

**REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO E039 OF 2025
JINAL ENTERPRISES**

**LIMITED.....APPELLA
NT
VERSUS
JACOB
ONGONG'A.....1ST
RESPONDENT
ODUOR AKINYI
CATHERINE.....2ND
RESPONDENT**

(Being an Appeal from the Judgment and Decree of Hon. A. Towett (PM) delivered at Naivasha Chief Magistrate’s Court on 3rd April 2025 in Naivasha CMCC No. E305 of 2023)

JUDGMENT

Background

1. This appeal arises from the judgment and decree delivered by the Honourable A. Towett (PM) on 3rd April 2025 in Naivasha Chief Magistrate's Civil Case No. E305 of 2023. The 1st Respondent had instituted the suit against both the Appellant and the 2nd Respondent seeking general and special damages arising from a road traffic accident that occurred on 1st December 2022. The accident involved two vehicles; motor vehicle registration number KDK 762A/ZF 8663, a trailer owned by the Appellant and motor vehicle registration number KCF 297E, owned by the 2nd Respondent. The 1st Respondent was a fare-paying passenger aboard motor vehicle KCF 297E.
2. The records show that during the trial proceedings, the 2nd Respondent neither entered appearance nor filed a Statement of Defence, leading the court to enter interlocutory judgment against her on 19th June 2024. At

the ensuing trial only the 1st respondent led evidence as the appellant closed its case without calling any witnesses to rebut the evidence tendered by the 1st Respondent.

3. In its judgement, the trial court found both defendants, 100% jointly and severally, liable for the accident and proceeded to award the 1st Respondent a total sum of Kshs. 1,192,500.00.

The Appeal

4. Dissatisfied with trial judgement in its entirety, the Appellant lodged the instant appeal vide Memorandum of Appeal dated 27th April 2025. The Appellants appeals on four grounds on the face of the Memorandum all pleaded in the alternative and without prejudice to one another. The grounds, in summary, fault the trial court's findings on both liability and quantum.

Summary of the Trial Proceedings

5. The 1st Respondent sought compensation, alleging that the accident was caused by the joint and several negligence of both defendants. The particulars of negligence against the Appellant's driver included parking the trailer on the road without putting up any signs to warn traffic of its presence, driving a defective vehicle, and blocking the path of the vehicle the 1st Respondent was aboard. The Plaintiff also contained detailed particulars of negligence against the 2nd Respondent's driver, including failing to see the stationary vehicle in sufficient time, failing to brake, and driving without due care and attention.
6. The 1st Respondent's case was supported by two witnesses. PW1, the doctor, classified the injuries as grievous, resulting in a 20% permanent disability. The injuries included a left femur fracture, commuted fracture of the frontal bone, head injury, and anterior cranial fossa

pneumoencephally, among others. He also opined that the 1st Respondent would require Kshs. 200,000.00 for future medical expenses.

7. PW2, the 1st Respondent as plaintiff at trial, testified that he was travelling to Mombasa when the accident occurred on the way to Nairobi, around midnight. He blamed the accident on both drivers, stating that the driver of Motor Vehicle KCF 297E was driving at a high speed, while the Appellant's trailer KDK 762A/ZF 8663 had stopped on the road without any warning indicators or hind lights.
8. Under cross-examination, the 1st Respondent conceded that the Police Abstract (PEXh 6), which he produced as evidence, laid blame on the driver of motor vehicle registration number KCF 297E. He confirmed that the trailer was either moving very slowly or had stopped.
9. The Appellant, as 1st defendant at trial, filed a defence but opted not to adduce any evidence, closing its case immediately after the 1st Respondent concluded his testimony.
10. In finding for the 1st respondent, the trial court relied on the principle that the Plaintiff's testimony and documents remained unchallenged and uncontroverted since the Appellant failed to call any witnesses. The court cited the concurrent negligence established by the 1st Respondent, speeding by the 2nd Respondent's driver and negligent parking without warning signs by the Appellant's driver, to conclude that both the 1st and 2nd Defendants were liable jointly and severally for the accident.
11. On quantum, the trial court noted the severity of the injuries and awarded Kshs. 800,000.00 for general damages, justifying the figure by reference to the comparable case of **Derrick Mwenda Ngaine & Another Vs. Dennis Mwenda (2021) eKLR** where the court awarded Kshs. 600,000.00/=. She increased the sum by Kshs. 200,000.00 to cover inflation since 2021. The court awarded a global sum of Kshs. 200,000.00 for loss of future earning capacity, citing the proven 20% permanent incapacity.

Summary of the Appellant's Submissions

12. The Appellant argued that the trial court's finding on liability and quantum was fundamentally flawed. On liability, the Appellant contended that the finding of liability against it was erroneous, emphasizing that the Appellant's vehicle was a stationary trailer struck from behind. The Appellant submitted that the 1st Respondent failed to discharge the evidential burden of proof under Sections 107-109 of the Evidence Act against the Appellant. The allegations of negligent parking were described as bare allegations lacking corroboration, such as a sketch map, testimony from the Investigating Officer, or photographs proving a breach of safety rules.
13. The Appellant averred that the law presumes negligence against a vehicle that rear-ends another parked or stationary vehicle, a principle established in the cited cases like **Embu Public Road Services Ltd v Riimi (1968) EA 22**. Since the 1st Respondent was a passenger in the moving vehicle KCF 297E that rammed into the trailer, and the 1st Respondent himself conceded that the Police Abstract (PEXh 6) explicitly recorded KCF 297E as the vehicle to blame, the trial court erred by failing to treat this as strong *prima facie* evidence absolving the Appellant. It was the Appellant's case that even if contributory negligence were considered, the trial court's decision to impose 100% joint and several liability, instead of proper apportionment based on evidence, constituted a misdirection in law. The decision in **Dete vs Mirieri (2025) KEHC 3337 KLR** was cited for the proposition that a rear-ender is presumed negligent unless he proves circumstances negating negligence.
14. On quantum, the Appellant challenged the awards for both general damages for pains and suffering as well as loss of future earning capacity. Regarding Loss of Future Earning Capacity, the Appellant submitted that the award of Kshs. 200,000.00 was speculative and unsupported by evidence. Citing the case of **S J v Francesco Di Nello & Another**

(2015) KECA 606, the Appellant argued that the 1st Respondent failed to adduce probative evidence of his occupation, income, pre-accident earnings, or a realistic prospect of loss to link the 20% disability to a real assessable diminution of future earnings, thereby failing to meet the required standard of proof.

15. On General Damages, the Appellant argued that the Kshs. 800,000.00 award was manifestly excessive and inconsistent with comparable awards for similar injury profiles, which counsel suggested should fall within the Kshs. 350,000.00 to Kshs. 450,000.00 range. The Appellant urged that the award met the threshold for appellate intervention set out in **Kemfro Africa Ltd t/a Meru Express Services v Lubia & Another (1976) EA**, as it was so inordinately high that no reasonable court would have made it.

Summary of the 1st Respondent's Submissions.

16. The 1st Respondent defended the trial court's findings on both liability and quantum, urging the dismissal of the appeal. The Respondent emphasized that the evidence that the Appellant's vehicle was negligently parked on the road at midnight without warning signs was not controverted or rebutted, as the Appellant called no witness. This failure to call evidence established a clear act of negligence against the Appellant, making it impossible for the Appellant to escape liability. Counsel relied on the case of **Jackson Mutyethumo vs Mary Menze Muthuku (2009) eKLR**, where liability was apportioned against a lorry that was parked as an obstruction on the road at night without warnings at 80% and the bus that rammed into it at 20%.
17. On the evidentiary value of the Police Abstract, the 1st Respondent agreed that the abstract may have purported to blame the 2nd Respondent's driver, but asserted that the abstract is not conclusive proof of liability. Relying on **Riara Group of Schools Limited v Africa Geothermal International (Kenya) Ltd (2023) eKLR**, the Respondent

maintained that evidence was adduced before the trial court confirming that both vehicles contributed to the accident, justifying the finding of joint and several liability.

18. On quantum, the Respondent asserted that the appellate court should only interfere with the award where the trial court took into account an irrelevant factor, left out a relevant factor, or the award was so high or low as to amount to an erroneous estimate. It detailed the severity of the injuries, including left femur fracture, comminuted fracture of the frontal bone, head injury, and pneumoencephally, confirming an uncontroverted 20% permanent disability. While defending the award of Kshs. 800,000.00, the Respondent submitted that the trial court relied on the comparable authority of **Derrick Mwenda & another vs Dennis Mwenda (2021) eKLR**, which the Appellant had also cited. The increase to Kshs. 800,000.00 was justified by the severity of the injuries and the incidences of inflation.

Issues, Analysis and Determination

19. In executing its mandate on a first appeal, the court has duly considered the grounds in the Memorandum of Appeal, the trial court's records and its decision as well as the detailed submissions by the Appellant and the 1st Respondent. the court finds the appeal to have been against both the apportionment of liability and the award and assessment of quantum of damages by the trial court.
20. On the substance of the appeal, the court first wish to determine whether the trial court erred in its finding on joint and several liability of the appellant and the 2nd respondent. The trial court found the Appellant negligent based on the uncontroverted testimony of the 1st Respondent that the trailer was parked on the road at midnight without warning signs or hind lights.
21. The Appellant's primary contention was that, having closed its case without adducing any evidence, there was still the evidence in the Police

Abstract which blamed the 2nd Respondent's driver. It is now the Kenyan law, drawn from jurisprudence of the superior courts that a police abstract, in the absence of supporting testimony from the investigating officer, only serves to confirm that an accident occurred and is not conclusive proof of liability. Ascertainment of liability must remain the judicial function of the court not the police. All the police have to do where they form the opinion that a driver is blameworthy is to prefer traffic charges.

22. Because the only evidence of eye witness was that given by the 1st respondent, which remained uncontroverted, this court finds that the trial court was entitled to rely on the sworn testimony of PW2 which detailed the specific negligent acts of both drivers. The Appellant's failure to adduce any evidence to rebut the allegation of negligent obstruction at night, including proving compliance with road safety requirements regarding warning signs for stalled vehicles, only avail support for the finding of fault against the Appellant as concluded by the trier of facts. The court finds that it was a negligent act by the appellant in parking a large motor vehicle on a highway at midnight without warning signs including reflective boards constituted a serious breach of the duty of care owed to other road users.
23. In finding the appellant and the 2nd respondent negligent, the trial court cannot be faulted. However, the two drivers were acting independently and not in concert. The two were thus concurrent tortfeasors and not joint tortfeasors. Their liability is by law distinct and must be severed so that each knows and bears own obligation. Liability between concurrent tortfeasors must thus be apportioned. The court must decide which defendant bears what portion of the blame. It is therefore not correct to hold concurrent tortfeasors jointly liable.
24. In this matter one of the 1st respondent's allegations that remain uncontested is the fact that the appellants motor vehicle was left stationary on a public road, a highway, at night without any warning signs

as to its presence on the road. That was ipso facto negligent. However, every driver is expected to maintain a look out and to exercise due care including keeping a safe distance from every other motorist ahead of him to avoid being a rear-ender. That duty was always on the 2nd respondent's driver. In ramming onto the appellant's motor vehicle from behind, the 2nd respondent's driver was equally at fault.

25. Under section 3(2) of the Law Reform Act, where multiple parties are found to have contributed to the damage, the court must apportion liability according to their respective degrees of fault. In weighing the concurrent negligence between the appellants driver and that of the 2nd respondent, the court finds the 2nd Respondent's driver was more negligent by speeding at night and failing to brake or swerve, resulting in the violent ramming into the stationary object. On the other hand, the Appellant's driver was also negligent by creating a serious, un-warned obstruction on the highway.

26. This court has further reviewed the evidence on record as applied to the applicable law and finds that even though both drivers were at fault, the 2nd respondents' driver having been on the move with passengers had a heavier duty of care and was more to blame because he ought to have had its headlights on, and kept a safe distance that could have allowed him take some evasive acts to avoid hitting a stationary object on its lane. The court find the 2nd respondent's driver to have contributed to the collision at 60%. That leaves the appellant to bear 40%. As concurrent tortfeasors, the court apportions liability between the appellant and the 2nd respondent at 40%:60% respectively

27. The consequence is that the finding of the trial court that the two were jointly and severally liable is set aside and in its place substituted a finding that the appellant bears 40% of the blame as the 2nd respondent takes 60%.

28. On quantum, the Appellant has challenged the award of Kshs. 200,000.00 for Loss of Future Earning Capacity on the ground that the 1st

Respondent failed to prove his income or occupational history, making the award speculative.

29. Loss of Future Earnings must be differentiated from loss of future earning capacity. While an award for loss of future earnings compensates for an actual, assessable loss of income proven to have been lost, using the multiplier-multiplicand formula, requiring strict proof of monthly earnings, Loss of Future Earning Capacity does compensate for the inherent reduction in the ability to compete in the labour market, typically awarded as a global sum where specific earnings cannot be proven, but where a proven permanent disability exists.
30. In the circumstances of this matter, the 1st Respondent provided uncontroverted evidence that he was an electrician and sustained grievous injuries, leading to a permanent disability assessed at 20%. The court notes that the injuries; a left femur fracture and a comminuted frontal bone fracture, are significantly restrictive, particularly for an individual engaged in physical trade such as an electrician, which inherently entail scaling heights. The court thus finds and holds that the trial court, in awarding a global sum of Kshs. 200,000.00, recognized the lack of strict income proof but simultaneously acknowledged the demonstrable, long-term competitive disadvantage imposed by the 20% permanent incapacity. This award serves to compensate the 1st Respondent for the diminished opportunity and ability to seek and maintain employment in his chosen or any other field, particularly in light of the disclosed orthopaedic and neurological consequences of the limb and head injuries.
31. On the awarded General Damages Kshs. 800,000.00, the appellant contends that same was excessive and amounted to an erroneous estimate. The principles governing appellate intervention on quantum are strict: an appellate court may only interfere if the trial court erred in law or fact, considered an irrelevant factor, ignored a relevant factor, or arrived at an amount that is so inordinately high or low that it represents

an entirely erroneous estimate. The appellant has chosen the tag of excessive award to run with. It was thus his duty to demonstrate that to the satisfaction of the court.

32. This court is however reminded that the duty to assess damages is at the discretion of the trial court and it is not permitted to interfere merely because it feels that had it been the trial court it would have made a different award. Rather, it must be satisfied that the award falls outside the rule that comparable injuries should attract comparable awards and keep in mind that too high awards have the potential to hurt the economy and the body politic.
33. The record here shows that the 1st Respondent suffered extensive and severe trauma, including a left femur fracture, comminuted fracture of the frontal bone, head injury, deep cut wounds, and anterior cranial fossa pneumocephally (air in the cranial cavity, among other injuries). These injuries are confirmed to result in 20% permanent physical disability. Categorizing these injuries, particularly those involving bone fractures and severe head trauma, as moderate, as suggested by the Appellant, is inappropriate. These injuries classify as grievous harm.
34. In reaching its award, the trial court demonstrated a measured approach by consciously relying on precedent and adjusting for economic realities. The court used the case of **Derrick Mwenda** (supra) where the court awarded Kshs. 600,000.00 in 2021, for comparable injuries as a benchmark and added Kshs. 200,000.00 to account for inflation, arriving at Kshs. 800,000.00. The court affirms that this award falls well within the range of comparable compensation for comparable injuries involving major bone and head trauma, particularly when accounting for the passage of time and inflation.
35. In the upshot, the Appeal succeeds to the extent that the joint and several liability is set aside and, in its place, substituted a judgment that the liability between the appellant and the 2nd respondent be apportioned

at 40:60. The appeal against the award and assessment of damages is found to lack merits and is thus dismissed.

36. Because the success of the appeal is minimal, the court makes no orders as to the costs of the Appeal.

Dated, signed and delivered virtually this 5th day of December, 2025

Patrick J. O. Otieno
Judge

In the presence of;

Mr. Opondo for the Appellant.

No appearance for the Respondent.

Ms. Hannah - Court Assistant.