



**Girango v Misiani (Civil Appeal E155 of 2024)
[2025] KEHC 15085 (KLR) (27 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E155 OF 2024
DKN MAGARE, J
OCTOBER 27, 2025**

BETWEEN

YOBESH MATARA GIRANGO APPELLANT

AND

DANIEL MISIANI RESPONDENT

(An appeal from the Judgment and decree of Hon. S.N. Abuya, Chief Magistrate dated 30.7.2024 arising from Kisii CMCC No. E950 of 2021)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S.N. Abuya, Chief Magistrate dated 30.7.2024 arising from Kisii CMCC No. E950 of 2021.
2. The plaint dated 4.10.2021 claimed damages arising from an accident that occurred on 15.3.2021. The accident involved the respondent who was a pillion passenger on motorcycle registration No. KMAN 152M along Kisii – Daraja Moja Road and the Appellant’s motor vehicle Registration No. KCY 658R. The Respondent pleaded that the suit motor vehicle hit the motorcycle. He was as a result suffered serious injuries, loss and damages.
3. The Respondent set forth particulars of negligence for the accident motor vehicle. The Respondent pleaded Ksh. 32,050/= as special damages. These were made up as hereunder:
 - a. Medical Expenses Ksh. 25,000/=
 - b. Medical report Ksh. 6,500/=
 - c. Motor vehicle search Ksh. 550/=
4. The Respondent also claimed general damages arising from the following injuries:



- a. Contusion to the upper mouth lip
 - b. Traumatic loosening of three front upper teeth
 - c. Cut wound to the face
 - d. Contusion to the left shoulder joint with dislocation
 - e. Bruising to both forearms
 - f. Bruising to both legs.
5. The Respondent entered appearance and filed defence dated 7.12.2022 denying the particulars of negligence and injuries pleaded in the plaint. He pleaded that the accident occurred without their negligence. Alternatively, he blamed the unnamed cyclist. The Appellant filed a list of three unnamed witnesses and unattached documents.
6. The learned magistrate heard three witnesses on the part of the respondent. The appellant testified and did not call any other witness. The court rendered its judgment as follows:
- a. Liability at 100% against the Appellant
 - b. General damages - Ksh. 450,000/=
 - c. Special damages - Ksh. 32,050/=
7. The appellant was dissatisfied with the judgment and lodged a memorandum of appeal dated 14.8.2023, setting out the following grounds:
- a. The learned magistrate erred in law and fact in finding the Appellant 100% liable for the accident.
 - b. The learned magistrate erred in blaming the Appellant for failure to join a third party.
 - c. The learned magistrate erred in finding teeth injuries that were not proved.
 - d. The learned magistrate erred in awarding general damages of Ksh. 450,000/= that were inordinately high.
 - e. The learned magistrate erred in awarding special damages that were not proved.
 - f. The learned magistrate's exercise of discretion in assessment of liability and quantum was injudicious.

Evidence

8. Daniel Nyameino, a Clinical Officer from Kisii Teaching and Referral Hospital, testified as PW1. He stated that he examined the Respondent and produced a medical report dated 24.3.2021. He explained that the report was based on treatment notes and a physical examination. On cross-examination, he confirmed that by the time of examination, the injuries could have healed and that permanent disability was unlikely. On re-examination he stated that the dislocation is likely to cause post traumatic arthritis and habitual dislocation in future.
9. No. 883000 PC Moses Kasera of Kisii Police Station testified as PW2. He produced the police abstract in respect of the accident. According to him, the Respondent was not to blame for the accident as he was a pillion passenger. He stated that the motor cycle on which the Respondent was a passenger was hit from behind. On cross-examination, he maintained that it was the motor vehicle that collided with



the motorcycle. He further stated that the case was still under investigation since the rider has not been traced. Once the rider is traced, the appellant was to be charged.

10. PW3 was the Respondent. He relied on his witness statement and produced his bundle of documents filed in court. He blamed the driver of the motor vehicle for the accident. He had a helmet which when he fell it broke. He had not healed the pains.
11. On his part, the Appellant testified as DW1. He blamed the rider of the motorcycle for the accident. He turned near the motor vehicle and touched the side mirror. On cross examination, he was not driving at high speed. He stated the rider was carrying a passenger, though he could not confirm if it was the Respondent. Two aspects missing from the evidence is his role in taking the injured to hospital and the reporting of the accident.

Impugned Judgment

12. The court adopted the 5 issues set out by the Respondent, these were:
 - a. Whether the Respondent was the owner of the suit motor vehicle
 - b. Whether the Respondent was injured in the accident
 - c. Whether the respondent was to blame for the accident
 - d. Whether the appellant was to blame for the accident
 - e. Compensation
13. The learned Chief Magistrate addressed each of the issues seriatim, in full compliance with Order 21 Rule 5 of the Civil Procedure Rules, which provides as follows:

In suits in which issues have been framed, the court shall state its finding or decision, with the reasons thereof, upon each separate issue.

Submissions

14. The Respondent filed submissions dated 12.09.2025 opposing the appeal in totality. He submitted that he was wearing a reflective jacket and helmet. He continued that DW1 admitted to being involved in the accident, but could not stop in time despite seeing the brake lights of the motor cyclist. They stated that in any case, they ought to have joined a third party should they have wished the court to make a finding on liability against the motor cyclist. Reliance was placed on the case of Embu Public Road Services Limited Versus Riimi (1968) EA 26 wherein it was held inter alia that;

“As I understand the law as set out by these two judgments of this court, where the circumstances of the accident give rise to the inference of negligence from the defendant, in order to escape liability, has to show in the words of Sir AList Air Forbes, that there was a probable cause of the accident which does not connote negligence or in the words which I have previously used that the explanation for the accident was consistent only with an absence of negligence.

The essential point in this case therefore is a question of fact, that is whether the explanation given by the defendant shows that the probable cause of the accident was not due to his negligence or that it was consistent only with the absence of negligence...

15. Further reliance was placed upon the case of John Fanuel Awiti Ogol v Murithi [1985] KECA 75 (KLR), wherein the Court of Appeal pronounced itself as hereunder:



Once it was proved that the appellant was hit while on the pedestrian crossing, an accident blameable on the respondent was disclosed. The burden of proof was then on the respondent to explain and demonstrate that the accident was not due to any fault of his: *Cole v De Trafford* [1918] 2 KB 523. That is not to say that the respondent had to prove how and why the accident happened. It would suffice if he was able to show that he personally was not negligent even if the accident remained inexplicable: *Woods v Duncan* [1946] AC 401 and *Bingham's Motor Claims Cases*, by Taylor 7th edition, page 47. Mr. Menezes relied on the decision in *Hunter v Wright* [1938] 2 All ER 621 to argue that no negligence could attach to the respondent as driver. However, Mr. Gumba stated, in *Hunter's case* Mrs. Grasty, the driver, gave evidence which went to show that the skid was not caused by any act of negligence and, Goddard LCJ said:

“It is perfectly clear that Mrs. Grasty did discharge the onus, which lay upon her, of showing that she was guilty of no negligence.”

16. He continued with the words of A.R.W. Hancox, JA, in the aforesaid case where he posited as follows:
It may be that strenuous efforts were made unsuccessfully to secure witnesses but, in the absence of any explanation a finding of negligence was inevitable once it was shown that the doctrine of *res ipsa loquitur* applied, as it did in this case.
17. On the strength of the foregoing, he submitted that the court was right in finding the appellant 100% liable.
18. On quantum, the Respondent supported the court's finding. Reliance was placed on the case of *Mohammed Iqbal, Nida Enterprises & CMC Holdings Limited v Agnes Mbayaki Shikami* and the case of *Butt v Khan* [1978] KECA 24 (KLR). This court was urged to adopt the standard set out in the latter case, where the court of appeal [Madan, Wambuzi & Law JJA] expressed themselves as follows:
An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
19. In that respect, the Respondent relied on the case of *Acacia Ventures Limited v Nellie Belindah Osok* [2021] KEHC 4801 (KLR), where the court, J. Kamau, set aside judgment that had been entered by the lower court of Ksh. 1,000,000/= and entered judgment for general damages for Kshs 500,000/= for a claimant who suffered bruises on the forehead, upper lip cut wound, nose bleeding, loss of four (4) lower teeth, complex soft tissue injuries and anterior maxillary dental alveolar fracture following the said accident.
20. Further reliance was made on the case of *HCCA No 27 of 2015 Agility Logistics vs John Wambua Musau & Harrison Ndungi T/a Miangeni Meat*, where an award of 500,000/= was given for what they termed as similar authorities, which are in any case very different injuries.
21. The Respondent prayed that the appeal be dismissed with costs.
22. The Appellant filed submissions dated 4.09.2025. They set out the duty of the court as set out in the case of *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] KECA 528 (KLR), where the court of appeal [G.B.M. Kariuki, Kiage & Murgor, JJ.A] posited as follows:

This Court has in the past propounded on the principles to be applied while considering whether to interfere with damages awarded by the trial Court. In *Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini V. A.M.M Lubia and Another* [1982 – 88] 1



KAR 777 at p.730, Kneller, J. A. held:

“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango v. Manyoka* [1961] EA 705 709, 713; *Lukenya Ranching and Farming Co-operatives Society Lt v. Kavoloto* [1970] EA, 414 418, 419.”

23. They relied on the same decisions on the duty of the court, including the decision of *Power Lighting Comp. Ltd & Another V Zakayo Saitoti Naingola & another* [2008] KEHC 504 (KLR), where RN Nambuye, J, as she then was, posited as follows:

On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages

- (1) Damages should not be inordinately too high or too low.
- (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
- (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
- (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.

Analysis

24. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

25. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

26. The duty of the first appellate court was set out in the case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the Judges in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court’s finding of fact if it appears either that he failed to take



account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

27. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

28. This court’s jurisdiction to review the evidence should be exercised with caution. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424 , the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

29. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, this court must reconsider the evidence, evaluate it itself and draw its own conclusions.

30. The Appellant urged the court to find that the lower court erred in finding him 100% liable for the accident. On the other hand, the Respondents’ general case is that the judgment of the lower court was correct on both quantum and liability and should not be disturbed.

31. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities, that the Appellant failed to prove his case. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

32. It follows that the initial burden of proof lies on the Respondents, but the same may shift to the Defendant, depending on the circumstances of the case. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”



33. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

34. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

35. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of appeal held that:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

36. The Respondent herein was a pillion passenger to the motorcycle. The motorcycle is not in this case. PW2 testified that the rider was not traced. The lower court found that it was the duty of the Appellant to join a third party.

37. DWI testified that the motorcycle rider was to blame. In my revaluation of the evidence and testimonies in the lower court, the Respondent was not to blame in any way. The Respondent thus proved that it is the Appellant who was 100% to blame for the accident. Where the Respondent proved his case to the required standard in the lower court, it was the duty of the Appellant to prove contributory negligence which in my view he failed. In the case of *Mac Drugall App V Central Railroad Co.* Rbr 63 Cal 431 the court held that; -

“In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the Respondent is



a matter of defence and it is an error to instruct the jury that the burden of proof is on the Respondent to show that the injury occurred without such negligence”.

38. There could be no liability against a third party who was not party to the proceedings as no fault was established against him. In the case of *Kiema Muthuku v Kenya Cargo Handling Services Ltd* (1991) 2 KAR 258, the court of appeal posited as doth:

There is, as yet, no liability without fault in the legal system in Kenya, and a Respondent must prove some negligence against the defendant where the claim is based on negligence.

39. The Appellant alleged that a third party was to blame for the accident. It was the duty of the Appellant to take out Third Party Proceedings against a party they wished to take up liability. The Appellant did not issue a Third Party Notice. I have no basis to interfere with the reasoning of the lower court.

40. The Appellant ought to have invoked the provisions of Order 1 Rule 15 of the Civil Procedure Rules as follows:

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the Respondent; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Respondent and the defendant and should properly be determined not only as between the Respondent and the defendant but as between the Respondent and defendant and the third party or between any or either of them

41. Due to failure to join a third party, there were no directions on apportionment of liability. It was thus the duty of the Appellant to prove contributory negligence which in my view they failed. Contributory negligence could not be shelved to a third party who was not a party to the proceedings and the presumption remained that the Appellant was the registered owner of the motor vehicle whose driver was an agent of the Appellant. In the case of *MacDrugall App V Central Railroad Co.* Rbr 63 Cal 431 the court held that; -

“In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the Respondent is a matter of defence and it is an error to instruct the jury that the burden of proof is on the Respondent to show that the injury occurred without such negligence”.

42. This is the rule in *Embu Road Services V Riimi* (1968) EA22 and 25 *Mzuri Muhhidin V Nazzar Bin Seif* (1961) EA 201, *Menezes Stylianicers Ltd* CA No.46 of 1962 in which the courts held inter alia; -

“Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only



with absence of negligence”. See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

43. The third party that the Appellant alleged was not a party to the proceedings and no adverse finding could be made against them. In *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR, the court observed that:-

“The defence does not even allude to the said third party; the issue has just propped up in the submissions by the Defendant. In any case, the said third party is not a party in the suit and no claim has been laid against it by the Respondent or the Defendant. In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under (Order 1 rule 15 - 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”

44. It is only after the alleged third party was served and failed to enter appearance that directions on judgment against them would apply. It is this rationale of the law that is imbedded in Order 1 Rule 17 of the Civil Procedure Rules as follows:

If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the “third party”) desires to dispute the Respondent’s claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice.

45. Therefore, the Respondent proved want of care on the part of the driver of the accident motor vehicle, the Appellant. I am in consonance with the reasoning of the court in the case of *Mombasa Maize Millers & another v Elius Kinyua Gicovi* [2021] eKLR where Nyakundi J referred to *Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan*, and held as follows:

“In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In *Nance v British Columbia Electric Rly* [1951] AC 601, at page 611, Lord Simon said:

“.....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the Respondent’s claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.”

46. On quantum, the lower court proposed an award of Kshs. 450,000/= in general damages. The court did not indicate any authority as basis for the award. The Respondent suffered the following injuries:
- i. Contusion to the upper mouth lip



- ii. Traumatic loosening of three front upper teeth
 - iii. Cut wound to the face
 - iv. Contusion to the left shoulder joint with dislocation
 - v. Bruising to both forearms
 - vi. Bruising to both legs.
47. In my reevaluation, I have no reason to doubt the evidence of the medical doctor obtained in the medical report by Dr. Nyameino dated 24.3.2021. The Appellant did not tender any medical evidence. Viewed in line with the finding of the lower court, I equally, in the absence of any contrary medical evidence, find no reason to fault the lower court's finding and therefore uphold the injuries suffered as the injuries pleaded and proved on evidence.
48. Therefore, this court has to establish similar fact scenarios though bearing in mind that no two cases are precisely the same and that it is inevitable that there 29.12.2020. will be disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985]eKLR. However, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."
49. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 - 2) The award should be commensurable with the injuries sustained.
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high.
50. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a learned magistrate were clearly laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:
- "...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a learned magistrate unless it is satisfied either that the learned magistrate acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."



51. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985]* eKLR as follows:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

52. Further, this Court had due regard to the case of *Kigaraari v Aya (1982-88) 1 KAR 768* where it was held that:

“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 members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

53. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka 1961, 705, 713* at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

‘The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.’

We find the words of Lord Denning in the *West (H) & Son Ltd (1964) A.C. 326* at page 341 on excessive awards on damages important to replicate herein thus:

“I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.”

54. The words of Lord Denning were reiterated by Nyarangi, J.A. in *Kigaragari v Aya [1985]* eKLR thus:

“I would express firmly the opinion that 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 bear 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 (in the case of accident cases) or increased fees.”

55. Further, in the case of *Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294* being guided by the principles enunciated by



both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J stated as follows:

“The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.”

56. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of *H. West and Son Ltd v. Shepherd* [1964] AC.326 (*supra*) where it was stated that:

...but 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. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”

57. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.
58. I proceed to determine similar fact cases in relation to damages as applicable to this appeal. Therefore, I find the following cases to present similar fact situations to the appeal herein.
59. In *Duncan Mwenda & 2 others v Silas Kinyua Kithela* [2018] eKLR, the Respondent suffered severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall. The Court awarded Kshs. 350,000/- in general damages. The Appellant relied on this case before the learned magistrate.
60. In *Francis Ochieng and Another v Alice Kajimba MGR HCCA No. 23 of 2014* [2015] eKLR, the Respondent sustained a cerebral concussion with loss of consciousness for two hours, massive haematoma on the right parietal head, subconjunctival haematoma of the right eye, loss of 5 anterior lower and two upper teeth, periorbital ecchymosis and cut wound on the right hand and knee. An award of Kshs. 350,000/= was awarded in 2015.
61. The injuries in the above two cases are slightly more severe than in this case. In *Mulwa & Another v Nzai (Civil Appeal E072 of 2023)* [2024] KEHC 6898 (KLR) (10 June 2024) (Judgment) the court awarded Kshs. 250,000/= which was reduced from the lower court’s award of Ksh. 400,000/= for a claimant who suffered several injuries, including a small bruise on the right ankle, soft tissue injuries to the lower back and right lower limb, blunt object injury to the lower and right limb, as well as multiple bruises on the right lower limb.



62. All these authorities show that the award of Kshs. 450,000/= was inordinately high and not a fair estimate of general damages. The award of Ksh. 300,000/= would in my view be adequate compensation taking into regard the passage of time and inflation.

63. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 stated that:

“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.”

64. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the learned magistrate failed to award special damages that were pleaded and proved. In *Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003*, Kimaru, J held that:

“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 has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

65. On special damages, the pleadings and evidence show that the Respondent pleaded and proved Ksh. 32,050/= which the lower court adopted as proved. I allow it.

Determination

66. In the upshot, I make the following orders: -
- a. The appeal on liability is dismissed.
 - b. The appeal against special damages is dismissed.
 - c. Judgment on general damages is set aside and substituted with an award of Ksh. 300,000/=.
 - d. As the appeal is partially successful, each party to bear own costs of the appeal.
 - e. 30 days stay of execution.
 - f. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF OCTOBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Munji for the Appellant

No appearance for the Respondent

Court Assistant – Michael

