nd Defendant. He stated that the motor vehicle had no pre-accident defects. He stated that both the motor vehicle and cycle were inspected. He stated that preliminary investigations laid blame on the 2nd Defendant.

11. By consent of the parties, the inspection report of the motor vehicle KBM 001P was produced as Defence Exhibit 1.

12. In re-examination of PW1, he stated that the Inquest relates to the death of the pillion passenger. He stated that the inspection report reveals that the motor vehicle was damaged on the front wing (bumper and headlamp).

13. PW1, the Plaintiff, adopted his undated witness statement which was filed together with the Plaint as his evidence-in-chief. In the said witness statement, the Plaintiff rehashes the material facts averred in the Plaint. In addition, the Plaintiff narrates that on the material date, he was in a motorcade, including motor vehicle registration number KBM 001P, from Makutano headed to Machakos for a political rally at Machakos Show Ground. He states that he was riding on the "rightful" lane and cannot be blamed for the accident. He states that he lost consciousness for 4 days and found himself in hospital which he later learnt that it was Bishop Kioko Hospital.

14. In buttressing his case, the Plaintiff exhibited the following documents: (i) Treatment Notes as the Plaintiff's Exhibit 2; (ii) P3 Form as the Plaintiff's Exhibit 3; (iii) Medical Report as the Plaintiff's Exhibit 4; (iv) Copy of Records as the Plaintiff's Exhibit 5: (v) a bundle of receipts as the Plaintiff's Exhibit 6; and (vi) a demand letter as the Plaintiff's Exhibit 7.

15. In cross-examination of the Plaintiff, he stated that he had been riding since he left high school. He stated that he was a week shy of completing his driving school. He stated that motor vehicle registration number KBM 001P was defective in terms of faulty breaks. He stated that they were both in a motorcade. He stated that the deceased had a shirt and he wore a reflector jacket but he had no helmet on. He stated that he could not recall clearly what transpired since he lost consciousness. He stated that there was a flow of motor vehicle from Machakos town towards Makutano general direction. He stated that he saw that the Defendants' medical report records three injuries only but the Plaintiff's medical report records 4 injuries. He stated that nobody was blamed in the police abstract.

16. In cross-examination, PW2 stated that he was knocked from behind. He stated that his collar bone was fractured and he cannot lift heavy things. He stated that he had one week to complete driving school.

17. In his written Submissions dated 3rd May 2024 and filed on even date, learned Counsel Mr. Mulyungi instructed by the Firm of Messieurs Mulyungi & Mulyungi Advocates, representing the Plaintiff, has summarized the testimonies of both the Plaintiff's and the Defendants' witnesses and reaches a conclusion that the Plaintiff has proved his case on a balance of probabilities and this Court is urged to hold the Defendants 100% liable.

18. Regarding quantum of general damages for pain, suffering and loss of amenities, this Court is urged to award the Plaintiff Kshs. 1,000,000, placing reliance in Judy Ngochi vs. Kamakia Ele Selelo Ledamoi [2019] eKLR; and Joseph Njeru Luke & 2 others vs. Stella Muli Kioko [2020] eKLR.

19. Regarding special damages, it is urged that the Plaintiff pleaded and proved that he incurred Kshs. 34,534.08.

20. Finally, this Court is urged to award costs and interest.

PART III: The Defendant's Case

21. In their joint Statement of Defence dated 1st February 2023 and filed on 3rd February 2023, except ownership of motor vehicle registration number KBM 001P which was admitted and the fact that the accident occurred, the Defendants denied negligence and put the Plaintiff to strict proof thereof.

22. In particular, the Defendants denied that motor vehicle registration number KBM 001P knocked the motor cycle down. The Defendants aver that the said motor cycle overtook the motor vehicle at a high speed and collided with a motor vehicle which was ahead and the Plaintiff plus his pillion sprawled on

the road to the right hand side. It is averred that in the endeavour to avoid running over the rider and the pillion, the 2nd Defendant quickly swerved to the extreme right and finally stopped on the right hand side off the road.

23. It is averred that the motor vehicle with which the motor cycle collided disappeared from the scene and the Plaintiff and his passenger were rushed to hospital. It is averred that the Defendants immediately after proceeded to the rally and upon dropping the 1st Defendant, the 2nd Defendant went and reported to the police who visited the scene in company of the 2nd Defendant.

24. The Defendants thus rely on contributory negligence on basis of the following: failing, neglecting, refusing and/or ignoring to exercise due care and precautionary measures on the road; and riding a motorcycle at a high speed in the circumstances and overtaking without due care to other to other road users.

25. At the hearing of the Defendants case, the 2nd Defendant was the only defence witness. He adopted his witness statement dated 29th June 2023 and filed on 16th July 2023 as his evidence-in-chief. In the said statement, the 2nd Defendant rehashed the substance of the defence afore-stated.

26. In bolstering the Defendants' case, the 2nd Defendant exhibited the following documents: (i) a copy of the 2nd Defendant's driving licence as the Defendants' Exhibit 2; (ii) a police abstract as the Defendants' Exhibit 3; and (iii) a claim form as the Defendants' Exhibit 4.

27. In cross-examination of the 2nd Defendant, he stated he has 24 years of driving experience. He admitted that he was the 1st Defendant's driver at the material time and that the motor vehicle is owned by the 1st Defendant. He stated that there was another witness in the motor vehicle, one Corporal Wandia, but she is not a witness in the matter. He stated that the 1st Defendant too is not a witness in this case since she did not record a witness statement. He stated that he was driving between 80-100 km/h before turning into Makutano where he started driving at around 40-50 km/h/. He stated that at Mlolongo, a lorry was reversing and hit the front of motor vehicle registration number KMB 001P on the front and the left headlight was damaged. He stated that it is a traffic offence not to stop and report an accident. He stated that the rally was to begin at around 2.30 pm. He stated that the minimum separation distance should be about 10 metres. He stated that the motor cycle collided with another motor vehicle which was ahead of him and threw it to the right hand side and he endeavoured to avoid running over them by swerving to the right hand side. He stated that he first dropped the 1st Defendant at the rally and proceeded to report the accident thereafter. He stated that he could not tell who took the victims to hospital. He stated that motor vehicle registration number KBM 001P did not knock the motor cycle down. He stated that he was not able to see the registration plate number of the motor vehicle which knocked the motor cycle down.

28. In re-examination of the 2nd Defendant, he stated that he was driving at around 40-50 km/h at the material time. He stated that the motor vehicle was hit on the front at Mlolongo by a reversing lorry.

29. In her written Submissions dated 21st May 2024 and filed on even date, learned Counsel Ms. Kaunda instructed by the Firm of Messieurs Mohammed Muigai LLP, Advocates representing the Defendants, submits that regarding liability, the Plaintiff failed to discharge his onus under section 107 (1) of the *Evidence Act* by proving that the motor cycle was hit by the 1st Defendant's motor vehicle, placing reliance in EWO (Suing as the next friend of a minor COW) vs. Chairman Board of Governors Agoro Yombe Secondary School [2018] eKLR.

30. Further, it is contended that in negligence, causation is important and it must be established in evidence. In this regard, reliance is placed upon *Riara Group of Schools Limited vs. Africa Geothermal*

International (Kenya) Ltd (Civil Appeal E482 of 2021) [2023] KEHC 26525 (KLR) (Civ) (8 December 2023) (Judgment).

31. Additionally, it is submitted that negligence must be established in evidence, citing Abbay Abubakar Haji Patuma Ali Abdalla vs. Freight Agencies Ltd [1984] eKLR which cited Lakhamshi vs. Attorney General [1971] EA 118.

32. In addition, it is urged that mere assertion by PW1 that the 2nd Defendant was blamed is not conclusive evidence of negligence, citing the holding in Nicholus King'oo Kithuka vs. Jap Quality Motors & another [2022] eKLR. It is thus submitted that this Court is not bound by the opinion of PW1 and it should instead independently evaluate the evidence and reach an independent conclusion on whether the accident can be attributed to the Defendants.

33. Finally, it is submitted that vehicles normally driven cannot run into each other without cause and in this case, the cause was the unidentified motor vehicle which hit the motor cycle and disappeared from the scene, relying on the Court of appeal holding in Joyce Mumbi Mugi vs. The Co-operative Bank of Kenya Limited & 2 others [2021] eKLR.

34. Regarding the question whether the Plaintiff suffered injuries, loss and damage, it is urged that applying common sense as espoused in Michael Hubert Koss & another vs. David Seroney & 5 others [2009] eKLR, loss of consciousness asserted by the Plaintiff does not match with the magnitude of damages recorded in the motor vehicle inspection report. In this context, this Court is urged to invoke the maxim ex turpi non causa oritur actio (a person cannot benefit from his own illegality).

35. This Court is thus urged to dismiss the suit with costs.

36. Without prejudice to the foregoing, regarding the question of quantum of general damages for pain, suffering and loss of amenities, it is submitted that the Plaintiff should be found to have contributed to the accident by 70%, relying on East Africa Limited vs. Dominic Mutua Ngozi [2021] eKLR.

37. The Defendants propose an award of Kshs. 200,000 in general damages for pain, suffering and loss of amenities, staking reliance in Daniel Gatana Ndungu & another vs. Harrison Angore Katana [2020] eKLR; and John Wambua vs. Mathew Makau Mwololo & another [2020] eKLR.

PART IV: Questions For Determination

38. The questions whether an accident involving motor vehicle registration number KBM 001P and motor cycle registration number KMFU 105F occurred on 29th January 2022 and whether the Plaintiff was injured, were not contested in evidence. They were admitted. That leaves a slimmer list of questions for determination.

39. Gleaning from the Plaint, Statement of Defence, Reply to the Statement of Defence, and the rival written Submissions, this Court has distilled six questions for determination as follows:

    i. Whether the driver of motor vehicle registration number KBM 001P was negligent.

    ii. The degree of blameworthiness (liability) between the Plaintiff and the 2nd Defendant.

    iii. Whether the Plaintiff has established that the Defendants were the owners of the said motor vehicle at the material time and if yes, whether the Defendants are vicariously liable for the accident caused by the driver thereof.

    iv. Whether the Plaintiff is entitled to general damages for pain and suffering and if yes, the quantum thereof.

v. Evaluation of the evidence adduced in support of special damages and the quantum thereof.

vi. Which party shoulder the costs of this suit?

PART V: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination

40. This Court now embarks on analysis, interrogation, assessment and evaluation of each of the six questions, in turn.

(i) Whether the driver of motor vehicle registration number KBM 001P was negligent

41. The Civil Procedure Rules (hereinafter "the CPR") prescribe a mandatory requirement that not only should a Plaintiff plead, but also to outline the particulars of negligence. See Order 2, rule 10 of the CPR.

42. This watershed principle was established in common law and most notably, by Lord MacMillan, in the cause celebre decision in Donoghue vs. Stevenson [1932] AC 532, who enunciated that "Negligence must be both averred and proved."

43. What amounts to a tort? And what amounts to a tort of negligence? How is negligence assessed? Was the driver negligent? These are pertinent questions I will answer under this segment.

44. An act or omission (not being merely the breach of a duty arising out of a personal relation or undertaken by contract) which is related to harm suffered by a determinate person in one of the following ways:[2] (a) an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of; (b) an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the persons acting or omitting; (c) an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented; and (d) not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent. This dispute is founded on the tort of negligence (as more particularly described under paragraph (c) supra).

45. What then amounts to negligence? This tort has no received a definition in any statute. By dint of section 3(1) (c) of the *Judicature Act*, a Court is empowered to invoke principles of common law as construed and expounded in decisional law.

46. My reading of decisional law around this tort reveals that Courts have avoided a rigid and a supposed exhaustive formulation thereof, largely because acts of negligence are infinitely and interminably variable.

47. In this framework, there is no universally accepted definition of negligence. It follows that the catalogue of acts which constitute negligence has never closed since the days of Lord Macmillan, Lord Atkin, Lord Esher Lord Justice A.L. Smith to name but a few forerunners who entered the terra incognita area of the tort of negligence and laid down the general principles of negligence we now apply.

48. At this stage, it is instructive to observe that upon conducting an anatomy of the law of negligence at the material time in England and Scotland, with special attention to decisions rendered over time on this particular tort, in the case which is now often cited as the tabula in naufragio (a plank in a shipwreck) in negligence claims namely Donoghue vs. Stevenson [1932] AC 532 (hereinafter "the Donoghue case"), Lord Macmillan came to a conclusion that categories of negligence will never close. Proceeding

[2] Sir Fredrick Pollock, The Law of Torts: A treatise on Principles of Obligations Arising from Civil Wrongs in Common Law (4th ed.) (1895), pages 20-21.

on this footing, Lord Macmillan offered broad principles of general application in negligence claims. In his words, His Lordship rendered himself thus: "The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What then are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human errancy and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of Judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view is in determining what circumstances will establish such a relationship between the parties as to give rise on the one side to a duty to take care and on the other side to a right to have care taken to descend from these generalities to the circumstances of the present case I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that if the Appellant establishes her allegations the Respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter may reasonably be characterized as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the Respondent to be careless in (his process of manufacture. The question is, does he owe a duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities and that relationship which he assumes and desires for this own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the Respondent, when he manufactured his ginger beer, had directly in contemplation that it would be consumed by members of the public; can it be said that he could not be expected as a reasonable man to foresee that if lie conducted (his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as 'he did not know that any poison bad got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said through carelessness and thus excluded the case of a pure accident such as may happen where every care is taken."

49. In the Donoghue case, and in complementing Lord Macmillan, Lord Atkin offered broad general principles to apply in determining whether or not an act or omission amounts to negligence. His Lordship ingeniously deployed the Biblical command "love thy neighbour as you love thyself" to present a thesis that the duty of care springs from the natural course of things that while doing or omitting to do an act, as a person of ordinary sense (now commonly known in legal parlance as a reasonable person), the person must foresee a person who may directly suffer injury from the actions or omissions and that person foreseen, is the neighbour who is the owed this duty of care in the context of this Biblical precept. In his rendition which has reverberated since, his Lordship expressed himself thus: "At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes a law you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

50. The reasoning of Lord Atkin was built on the earlier decision of the House of Lords in Heaven vs. Pender 11 QBD 503, in which Lord Esher limited the duty of care to those when acting or omitting are proximate and will thus suffer injury, which doctrine was adopted by A. L. Smith L.J. in Le Lievre vs. Gould [1893] 1 Q.B. 497. Lord Esher (at page 497) where his Lordship stated "That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property."

51. A. L. Smith L.J. in turn, also developed the general the general principles further on the foundation of the decision in Heaven vs. Pender in Lievre vs. Gould [1893] 1 Q.B. 497 in which he reasoned that "The decision of Heaven v. Pender was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that if due care was not taken damage might be done by the one to the other."

52. Is negligence actionable per se? In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434 (hereinafter "the Masembe case"), it was held that "Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the Court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of; and where the damage was caused by the negligent acts of different persons, to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or among them accordingly...There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

53. The law on negligence, as I discern it, is that negligence it is not actionable per se. The general picture of actionable negligence is that it is the act or omission which is foreseeable, by ordinary sense or a reasonable person, that it can cause damage and which results into actionable damage, in situations

where the careless party owes the victim a duty of care but fails to exercise care and skill in the eyes of a bystander reasonable person.

54. In addition to the general principles applicable to a claim of negligence discussed herein above in the Donoghue case, I have deemed it necessary to sample further principles. In the English case of Blyth vs. Birmingham Waterworks Company [1856]11 Ex Ch 781, negligence was defined by Sir Edward Hall Alderson to mean "...the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The Defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."

55. Since negligence is not actionable per se, a claimant must demonstrate that the act caused damage and that the Defendant did not contribute to the damage or if the Defendant contributed, the degree of contribution should be assessed. See the Masembe case.

56. It follows that a mere occurrence of an accident is not - ipso facto - evidence of negligence. It can as well be an error of Judgment. Errors of Judgment do not amount to careless driving. In Simpson vs. Peat (1952) 1 ALL ER 447 it was held that errors of Judgement do not amount to careless driving and that the mere fact that an accident occurs does not follow that a particular person has driven dangerously or without care and attention. This position was deployed in Rambhai Shivabhai Patel & Another vs. Brigadier-General Arthur Corrie Lewin [1943] 10 EACA 36 where it was held that the mere occurrence of an accident is not in itself evidence of negligence and that there must be reasonable evidence of negligence.

57. In the above connection, some general principles have been laid down to govern this area of law. I desire to discuss the key ones.

58. First, not even an abstract of the police records is - in and by itself - sufficient prove of negligence. It is only sufficient prove that a report of an accident was made. A Plaintiff must therefore adduce evidence to explain how the accident occurred and in particular prove negligence on the part of the Defendant or Defendant's driver. In David Mwangi Kariuki & another vs. Stephen Mwangi & another [2017] eKLR, it was held that "Admittedly such document (an Abstract of Records from of the Police) proved the occurrence of the accident by giving the salient details of the accident. It does not by any means prove how the accident occurred. It was upon the Respondent to call and tender credible evidence on how the accident occurred, and to prove negligence on the driver's part."

59. Second, is the principle of reasonable anticipation which posits that a man who drives a motor vehicle is bound to anticipate any eventuality like things, people, animals on his way and thus drive a speed which may afford avoidance of an accident. See Tart vs. Chitty and co (1931) ALL ER, pages 828 – 829, where Rowlat, J., laid the following guiding principle in determining negligence of drivers: "It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be in things and people and animals in the way at any moment and he is bound to go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it." Similarly, in Masembe case (supra), the Court restated the holding in Tart in East Africa and went on to lay the following guiding principle in determining negligence of drivers: "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it...A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object...Whereas a driver is not

to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently...There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."

60. Third, speed by and in itself cannot be used to infer negligence in absence of circumstances. It follows that a speed of even 30 km/h is certain circumstances which cannot permit such a speed, is too high a speed. See Karisa and Another vs. Solanki and Another [1969] EA 318, the following general principles of negligence of drivers were laid down: "The car driver, driving at a speed of about 65 mph which was not in itself negligent, when he saw the oncoming bus, whose presence on the road reduced the area available to take evasive action should any emergency occur and whose lights to some extent impaired the area of vision provided by its own lights, only reduced his speed to about 60 mph. This action was one which a reasonably careful driver, and the duty which the car driver owed to the Plaintiff was that of being a reasonably careful driver, would not have taken, as the speed in those circumstances enormously increased the potential danger of an accident. While, therefore, a speed of 60 mph is not negligence, it is that speed in the particular circumstances which constitutes negligence; and the Judge was wrong in considering the question of speed separate from the other circumstances of the case...We are not satisfied that the car driver could not and should not as a reasonably careful driver, keeping a particular keen look-out, have seen the lorry in time to have swung to the left on the verge, no matter how uncertain his knowledge of the precise terrain there, rather than run straight into the stationary lorry... Looking at the facts of the case as a whole, the Judge tended to consider the two main circumstances of speed and a proper look-out separately and not part of a comprehensive whole, and it was this failure to look at the facts as a whole which led him into the manifest error of coming to the conclusion that there was no negligence on the part of the car driver. He was clearly wrong in failing to find negligence on the part of the car driver. Consequently, the car driver found to have contributed to the accident to the extent of 20 per cent."

61. Fourth but closely connected to the third, a driver is under a common law duty of care towards not only other road users but also passengers. In PNM & another (the legal personal Representative of estate of LMM vs. Telkom Kenya Limited & 2 others [2015] eKLR, it was held that the driver was under a common law duty and obligation to exercise a high degree of care towards other road users and passengers and that had he exercised such care and caution, the accident would have been avoided. In the English case of Bourhill vs. Young [1943] AC 92, the House of Lords held as follows on the duty of care imposed on the drivers of motor vehicles: "No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway but, it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be the injured by the omission to take such care." In the case of Lochgelly Iron Court Co. Ltd vs. Mcmillan 1934 AC, Lord Wright held as follows: "In strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission. It properly involves the complex concept of guilty, breach and damage thereby suffered by the person to whom the duty was owing."

62. What then are the elements which constitute negligence? Negligence is that act or omission which is foreseeable, by ordinary sense or a reasonable person, that it can cause damage and which results into actionable damage, in situations where the careless party owes the victim a duty of care but fails to exercise care and skill in the eyes of a bystander reasonable person. A reasonable man/person in this thesis, as applied in the Donoghue case by Lord Macmillan or a person of ordinary sense as applied in the Donoghue case by Lord Atkin can be understood as follows.

63. In the seminal works of JC Van Derwalt & JR Midgrey, on Principles of Derelict, 3rd Edition, at page 121, the learned authors describe a reasonable person and reasonableness deploying the following attributes: "The criterion of the reasonable person is the embodiment of an external and objective standard of care. The qualities, experience, idiosyncrasies and Judgment of the particular actor are in principle not relevant in determining the qualities of the reasonable person. The law requires adherence to a generally uniform and objective degree of care. The reasonable person is the legal personification of the ideal standard to which everyone is required to confirm such a person represents an embodiment of all the qualities which are require of a good citizen. ...The concept denotes a person exercising those qualities which society require of its members for the protection of their interests. The reasonable person is therefore the legal personification of the ideal standards of care which the community desires its members to exercise in their daily actions and contact...The particular attributes or qualities of this mystical figure have an important bearing upon whether harm was foreseeable and whether or not steps have been taken to prevent harm."

64. And locally, a reasonable man has been described by C.B. Madan, CJ and D.K.S. Aganyanya and J.E. Gicheru, JJ in Stanley Munga Githunguri vs. Republic [1986] eKLR, in the following words: "Mr Chunga asked us to read the statements in the National Assembly in the context of the debate, and to say that no assurance was ever given that the Applicant would not be prosecuted. In our view both statements, made publicly in no less a forum than the National Assembly, constituted a positive assurance that the Applicant would not be prosecuted. That is the conclusion to which the reasonable man in the market hearing those utterances would have come to. That being so the reasonable man in the market would also believe that the Attorney-General's word would be honoured. The reasonable man is the man in the market, the man on the Pangani bus or a housewife."

65. Using different words to achieve the same depiction as painted by C.B. Madan, CJ and D.K.S. Aganyanya and J.E. Gicheru, JJ, Kuloba J. (as he then was) in J Kudwoli & Another vs. Rureka Educational and Training Consultants & 2 Others [1993] eKLR depicts a reasonable man to mean "...a mythical being described in a number of judicial and literary metaphors, like "the man in the street", or "the man who takes the magazine at home and in the evening pushes the lawn mower in his shirt sleeves", a reasonable man is really a cool, level-headed and collected man who acts and reacts in appropriate perspective. He is not a reasonable man he who is so lax or so cynical that he would think none the worse of a person whatever was imputed to him. He is not a reasonable man he who is so censorious as to regard even trivial accusations as lowering another's reputation. He is not one who is so hasty as to infer the worst meaning from any ambiguity. He is not unusually suspicious or unusually naive. He does not always interpret the meaning of words as a lawyer for he is not inhibited by a knowledge of the rules of construction..."

66. And what does it take to prove negligence? In order to succeed in a negligence claim, the Plaintiff must establish four elements namely duty, breach of duty, legal damage and causation. The Plaintiff must demonstrate that: (a) the Defendant owed a duty to others and in particular, the claimant to exercise reasonable care (duty); (b) the Defendant has breached the duty of care through an action or omission (breach of duty); (c) as a result, the Plaintiff has suffered legal damage/legal injury (damage); and (d) the action or omission of the Defendant was the immediate cause of the legal damage (proximate cause/ causation). See M (A Minor) vs. Amullenga & Another [2001] KLR, where the Court held that "In order to succeed in an action for negligence the Plaintiff must prove: (a) That the Defendant owes the Plaintiff a legal duty. (b) That the Defendant was in breach of that duty. (c) That as a result of the breach of that duty the Plaintiff suffered damage."

67. In Clerk and Lindsell on Torts 18th Edition, p. 600, paragraph *4*, the legal scholarly works outlines the essentials on an action for breach of statutory duty as follows: "(1) The claimant must show that the

damage he suffered falls within the ambit of the statute mainly that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss could not have occurred if the Defendant had complied with the terms of the statute. (2) It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability. (3) As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused would have occurred in any event. (4) Finally there is the question whether there are any Defences available to the action."

68. While endeavouring to lay down a general conception of relationships, outside contractual or statutory relationships, in which then a duty of care as applied in the definition of negligence should be presumed, Lord Atkin in Donoghue vs. Stevenson [1932] AC 532, deployed the biblical ordinance of a good neighbour "love thy neighbour as thyself" to argue that the duty of care springs from the reasoning that while doing or omitting to do an act, you must foresee a person who may directly suffer injury from your actions or omissions and that is the neighbour you should care about. His Lordship reasons as follows: "At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes a law you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

69. The reasoning of Lord Atkin was built on the earlier decision of the House of Lords in Heaven vs. Pender 11 QBD 503, in which Lord Esher limited the duty of care to those when acting or omitting are proximate and will thus suffer injury, which doctrine was adopted by A. L. Smith L.J. in Le Lievre vs. Gould [1893] 1 Q.B. 497. Lord Esher (at page 497) reasoned "That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property." A. L. Smith L.J. in Lievre v. Gould [1893] 1 Q.B. 497 says: - "The decision of Heaven v. Pender was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that if due care was not taken damage might be done by the one to the other."

70. In Wilson Clyde Coal Co. Ltd vs. English [1937] 3 All E.R 68, the doctrine of duty of care is condensed as follows: (a) Is there a relationship of proximity between the parties; (b) Was the injury to the claimant foreseeable; and (c) Is it fair, just and reasonable to impose a duty.

71. In Caparo Industries PLC vs. Dickman [1990] UKHL 2, seemingly following in the footsteps of Wilson Clyde case, a three-fold test of a duty of care was lad as follows: (a) Reasonably foreseeable; (b) There must be a relationship of proximity between the Plaintiff and the Defendant; and (c) It must be fair, just and reasonable to impose liability.

72. In the instant case, the duty of care be said to be founded on neighbour principle as established by Lord Atkin or statutory. The relevant Act in this case is the *Traffic Act* and statutory instruments thereunder including but not limited to the Highway Code. Section 47(1) of the *Traffic Act* provides that if any person who drives a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably have expected to be on the road is guilty of an offence. Section 49 (1) of *Traffic Act* provides that any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence. The text of section 47(1) of the *Traffic Act* reads as follows: "47. Reckless driving (1) Any person who drives a motor vehicle on a road recklessly, or at speed, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably have expected to be on the road, is guilty of an offence...." And the text of section 49 (1) of the *Traffic Act* reads as follows: "49. Driving without due care and attention (1) Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence..."

73. From the text of sections 47(1) and 49(1) of the *Traffic Act*, motorists owe other road users and their passengers a duty of care. These provisions of the law place a specific duty of care on both the drivers and pedestrians to avoid occurrence of an accident or endangering other road users.

74. In addition, the legal place and worth of the Highway Code is enacted in section 68(3) of the *Traffic Act*. The text of this section reads: "(3) A failure on the part of any person to observe any the provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

75. The fulcrum upon which this suit will turn, is whether the driver of motor vehicle registration number KBM 001P knocked the motor cycle registration number KMFU 105F from behind, without reasonable cause or justification. In other words, was the driver of motor vehicle registration number KBM 001P exclusively negligent?

76. Certainly, it will be a fundamental flaw to hold that once a motorist is hit from behind, the other party is automatically negligent. Negligence cannot be inferred from such assertions alone, in vacuo, unaccompanied by an accurate account of the circumstances under which the motorist was hit from behind.

77. In this context, it thus becomes necessary to venture into a deep interrogation of the evidence around this issue. The Plaintiff asserted that the motor cycle was hit from behind without reasonable cause or justification. On the other hand, the 1st Defendant denied that motor vehicle registration number KBM 001P knocked the motor cycle down and instead asserted that the said motor cycle overtook the said motor vehicle at a high speed and collided with a certain motor vehicle which was immediately ahead of the said motor vehicle - whose details the driver of the said motor vehicle did not manage to read – sending the Plaintiff plus his pillion sprawled on the road to the right hand side and that the driver of the said motor vehicle endeavoured to avoid running over the rider and the pillion by quickly swerving to the extreme right, finally resting on the extreme right hand side, off the road.

78. However, considering findings recorded in the motor vehicle inspection report (the defence Exhibit 1) which reveals that minor scratches were noted on the front bumper, the front wing dented and the nearside headlamp smashed and taking into account the fact that the alleged accident in Mlolongo

invoving the said motor vehicle and allged lorry, was not sufficiently established in evidence, the damages are consistent with a collision with the motor cycle. In relation to the Mlolongo accident theory advanced by 2nd Defendant, if at all it occurred, then the driver deserted his duty of reporting to the police, conferred on his shoulder by dint of section 73(1) the *Traffic Act* and Guideline 171 of the Highway Code. The report would have offered the Defendants the corroborative evidence most needed here and but the Defendants stripped themselves of corroborative evidence.

79. This Court thus reaches a firm conclusion that there was a collision between the said motor vehicle and the said motor cycle.

80. The fact that the motor cycle overtook the motor vehicle at a high speed when it was not safe to do so, was not displaced in cross-examination.

81. The Plaintiff having admitted in cross-examination that there was a flow of oncoming traffic, it was with wanton abandon of the *Traffic Act*, specifically Rule 73 of the Traffic Rules read with Guideline 52 of the Highway Code, overtaking in the said circumstances was not safe since it translates that the Plaintiff was riding side-by-side with traffic heading to Machakos general direction and which further translates that the rider hindered the use of the right lane and that the rider was riding too close to the motor vehicles which he was overtaking in a manner that was incontestably reckless. This conduct is prohibited by Guideline 52 of the Highway Code which provides as follows: "Overtake only when it is safe and legal to do so. Do not get too close to the vehicle you intend to overtake. Use your mirrors, signal when it is safe to do so, take a quick sideways. Glance if necessary into the blind spot area and then start to move out. Do not follow a vehicle ahead which is overtaking. When overtaking, move quickly past the vehicle you are overtaking. Allow plenty of room. Move back to the left as soon as you can but do not cut in. Give way to oncoming vehicles before passing parked vehicles or other obstructions on your side of the road...Stay in your lane if traffic is moving slowly in queues..."

82. It seems to me that the euphoria which is usually witnessed during political campaigns ruled the heat and mind of the rider. The conduct of the rider led to contact with the motor vehicle which was ahead of the said motor vehicle, sprawling them on the hard tarmac on the right hand side which then exposed the Plaintiff to be hit by the driver of motor vehicle registration number KBM 001P. This conduct of the Plaintiff was by all standards reckless in the manner and threshold contemplated by sections 46 and 47 of the *Traffic Act*.

83. Similarly, invoking section 119 of the *Evidence Act*, the driver of motor vehicle registration number KBM 001P is blameworthy. It can be discerned from the manner the accident occurred that the said driver failed to keep a safe distance in contravention of the *Traffic Act* and the Highway Code. In this regard, Guideline 50 of the Highway Code provides that "Once moving you should...not drive nose to tail (bumper to bumper); leave enough space between you and the vehicle in front so that you can pull up safely. Keep distance and a sharp look-out for the vehicle's brake light, anyhand, mechanical or light signals the driver may make to indicate his intention to slow down, stop or turn would allow you plenty of time to act." The precise distance which is deemed safe is not defined by legislation since different circumstances call for a different separation distance. The test of a safe driving distance is that which the driver can offer the driver sufficient time to take note of the incident ahead, slow down, pull up or even swerve safely.

84. It follows that the evidence on record points to the direction that both the said driver and the said rider had their share of contribution to the accident. What remains to determine is the precise respective share. Appallingly, in this regard, sufficient evidence did not generate to enable this Court determine the precise degree of blameworthiness. It was word of the Plaintiff against word of the 2nd Defendant, and nothing more. Not even a simple sketch of the subject lane or photographs taken by an appointed

Scene of Crime Officer. It has now been settled in Kennedy Nyangoya vs. Bash Hauliers [2016] eKLR; Nicholus King'oo Kithuka vs. Jap Quality Motors & another [2022] eKLR, et alia, that a recording in the police abstract or a mere assertion by a police officer that the driver was to blame is not conclusive evidence of that fact, ultimately, neither the Plaintiff nor the Defendants successfully generated persuasion in the mind of this Court that the other was exclusively to blame.

85. How is this evidential impasse resolved? It has been enunciated that such a deadlock should not thwart a Court from rendering justice for it does not permit a Court of law to throw its arms in air in resignation to frustration. Particularly, in Lakhamshi vs. Attorney-General [1971] 1 EA 118 (hereinafter "the Lakhamshi case"), it is instructive to underline that before rendering himself as much, Spry V-P appreciated the legal quandary Simpson J. faced and the situations many of us encounter sometimes and rendered himself as follows on the duty of the Court when faced with such a dilemma: "I accept that a Judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them." Also, speaking to the role of Judges in his Dissent in the case of Ferdinand Ndung'u Waititu vs. Independent Electoral & Boundaries Commission (IEBC) & 8 Others [2014] eKLR, Warsame J.A., states thus: "Now, as Judges, we are deeply honoured and privileged to determine the opposite and contrasting positions of these heavy weights. Our task is simple, and our duty is clear. Follow the path of the truth and that is through evidence and the law. The Judges' job is to scrutinize the law for evidence. The Court must subject the evidence of the parties to the most rigid scrutiny, analysis and re-evaluation, to ascertain whether or not the case is based on mere allegations. Parties demand, and we are obliged, to undertake strict judicial scrutiny in order to uncover the truth of the dispute...The real challenge is finding the right facts to marry with the law. Getting it right is what I intend to do in this dissenting Judgment..." Echoing the voices of Spry V-P and Warsame, JA, in Abbay Abubakar Haji vs. Marain Agencies Company & Another [1984] 4 KCA 53, in which all parties to a motor vehicle accident were killed, leaving no witnesses, the Court of Appeal of Kenya had this to say: "It is the clear duty of the Court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible, although that duty does not extend to supplying a theory as to what happens when the inferences from the primary facts do not inevitably point that way."

86. And so, in instances where the Court is persuaded that a collision occurred and the evidence available presents difficulties in deciding who to blame between the two, a watershed rule was established in common law that a Court should not lose sight of the fact that accidents do not just happen but rather caused and the participating parties should be then held equally liable. In Baker vs. Market Harborough Industrial Co-operative Society Ltd. [1953] 1 W.L.R. 1472, a collision of two motor vehicles which were moving in the opposite direction occurred at the centre of the road. In the original trial, the court held that the Plaintiff had failed to discharge her duty of proving negligence of the Defendant on a balance of probabilities. Lord Denning laid the following (now famously known as the rule in Baker): "It is pertinent to ask, what would have been the position if there had been a passenger in the back of one of the vehicles who was injured in the collision? He could have brought an action against both vehicles. On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers

were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger any compensation? The practice of the court is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them ... In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame. Once both are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each."

87. The rule in Baker was adopted in Kenya in Welch vs. Standard Bank Limited [1970] EA 115, a collision of two motor vehicles which were moving in the opposite direction occurred at the centre of the road and both drivers were killed leaving not eye witness. Madan, J., (as he then was) laid the following watershed rule: "When there is no material to generate actual persuasion in the Court's mind, still the Court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The Court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Everyday, proof of collision is held to be sufficient to call on the two Defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the Court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame...Justice must not be denied because the proceedings before the Court fail to conform to conventional rules provided, in its Judgement, the Court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the Court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion...There being nothing to enable the Court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The Court does hold so in this case." Similarly, in Haji vs. Freight Agencies Ltd [1984] KLR 139, it was held that "Where it is proved by evidence that both parties are to blame and there is no means of making a reasonable distribution between them, the blame can be apportioned equally on each...however, in the absence of clear evidence of contribution to the accident, the justice of the case would have been met by apportioning blame equally."

88. The rule in Baker was adopted in East Africa in Lakhamshi vs. Attorney-General [1971] 1 EA 118, where there was a collision of two motor vehicles but it was difficult to establish who between the two drivers was to blame and the High Court (Simpson, J.) found that the Plaintiff had failed to discharge his burden of proving negligence on the part of the Defendant and dismissed the claim. On appeal to the Court of East Africa and in his lead Judgment which apportioned liability at 50:50, Lutta JA adopted the rule in Baker in East Africa (with Spry V-P & Mustafa JJA concurring) as follows: "It seems to me that the drivers saw each other's vehicles in sufficient time to avoid the accident by keeping a proper look out, and driving their vehicles on the correct side of the road in order to avoid the collision. An inference that they both failed to give way to the other is irresistible. Each driver could have pulled on to his near-side of the road or stopped to allow the other to pass through the smoke before driving through it; neither did so. No avoiding action was taken by either of the drivers. In the circumstances both the drivers are to blame..."

89. The same Baker rule was deployed by the Court of Appeal in Farah vs. Lento Agencies [2006] 1 KLR 123 (also reported as Hussein Omar Farah vs. lento agencies [2006] eKLR), where Omolo, Tunoi and Githinji, JJA (as they then were) rendered themselves as follows: "In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. Everyday, proof of collision is held to be sufficient to call the Defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court would unhesitantly hold that both are to blame. They would not escape liability simply because the Court had nothing by which to draw any distinction between them... The trial Court...had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

90. And so was the case in Anne Ndoti Mwololo & Another vs. Telkom Kenya Limited & 2 Others Mombasa HCCS NO. 89 of 2005, where the Court held that "Since the deceased was a passenger, it is obvious that he had no role to play in driving of the motor vehicles which were involved in the accident. Therefore the principle of res ipsa loquitor applies in this case. As for apportionment of liability between the drivers of the two motor vehicles involved in the accident, there is no clear evidence as to how the accident occurred. What is certain is that two motor vehicles collided and as a result the deceased suffered fatal injuries. The police abstract form did not put blame on any of the drivers and the law is clear that the onus of establishing contributory negligence lies on the Defendant. Unfortunately none of the Defendants discharged that burden evidentially. From the circumstances of this case a fair order is to apportion liability equally between the 2nd and the 3rd Defendants."

91. See also James Wangugi Kigo vs. Waithaka Kahara Nairobi HCCC No. 598 of 1991; *Alfarus Muli vs. Lucy M Lavuta & Another Civil Appeal No. 47 of 1997*; Shadrack Kilonzo Kavoi vs. Gacheru Peter & 3 others [2020] eKLR; Haji vs. Freight Agencies Ltd [1984] KLR 139; Bernard Bosire Ondieki (Suing as administrator of Estate of Deborah Bochere Ondieki {deceased}) vs. Daniel Munika Makan [2021] eKLR; and John Simon Ashers & Anther vs. Nelson Okello Onjao [2020] eKLR, where the rule in Baker was deployed.

92. Wherefore - on authority of the rule in Baker as adopted and deployed in Welch vs. Standard Bank Limited [1970] EA 115; Haji vs. Freight Agencies Ltd [1984] KLR 139; Lakhamshi vs. Attorney-General [1971] 1 EA 118; Anne Ndoti Mwololo & Another vs. Telkom Kenya Limited & 2 Others Mombasa HCCS NO. 89 of 2005; Farah vs. Lento Agencies [2006] 1 KLR 123 (also reported as Hussein Omar Farah vs. lento agencies [2006] eKLR); James Wangugi Kigo vs. Waithaka Kahara Nairobi HCCC No. 598 of 1991; *Alfarus Muli vs. Lucy M Lavuta & Another Civil Appeal No. 47 of 1997*; Shadrack Kilonzo Kavoi vs. Gacheru Peter & 3 others [2020] eKLR; Haji vs. Freight Agencies Ltd [1984] KLR 139; Bernard Bosire Ondieki (Suing as administrator of Estate of Deborah Bochere Ondieki {deceased}) vs. Daniel Munika Makan [2021] eKLR; and John Simon Ashers & Anther vs. Nelson Okello Onjao [2020] eKLR - this Court finds the driver of motor vehicle registration number KBM 001P (the 2nd Defendant herein) and the rider of motor cycle registration number KMFU 105F (the Plaintiff herein), equally negligent and accordingly equally blamed.

(ii) The degree of blameworthiness (liability) between the Plaintiff and the 2nd Defendant

93. As concluded herein above, the Plaintiff and the 2nd Defendant are equally blameworthy.

(iii) Whether the Plaintiff is entitled to general damages for pain and suffering and if yes, the quantum thereof

94. The rationale underpinning an award of damages for pain and suffering is to compensate the victim for enduring the physical and mental distress occasioned by the injuries before the trial and even after the trial. This includes but not limited to the ordinary pain that comes with the injuries, the pain that comes with treatment of the said injuries, the embarrassment arising from disability or disfigurement (if any) and the anxiety. In Halsbury's Laws of England, 4th Edition, Volume 12(1), page 348 at paragraph 883, the rationale is stated as follows: "883. Pain and suffering. Damages are awarded for the physical and mental distress caused to the Plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the Plaintiffs' condition may deteriorate." The general purpose of awarding damages is reparation. Put differently, the purpose of awarding damages is to put the party who has been injured in a position believed by law and Courts to be the position as he would have been if he had not sustained the wrong for which he is receiving compensation. One of the earliest English cases which developed the principle of restutitio in integrum is Livingstone vs. Rawyards Coal Co (1880) 5 App Cas 253. In this case, Lord Blackburn enunciated a principle to guide assessment of general damages as follows: "Compensation should be that sum of money which will put the party who has been injured in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."

95. What are the distinguishing characters between general damages and special damages? While special damages are the damages which are ascertainable and quantifiable as at the date of the legal action, general damages are neither ascertainable nor quantifiable as at the date of legal action. Drawing parallels between general and special damages, in the Court of Appeal decision in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177, Gicheru, Cockar and Muli, JJA (as they then were) described the special and general damages in the following words: "The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded." Similarly, in the High Court decision in Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another, Kericho HCCA No. 45 of 2003(UR), Kimaru, J. had occasion to draw parallels between special and general damages as follows: "In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary

loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the Plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages...General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages have become crystallised and concrete since the wrong the Defendant could be surprised at the trial by the detail of its amount."

96. What are the determinative dynamics and variables in assessing general damages? It has been observed that a Court will always be confronted with stark difficulties in assessing general damages because of the many incalculables involved. This observation was entered in Ugenya Bus Service vs. Gachiki (1976-1985) EA 575, at page 579, where the Court observed thus: "General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can." In Mohamed Juma vs. Kenya Glass Works Ltd, CA NO. 1 of 1986(unreported) cited by W. Musyoka, J. in Easy Coach Bus Services & another vs. Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased) [2019] eKLR, Madan, JA (as he then was) stated that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. His Lordship expressed himself as follows: "It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons." Also, in Bencivenga vs. Amino [1986] KLR 269, Abdullah, J. (as he then was) explained that "Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which the society deems fair, fairness being interpreted by the Court in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the Plaintiff including his age and any unusual deprivation he may suffer is reflected in the amount of the award...The award of damages must be fair, bearing in mind the previous decisions and moreover, each case has its own circumstances which may not be overlooked including the age of the Plaintiff and any unusual deprivation he may suffer. The basic principle so far as loss of earnings and out of pocket expenses are concerned is that the injured person should be placed in the same financial position, as far as can be done by an award of money, as he would have been had the accident not happened...In cases in which there are Kenyan decisions on the point, in which the main essentials bear a reasonable measure of similarity to it, Kenya decisions should be used to the exclusion of the others, save those from the

neighbouring jurisdiction with similar conditions to Kenya. Only when there are no local decisions on the point should resort be had to English and other authorities, and then only as helpful indicators... General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is very heavy task. When the Court is ponderingly struggling to seek a reasonable award, it does not aim at precision. It knows that it is placed in an inescapable situation for criticism by one party or other, sometimes by both sides. It does not therefore aim to give complete satisfaction but do the best it can. It knows that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs 20,000 for loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly. They are remembered but ignored. We have inflation with us and we have to live with the exorbitance, which the inflation has brought into our lives."

97. So that a Court is enabled to determine the appropriate quantum for pain and suffering, the whole picture and in particular, the effect of injuries on the victim must be painted. Where possible, comparable injuries should attract comparable general damages. In the Court of Appeal of East Africa decision in Bhogal vs. Burbidge [1975] EA 285, Law, Ag. P. (as he then was), laid down the key factors to guide a Court when assessing general damages. His Lordship said that "The general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at. That is so, but some degree of uniformity must be sought in the award of damages, and the best guide in this respect is, in my view, to have regard to recent awards in comparable cases in Courts...the Kshs 300,000 awarded by the trial Judge, a figure which, with respect, I consider to be based on wrong principle when measured against the wards in other comparable awards in recent local cases."

98. As far as circumstances can allow, comparable injuries should be compensated by comparable awards. In Tayab vs. Kinanu [1983] KLR 114, while adopting the holding by Lawton LJ in Burke vs. Woolly [1980] Kemp & Kemp Case 15-056 and 19-007, who in turn adopted the reasoning by Lord Morris in H. West and Son Ltd vs. Shephard [1964] AC 326 at 346, Hancox, JA expressed himself in regard to comparability of awards viz a viz injuries in the following words: "Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards."

99. Subsequent decisions in have never departed or derogated from this path. To name but a few, in Tayab vs. Kinanu [1983] KLR 114, while echoing the holding in H. West and Son Ltd vs. Shephard [1964] AC 326 AT 345, Potter, JA expressed the worth and shortcoming of award of money for injuries in the following words: "Money cannot renew a physical frame that has been battered and shattered. All that Judges and Courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional...Scarcely any sum could compensate a labouring man for loss of a limb, yet you do not in such case give him enough to maintain him for life... You are not to consider the value of existence as if you were bargaining with an annuity office...I advise you to take a reasonable view of the case and give what you consider fair compensation."

100. The Supreme Court of Uganda decision in Cuossens vs. Attorney-General [1999] 1 EA 40, Oder, Tsekooko, Karokora, Kanyeihamba and Mukasa-Kikonyogo JJSC held that "The general rule regarding measure of damages applicable both to contract and tort is that sum which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation...In cases of pecuniary loss, such as claimed in the present, it is easy enough to apply this rule in the case of earnings which have actually been lost, or expenses which have actually been lost, or expenses which have actually been

incurred up to the date of trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages and in this category falls income or earnings lost between the time of injury and the time of trial...But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of trial. It is therefore awarded as part of the general damages...An estimate of prospective loss must be based in the first instance, on a foundation of solid facts; otherwise it is not an estimate, but a guess. It is therefore, important that evidence should be given to the Court of as many solid facts as possible. One of the solid facts that must be proved to enable the Court assess prospective loss of earnings is the actual income which the Plaintiff was earning at the time of the injury...The method of assessment of loss of income or earnings applies equally to claims based on personal injury as well as to those for loss of dependency arising from fatal accidents... Sometimes it is impossible, though the justice of the case requires some award to be made or arithmetic has failed to provide the answer which common sense demands...A Plaintiffs' loss of earning capacity occurs where as a result of his injury his chances in the future of any work in the labour market or work as well paid as before the accident are lessened by his injury...It is a different head of damages from an actual loss of future earnings, which can readily be proved at the time of the trial. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence while compensation for diminution of earning capacity is awarded as part of the general damages...The question is what is the present value of the risk that at future date or time the Plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the Plaintiff had not worked before the accident) or in addition to another (where the Plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the Plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible but a Court can try to assess what earnings a Plaintiff may lose after the trial and for how long. There is no formula and the Judges must do the best they can...The assessment of damages is more like an exercise of discretion by the trial Judge and the appellate Court should be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable Court would or he has taken into consideration matters he ought not to have considered or not taken into account those matters he ought to have considered and in the result arrived at the wrong decision... Loss of earning capacity is a claim on its own and the figure need not be plucked from the air because the Plaintiff would be expected to furnish the material on which a reasonable figure could be based. The figure should be based on mathematical calculation using such relevant factors as the Respondent's age and qualifications and the nature of the injuries sustained."

101. Over time, decisional law is replete with decisions which have amplified the reasoning in the Livingstone case. There are now multiple subsets of principles drawing wisdom from the general principle and they command that in awarding damages, the full picture, the circumstances and the effect of injuries on the particular person concerned must be born in mind and that some degree of uniformity must be sought.

102. With particular focus on general damages, it is now necessary to set out the guiding principles laid in the case of Sofia Yusuf Kanyare vs. Ali Abdi Sabre & Another [2008] eKLR. In that case, R.N. Nambuye J. (as he then was) set out the guiding principles as follows: (a) An award of damages is a matter of discretion on the part of the Court, seized of the matter; (b) The award should not be too high or too low; (c) It is not meant to enrich the victim, but to try as much as possible to restore him/her in the positing in which they were in, before the accident; (d) Awards in past decisions are meant to be mere guides and each case should depend on its circumstances; and (e) Where awards in the past

decisions are to be taken into consideration, their age, and the rate of inflation as well as the value and the purchasing power of the Kenyan shilling should be taken into consideration.

103. In addition to the five guiding principles set out above on general damages, it is also appropriate at this stage to set out a sixth principle laid in the case of Joseph Musee Mua vs. Julius Mbogo Mugi & 3 others [2013] eKLR where the Court in concurring with the principle set out in the case of Osman Mohamed & Another vs. Saluro Bundit Mohammed, Civil Appeal No. 30 of 1997, where the Court stated that "Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees."

104. A view similar to that held in the Musee case was expressed in Kigaragari vs. Aya [1976-1985] EA 224, (which was heard and determined by Nyarangi and Hancox JJA, Platt Ag. JA [as they then were]), in which Nyarangi JA, expressed himself as follows which has now come to the benchmark: "Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance premiums and insurance fees."

105. In the Kigaragari case, Nyarangi, JA recommended development of a common law system in Kenya in consistent way, which system was over time developed and working hitherto. The recommendation went like this: "The Court of Appeal should develop the common law of Kenya in a consistent way as regards damages. Awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must rest heavily upon the Court. The largest Application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover. If the sums get too large we are in danger of injuring the body politic. As large sums are awarded so premiums for insurance rise higher and higher...It is of course desirable that so far as possible comparable injuries should be about or nearly equally compensated: However, the comparison should be confined to decisions of local Courts, other decisions e.g. overseas ones serving merely as a guide."

106. Assessment of damages is at the discretion of the trial Court. In the Court of Appeal decision in Catholic Diocese of Kisumu vs. Sophia Achieng Tete [2004] 2 KLR 55, Tunoi, O'Kubasu and Githinji, JJA (as they then were) rendered themselves as follows: "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."

107. Having concluded herein above that the Plaintiff sustained the injuries afore-concluded, invoking section 119 of the *Evidence Act*, this Court reckons that the Plaintiff must have been robbed of his ordinary natural comfort and suffered both physical and mental anguish, at the time of the accident, during treatment and even after treatment. It is on this premise that this Court finds that the Plaintiff is entitled to general damages for pain and suffering.

108. This Court now turns to consider a just, fair and reasonable quantum of general damages for pain and suffering.

109. In this regard, Counsel for the Plaintiff submits that an award Kshs. 1,000,000 will be reasonable in the circumstances, staking this proposition in Judy Ngochi vs. Kamakia Ele Selelo Ledamoi [2019] eKLR; and Joseph Njeru Luke & 2 others vs. Stella Muli Kioko [2020] eKLR.

110. On the other hand, Counsel for the Defendants submits that an award of Kshs. 200,000 will be just, fair and reasonable, placing reliance upon Daniel Gatana Ndungu & another vs. Harrison Angore Katana [2020] eKLR; and John Wambua vs. Mathew Makau Mwololo & another [2020] eKLR.

111. I find the injuries in Judy Ngochi vs. Kamakia Ele Selelo Ledamoi [2019] eKLR; Joseph Njeru Luke & 2 others vs. Stella Muli Kioko [2020] eKLR; Daniel Gatana Ndungu & another vs. Harrison Angore Katana [2020] eKLR; and John Wambua vs. Mathew Makau Mwololo & another [2020] eKLR, incomparable with the injuries the Plaintiff herein sustained. In the premise, this Court concludes that these precedents are not appropriate authorities in this regard and this Court will thus not take them into account in final assessment.

112. Undesirably, none of the four cited precedents bear injuries similar or closely similar to the injuries which were sustained by the Plaintiff herein.

113. In determining a dispute, a Court is not restricted and hamstrung to the provisions of the law and/or precedent-setting authorities cited by a party. This reasoning rests on the philosophy that a Court of law is the custodian of the law. See the Court of Appeal decision in Kwanza Estates Limited vs. Dubai Bank of Kenya limited (in liquidation) & another (2016) eKLR. In this connection, beyond the decision cited by Counsel for the Plaintiff and Defendants, I have independently pored through precedents on comparable injuries in range, spread and the nature of injuries, with special emphasis on the said predominant injuries sustained by the Plaintiff. I am fortunate to come across decision.

114. In Easy Coach Limited vs. Mary Lossa Aketch [2019] eKLR, Mary sustained a displaced fracture of right clavicle; a fracture of the right scapular; multiple laceration on both hands; bruises on the forehead; contusion on the left hip; contusion on the left leg laterally; and multiple cut wounds on the lower back and for which the doctor opined that the injury to the right clavicle was severe, just like the injury the one of the Plaintiff herein. Further, like the Plaintiff herein, Mary had one more fracture and in both cases, none of the fractures resulted in permanent physical disability. Mary was awarded Kshs. 750,000 which was affirmed on appeal, by E.N. Maina, J. on 7th March, 2019.

115. In assessing general damages, this discretion is regulated by principles. The first such principle is that the claimant is only entitled to what is in the circumstances a fair compensation, fair both to the claimant and the Defendant. The approach taken by Superior Courts in assessment of general damages flows from the decision of the Court of Appeal in Tayab vs. Kinanu (supra) which, while adopting the decision by Lord Denning in Lim Poh Choo vs. Camden and Islington Area Health Authority [1979] 1 A11 ER 332 held that "In considering damages in presence injury claims, it is often said: The Defendant are wrong doers so make them pay up in full. They do not deserve any consideration. That is a tedious way of putting the case. The accident like this one, may have been due to a pardonable error much as may befall any of us. I stress this so as to remove the misapprehension, so often repeated that the Plaintiff is enabled to be fully compensated for all the loss and detriment such as suffered. That is not the law. She is only entitled to what is in the circumstances a fair compensation, fair both to her and to the Defendant."

116. How should an award of damages for pain, suffering and loss of amenities be assessed? In Jack*line Syombua vs. BOG Ekalakala Secondary School, Embu, HCCC Number 118 of 2006* (Unreported) the Court had this to say about assessment of damages: "The task of assessing damages in a case such as this is a difficult one. The Court must nonetheless be guided by relevant precedents...In assessing

compensatory damages, the Court will always bear in mind that the purpose of awarding damages is not to pay as it were for the loss or injury the Plaintiff has suffered. Damages only assuage the pain or loss suffered by the Plaintiff because no amount of money can replace a lost limb."

117. As correctly observed by the Court in West H & Sons Ltd vs. Shepherd 1964 AC 326, money cannot restore the physical frame of the Plaintiff herein but it will offer solace and warmth. This Court having addressed its mind to the principles enunciated in precedents discussed supra and in particular that an award on damages is a matter of discretion of the Court; and that an award should be guided by the principle of restitutio in integrum; and that awards in past decisions are meant to be mere guidelines; and that the Court should consider the age of the past awards, the rate of inflation as well as value and purchasing power of the Kenya shilling over time; and that awards should be within limits set by decided cases. Further, having taken into consideration the award in Easy Coach Limited vs. Mary Lossa Aketch [2019] eKLR, which after taking into account inflationary and depreciation of the Kenya shilling since 7th March 2019, this Court assesses a sum Kshs. 800,000 as a just, fair and reasonable award of general damages for pain, suffering and loss of amenities, subject to the 50:50 degree of liability.

(v) Evaluation of evidence adduced in support of special damages and the quantum thereof

118. It bears repeating that special damages are the damages which are ascertainable and quantifiable as at the date of the legal action. The parallels between general and special damages have been set out herein above as discussed in detail in the Court of Appeal decision in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177, and further, in the High Court decision in Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another, Kericho HCCA No. 45 of 2003. I do not desire to repeat the parallels here.

119. But suffice it to say that it is now trite that special damages must not only be pleaded and but also be strictly proved. See Ratcliffe vs. Evans [1832] 2 QB 524 which was also cited in approval in Kampala City Council vs. Nakaye [1972] EA 446 and Hahn vs. Singh [1987] KLR 716; Rosemary Wanjiru Kungu vs. Elijah Macharia Githinji & Another [2014] eKLR; James Thiongo Githiri vs. Nduati Njuguna Ngugi [2012] eKLR; Coast Bus Services Ltd vs. Sisto Murunga Danji & 3 others, Civil Appeal No. 192 of 1992 (Unreported);

120. This Court has considered the subject receipts (the Plaintiff's Exhibit 6) guided by the principles laid in the Rosemary and Coast Bus cases (afore-outlined). In final analysis, this Court finds that the Plaintiff has succeeded to prove a total sum of Kshs. 34,534.08 in special damages, which this Court hereby awards.

121. The degree of liability between the Plaintiff and the Defendants has been apportioned at 50:50 by this Court. Does this ratio apply to special damages?

122. In Hashim Mohamed Said & another vs. Lawrence Kibor Tuwei (2018) eKLR, the Respondent (Lawrence Kibor Tuwei) sued the Appellants seeking general damages, special damages plus costs and interest of this suit arising from a road traffic accident. On the day appointed for hearing of the suit, the parties recorded a consent on liability at 85% - 15% against the Appellant. The only issue that proceeded for determination by the trial Court was the issue on quantum of damages. The Court in its Judgment. The Court awarded Kshs. 300,000 in general damages and special damages at Kshs. 261,033. The special damages were not subjected to apportionment as afore-stated by the trial Magistrate. The Appellant contested the quantum of damages awarded, hence this appeal. The memorandum of appeal has three (3) grounds including that the trial Magistrate had erred in law by failing to subject the special damages to the 15% contribution on liability. H.A. Omondi, J. held that "The special damages in my mind should not be subjected to the apportionment."

123. In Kenyatta University vs. Isaac Karumba Nyuthe (2014) eKLR, Isaac Karumba Nyuthe, the Respondent herein sued Kenyatta University, the Appellant herein for general damages, special damages, costs of the suit and interest following a road traffic accident which occurred on 8th October 2010 along Ruiru-Nairobi road involving the Respondent motor cyclist riding motor cycle number KMCC 510H and the Appellant's motor vehicle registration number KAY 416V Nissan Bus; and which accident occasioned the Respondent serious personal injuries for which he claimed damages. The trial Court found the Defendant 100% liable. However, on appeal, the High Court found that the Plaintiff had contributed to the negligence by 20% and thus apportioned the quantum limited to general damages. On special damages, R.E. Aburili, J. held that they are incapable of apportionment since "Special damages represent what a party has actually expended for services rendered."

124. In Timsales Limited vs. Harun Thuo Ndungu (2010) eKLR, the Appellant, Timsales Ltd, contested the decision of the trial Magistrate who had been awarded Kshs 35,000, in general damages, less 10% contributory negligence, and special damages of Kshs 2,000. The trial Court too apportioned special damages along the said ratio. M.J. Anyara Emukule, J. (as he then was) held as follows: "The trial Court however erred in adding the special damages and then deducting the 10% contributory negligence. Special damages represent what a party has actually expended for services rendered like a doctor's bill. That sum is not subject to any deduction by way of contributory negligence."

125. It is thus trite that special damages are not subject to and do not accord with the apportionment of liability applicable to general damages on grounds that special damages actually represent what the Plaintiff spent on services.

126. Wherefore this Court awards Kshs. 34,534.08 in special damages, not subject to the 50:50 degree of liability.

(vi) Which party should shoulder the costs of this suit?

127. Regarding costs, upon considering the cause of action and circumstances unique to this case including but not limited to the demand letter (the Plaintiff's Exhibit 7), this Court has found no good cause to depart from the general proposition of the law that costs follow the event and accordingly, this Court exercises its discretion in favour of the Plaintiff but subject to the degree of liability.

128. Regarding interest, the Defendants having failed to promptly settle the claim at the date of the claim or soon thereafter, it translates that the Plaintiff would have had a capital sum to invest with gains thereon. On this premise, again, I exercise my discretion in favour of the Plaintiff.

PART VI: Disposition

129. Wherefore this Court finds the Defendants, jointly and severally, 50% liable. Accordingly, Judgement is entered in favour of the Plaintiff in the following terms:

    i. The Plaintiff is awarded general damages for pain, suffering and loss of amenities in the sum of Kshs. 800,000, less 50% making the net award Kshs. 400,000.

    ii. The Plaintiff is awarded special damages in the sum of Kshs. 34,534.08.

    iii. The Plaintiff is awarded 50% of the costs of this suit.

    iv. The Plaintiff is awarded interest on (i) & (iii) above, at Court rates, from the date of this Judgment until payment in full.

v. The Plaintiff is awarded interest on (ii) above, at Court rates, from the date of filing this suit until payment in full.

130. It is so ordered.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 3RD DAY OF SEPTEMBER, 2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiff:.....

Advocate for the Defendants:.....

Court Assistant:.....