REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E106 OF 2022

DENNIS NYABUTO ..... APPELLANT

VERSUS

G4S COMPANY LIMITED .....1ST RESPONDENT

HOLIDAY CARS AND TOURS LIMITED.....2ND RESPONDENT

(As Consolidated with Civil Appeal No. E006 of 2023)

G4S COMPANY LIMITED .....1ST APPELLANT

HOLIDAY CARS AND TOURS LIMITED.....2ND APPELLANT

VERSUS

DENNIS NYABUTO ..... RESPONDENT

JUDGMENT

1. These are consolidated appeals from the judgment and decree given in Ogembo MCCC 51 OF 2020 delivered on 6.12.2022 by Hon. G.N. Barasa, SRM(PM). The Appellant, Dennis Nyabuto filed his appeal on 15.12.2022. The

respondent G4S Company Limited and Holiday Cars and Tours Limited filed their appeal on 23.1.2023. The two appeals were separately admitted. When the matters came up for hearing before me, I directed that they be consolidated with, Civil Appeal No. E106 OF 2022 as the lead file.

2. Two witnesses testified on behalf of the appellant, while one witness testified on behalf of the defendant. The defendant's driver did not testify. Upon hearing the parties, the court below made the following determinations:

    a) Liability - Against the Respondents at 50%:50%
    b) General damages – Kshs. 1,000,000/=
    c) Loss of earning capacity – nil
    d) Future medical expenses – nil
    e) Special damages – Ksh. 124,500/=
    f) Costs and interest of the suit

3. This matter was ordered to proceed by way of filing submissions. The second appeal will be treated as a cross appeal, the appellant in Civil Appeal No. E006 of 2023 will be referred to as the respondent throughout the appeal, unless the context shows otherwise.
4. The Appellant filed on 9.9.2025, while the Respondents filed on 8.10.2025. I gave directions on 6.10.2025. I wrote this judgment ready for delivery on 16.12.2025, but due to a mistake, it could not be accessed on my computer. I had to retrieve the same, hence a new date was given with apologies to the parties.

5. The appeal filed by the appellant is repetitive and unnecessarily long. It raises three issues only:
    a. The court erred in apportioning liability at 50:50 instead of holding the respondents 100% liable
    b. awarding general damages that were inordinately low as to amount to an erroneous estimate of damages.
    c. failing to award damages for loss of earning capacity and loss of future medical expenses.
6. The Respondent filed a 13-paragraph memorandum of appeal raising only two intertwined issues on liability, that is:
    a. Failing to have regard to the liability of an unknown motorcycle.
    b. Arriving at speculative liability.

Pleadings

7. The Appellant filed suit via a plaint dated 22.04.2020, claiming damages arising from a serious accident involving Motor Vehicle Registration Number KCS 537A and the appellant, who was a pillion passenger in an unknown motorcycle. The accident occurred along the Kisii -Kilgoris road at Kiomwanja. The appellant set 9 grounds of negligence against the Respondent. the plaint was amended on 13.07.2020, to include the second Respondent as one of the owners of the suit Motor Vehicle Registration Number KCS 537A.
8. The second respondent entered an appearance alone on 21.08.2020 and filed a defense on 25.08.2020. They denied being the owners of Motor Vehicle Registration Number

KCS 537A. They equally denied particulars of negligence and blamed an unidentified motor vehicle. They threatened to have the suit struck out. They also threatened to take out third-party proceedings at an opportune time.

9. They set out eight aspects of negligence for the appellant and 16 particulars of negligence for the user of the unknown motorcycle. On a without prejudice basis, they stated that the accident was wholly inevitable and occurred despite the driver of Motor Vehicle Registration Number KCS 537A's best efforts, and skills. The 2nd respondent thus averred that they should not be blamed.
10. The second Respondent averred that they are strangers to the allegations of injuries suffered and long hospitalization of the appellant. A request for judgment was made against the first appellant, who did not participate in the proceedings. an amended defence was filed on 10.09.2020, to remove the fact that the driver used the best skills and replace it with the driver being rammed from behind. They also removed the threat of joining a third party and replaced it with the appellant bearing the same wholly. Nevertheless, the particulars of negligence of the unknown motorcycle remained, hanging.
11. During the hearing, the court entered judgment as earlier requested against the first respondent. There is no record in the file of the first respondent being notified at all for formal proof proceedings. on the same day of entry of formal proof, the appellant testified. The court shall revert on the effect of this misstep.

12. Secondly, the advocate of the second appellant filed an appeal for both Respondents. this made it unnecessary to serve the first respondent. However, there is no evidence that they were ever instructed to act for the first respondent. this is informed by the provisions of order 9 rule 5, which provides as follows:

> A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

13. The appearance by the firm Murimi Ndumia and Muchela advocates was for the second Respondent. All documents were also for the second Respondent. Effectively, the proceedings against the first Respondent in this court are a nullity. Having filed an appeal for a party for whom there was no service, the proceedings against the first Respondent are a nullity. In **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for

> an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

14. The proceedings in this court for and against the first respondent are thus a nullity. Secondly, there was an admission on record that the motor vehicle in question belonged to the second respondent. Given that the formal proof proceeded on the hearing date, the first respondent had no opportunity to know that interlocutory judgment had been entered against them. They were entitled to be notified. The appellant ought to have read the evidence against the first respondent. This was not done. In the case of **Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR**, the High Court in trying to defining Formal Proof, stated thus:

> ……. I have not seen judicial definition of the phrase Formal Proof. Formal in its ordinary Dictionary meanings - refers to being methodical according to rules (of evidence). On the other hand according to **Halsbury's Laws of England, Vol. 15, para, 260**, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth

or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.

15. Consequently, the judgment against the first respondent is set aside. The case against of the first respondent is set aside for being a nullity. order 10 rule 6 and 7 provide as follows:

> 6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.
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> 7. Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more
> appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the

> defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.

16. There is no exclusion of service for formal proof. By proceeding with the hearing on the same date when hearing was set, the first respondent was condemned unheard. The order to serve the respondents for 16.03.2021 was never set aside. **Evidence 12**

17. The appellant testified and adopted a witness statement dated 22.04.2020. He stated that he was travelling as a pillion passenger on a motorcycle Kisii -Kilgoris road at Kiomwanja. He said that Motor Vehicle Registration Number KCS 537A drove at a very high speed, lost control, and went into the lane they were in and violently collided with a motorcycle. He suffered injuries as pleaded. He was rushed to Kisii Teaching and Referral Hospital, where he was admitted for three months. He reported the matter to Ogembo police station. He was examined by Dr Morebu whom he paid Ksh 6,500/=. He stated that he blamed the driver of Motor Vehicle Registration Number KCS 537A. He stated that he was issued with a P3 form which was duly filled. Later he was given a police abstract.

18. The police abstract indicated that the vehicle belonged to the first respondent, but on search, they found it belonged to the second respondent. He stated that as a result of the

accident, he had an amputation. He produced a bundle of receipts for 117,550/=. The court noted that his leg was amputated and the appellant was on crutches.

19. On cross-examination, he stated that they were in a funeral procession at 3.00 pm. He stated that Motor Vehicle Registration Number KCS 537A hit emergency brakes. The motor vehicle was overtaking the motorcycle. He said that a vehicle in the funeral entourage took him to the hospital. He stated that he boarded the motor vehicle at Lenmek hospital, hence he did not know the motorcycle.

20. PW2 was PC Constance Githinji from Ogembo police station. He was the investigating officer. He said the lorry was rammed from behind. He stated that the vehicle was a lorry stopped, and the rider of the motorcycle ran away. He did not take particulars. He stated that the motorcycle should have maintained a distance of 70 metres. He stated that the driver of the vehicle has also not been found. he stated that he issued the abstract and could correct it. He confirmed the occurrence of the accident and injury of the appellant.

21. PC Caleb Omuse of Ogembo police station testified for the defence. He stated that the said accident occurred and the motorcyclist was blamed. They indicated that the motorcycle in a funeral procession lost control and rammed into the rear of the motor vehicle. They stated that the point of impact was the rear. On cross-examination, he stated that he completed the police abstract but did not visit the scene. He stated that the motorcycle was partly to blame, but the

motor vehicle was to blame. He stated that there was no independent report. Further, both the motor vehicle driver and the motorcycle rider ran away. He stated that he got the evidence he was giving from Thiga's statement. He is the officer who received a report. from members of the public.

22. The second Respondent indicated that the driver left employment, hence, he could not be called.

Impugned Judgment

23. The court then took written submissions and entered the impugned judgment. The court had only two options: either to dismiss the suit if the second respondent was not to blame or to find the second respondent 100% liable. The court took an unusual route and found the appellant 50% at fault. This precipitated the appeal herein.

24. The court further stated that the appellant did not prove occupation, hence dismissed the prayer for loss of earning capacity. It stated that the appellant did not demonstrate how amputation of the leg affected him. The court awarded a sum of Ksh 1,000,000/= as general damages.

Submissions

25. The appellant filed humongous submissions dated 9.9.2025. The court will endeavor to devour them to the greatest extent possible. They set out the duty of the court as was enunciated in the case of **GKN & another (suing as Personal Representatives of the Estate of GNL (Deceased) v Civiscope Limited**

[2021] KEHC 5883 (KLR), where, EC Mwita posited as follows:

> 16. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and the impugned decision. This being a first appeal, it is the duty of this court as the first appellate court, to re-evaluate, reconsider and reanalyse the evidence and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.
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> 17. In Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, the Court of Appeal held:
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> [A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

26. The appellant noted that the court will not interfere with the court's decision unless the court considered an irrelevant consideration. Reliance was placed on the case of

Eunice Auma Onyango v Salin Akinyi Oluoch [2015] KEHC 1949 (KLR), where AC Mrima held as follows:

> An appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it, or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348.
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> 13. It was further held in the case of Hahn vs. Singh (1985)KLR 716 that the appellate Court will hardly interfere with the conclusions made by a trial Court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial.

27. They submitted that the appellant was held liable despite precedent in similar cases. They relied on the fact that the respondent did not tender oral evidence to controvert the appellant's evidence, who was a pillion passenger. Reliance was placed on the cases of **Mary Njeri Murigi v Peter Macharia & another [2016] KEHC 3535 (KLR)** and **Masembe v Sugar Corporation & another [2002] 2 EA**

434. The court was urged to find that the driver ought to have been held 100% to blame.

28. On the respondents being vicariously liable, reliance was placed on the case of Kansa v Solanki (1969) EA 318. They further, wondered how the court found the appellant liable despite finding that they appellant cannot be held liable. This was said to result in an absurdity. Thus, they stated that no decree of liability could be attributable to him as it was beyond his control.

29. On quantum, they stated that the appellant suffered 75%disability owing to the crush injury that led to the amputation.

30. Further, he submitted that there was a question of artificial limb which was not addressed at all. They submitted that the award on general damages was inordinately low. They proposed a sum of Ksh 2,800,000/=. Reliance was placed on the cases of:-

    a. **Daniel Kosgei Ngelechei v Catholic Diocese Registered Trustees Of Eldoret & another** [2016] KECA 489 (KLR), where an appeal from was dismissed by the court of appeal[Maraga, Musinga & Gatembu, JJ.A**]** from an award of the court awarded the appellant Kshs. 2,100,000.00 general damages for pain, suffering, and loss of amenities. the claimant had suffered a traumatic amputation of his left lower limb above the knee. it is not clear whether the reliance was on the appeal matter or the high court matter, Daniel Kosgei Ngelechei v Catholic Trustee Registered

Diocese of Eldoret & another [2013] KEHC 5582 (KLR) in the high court case, the court[G. W. Ngenye – Macharia, as then she was] awarded the said amount, Kshs. 2,100,000.00 and Ksh. 2,796,045/= for future replacement of prosthetic limb.

b. **C M (a minor suing through mother and next friend M N v Joseph Mwangangi Maina** [2018] KEHC 4815 (KLR), where the court, C. Meoli, awarded Ksh 2,000,000/= for a minor whose stump would require refashioning to enable the prosthesis fit properly. The minor was growing, and the bone that had been cut during amputation was also growing. A claimant had 40% permanent incapacity. The injuries affected the appellant's pre-existing medical condition.

c. **John Kipkemboi & another v Morris Kedolo** [2019] KEHC 8736 (KLR), where DN Musyoka J awarded general damages of Kshs 2,500,000.00 and for loss of earning capacity Kshs 1,500,000.00. The claimant suffered had amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury, and crush injury.

31. On the aspect of diminished earning capacity, they stated that the court ought to use the minimum wage of Ksh 7,240.95. They said that the court gave no basis for not awarding loss of earning capacity. They prayed for a sum of Ksh 1,955,056.50. The court was invited to rewrite the lower court's judgment. The amount was said to have been submitted in the lower court on. 1.12.2022.

32. On future medical expenses, they indicated that there was a discharge showing Ksh 400,000/= for artificial limb. They prayed for a sum of Ksh. 5,333,333 /=.

33. They beseeched the court to award them costs unless there is a good cause for not granting them. Reliance was placed on the case of **Universal Engineering Works v Mohamedali Suleiman Essaji** (1951) 2 LKR 99.

34. The court notes that, though well written, the appellant may find a shortened version of making the same point in fewer than five pages, especially by skipping unnecessary introductory literature.

35. The respondent set out the duty of the first appellate court. They submitted that the court should not interfere with the lower court's apportionment of liability. It was, however, not clear whether this is cast in stone or there are exceptions. They relied on the case of **Khambi and Another v Mahithi and Another** [1968] EA 70, it was held that:

> It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an

appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

Analysis

36. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of **Mbogo and Another vs. Shah [1968] EA 93** where 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 is 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.

37. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus **Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the law looks in their usual gusto, held by 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-trial and the Court of Appeal is not bound to follow the trial 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.

38. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial 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. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, 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…

39. Both appeals offend the provisions of Order 42 Rule 1 of the Civil Procedure Rules, which provides:

> (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

40. The Court of Appeal had this to say about compliance with Rule 86 (now Rule 88) of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR**:

> We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v.

IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs. The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues…

41. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination. In the case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] KECA 472 (KLR)**, the court of appeal[Nambuye, M. Warsame & Otieno-Odek JJA] observed that :

> Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62* of the Kenya Ports Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which

tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

> The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.

42. The first question is liability. It must be remembered that there were three interested eyewitnesses to the matter, the second respondent's driver, the rider, and the appellant. Only the appellant testified as an eyewitness. Consequently, there was no other eyewitness account on what happened, other than the word of the appellant. His evidence was that the appellant was in a convoy. The second respondent's driver overtook the rider and applied emergency brakes, causing the motorcycle to ram the rear of the vehicle.
43. The police witnesses differed on the accounts of what happened. However, there was no sketch plan of what happened. There were no credible investigations into the accident. The rider and driver fled the accident scene. The driver never recorded a statement. The police placed reliance on a report from unknown members of the public.

This is what is known as hearsay. The police account did not have even the rider's account of the circumstances.

44. Further, the police gave evidence that raises doubt about their own training. The police blamed the rider for not maintaining a 70 m distance from the lorry. There is no such requirement in law. What is required is keeping a reasonable distance. The distance of 70 m is not practicable. There is no amount of travel space where 70 m can be found.

45. The second aspect is the eye witness account from the appellant, who stated that the motorcycle was in a convoy and in front. It was careless, and the motor vehicle cut in, resulting in the accident. It must be remembered that only the appellant out of the three parties testified. The court cannot use police evidence for the finding on negligence. A police abstract is evidence that an accident occurred and was reported. Only cogent evidence from eye witnesses, sketch plan, and other credible evidence will suffice.

46. In the case of **Wayo & another (Suing on Behalf of the Estate of Benjamin Wayo Sailoki - Deceased) v Bwire (Civil Appeal E033 of 2022) [2025] KECA 866 (KLR)** (7 March 2025) (Judgment), the court of appeal[**AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA**], while hearing an appeal in the case of **Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR)** from Mativo J, as he then was, stated as follows:

> A police sketch map is prepared after the event. It is not an eyewitness' account. However, its

probative value was found by this Court to be an item of evidence to be considered as it shows the actual position the parties to an accident were immediately after the accident - See Equator Distributors v Joel Muriu & 3 Others [2018] KECA 53 (KLR).

51.We take cognizant of the fact that, in most serious road traffic accidents, the investigating officer will normally and almost always draw sketch plans for the afore-stated reason. We find it particularly disturbing that the police officer (PW1) did not find it necessary to produce in evidence the sketch map he was alleged to have drawn. This, no doubt, would have been a true reflection of what he would have found at the scene of the accident. It was expected that the police officer was to testify as an expert. He did testify as one, and in fact, we believe that he was trained on how to handle a scene of accident, but he was unable to demonstrate by a reconstruction of the scene that it was the driver of the motor vehicle who was 100% to blame. In fact, the best tool with which he would confidently have established the culpability of the respondent was a sketch drawing. We cannot fathom how, being an experienced traffic police officer who handled a serious road traffic accident, he omitted to discharge the task of adducing the drawings.

47. In short, the police abstract is the evidence of the occurrence of the accident. The police could support this with a sketch plan. However, the court is under a duty to evaluate the evidence on its own.

48. The evidence by the appellant was not controverted that the appellant was a pillion passenger and that the motor vehicle overtook the motorcycle carelessly and applied emergency brakes. The mere fact that the motorcycle rammed the foam behind does not make them negligent, in view of the evidence of careless overtaking that was not controverted. in the case of **Joel Muga Opija v East African Sea Food Limited [2013] KECA 181 (KLR)**, the court of appeal[Onyango Otieno, Azangalala & Kantai JJ.A**]** held as follows:

> That in effect leaves only the issue of whether negligence was proved within the standard required in civil suit. Ouma stated clearly that the deceased was hit from behind and fell on the left hand side of the road as one faces Pala side. We do not think that the mere fact that this witness was not listed as a witness in the abstract lessened the weight of his evidence. He was a member of the public and he said the police did not record statements of those who were at the scene. In any case he was not challenged by any evidence from the respondent to the contrary. We think that without any evidence challenging his evidence the fact would remain that the deceased was hit from

> behind and he fell on the left hand side. The driver must have been seeing him in front of him and there was no evidence that the deceased changed his manner of cycling or that he went zig zaging on the road. We see no reason to disturb the learned Magistrate's finding on negligence.

49. The next question is whose negligence? The accident involved a motorcycle and a motor vehicle. Both the rider and driver fled. The suit was filed against the driver. Cogent evidence was given against the driver. the driver did not give evidence at all. He had no reason to flee other than fear of the consequences of his actions. he failed to testify for a good reason. Ordinarily, people with borderline cases lie, hoping that the lies may convince the court. Those without cases run away since testifying will implicate them. This is what section 112 of the Evidence Act is for. it provides as follows:

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

50. The court was straining to find what the police said. However, the driver was known and was in the employee of the second respondent for reasons unknown, he did not testify, or even record a statement with the police. he was not called to dispute the version of evidence given by the appellant. an adverse inference should and must be made.

The only plausible explanation for his absence, is not what council told the court from the bar, but that had he testified, his evidence could have been adverse to the second Respondent. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:

> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

51. The appellant's evidence was uncontroverted. Failure to call the driver or an eye witness, meant that the version given by the appellant, however weak the court thought it was, stands.

52. The court below expressed its personal feelings in the judgment that eventually affected the objectivity of the decision. This is the point at which the impugned judgment departs from settled judicial standards. A court of law is not entitled to substitute legal reasoning with personal sentiment. In expressing itself as it did, the trial court arrived at a finding of grave consequence, one that impermissibly displaced the requirement of proof with conjecture, speculation, and conjectural inference. In so doing, the court descended from the realm of evidence-

based adjudication into subjective impression, thereby occasioning a fundamental misdirection in law. The court's own words best illustrate this error, and they are reproduced verbatim below:

> That the rider of the unknown motorcycle disappeared from the scene together with the motorcycle. There was no indemnification witness to the accident. The court ruled that the plaintiff was a pillion passenger aboard the motorcycle, which was unknown. Although I personally have a strong feeling that the plaintiff was the same person as the rider. But the court goes with facts in court, which indicated on the abstract he was a pillion passenger. The pillion passenger is not indicated how he contributed.

53. After making the finding that the appellant did not contribute, even if he wore a reflective jacket, the court proceeded in a complete somersault and held in 50% liable.
54. However, the court must confine itself to empirical evidence and refrain from acting on surmises, feelings, conjecture, or mere suspicion. The court is, however, entitled to draw legitimate inferences that are permissible in law. Such inferences must be grounded in evidence and may arise either through deductive reasoning, in which conclusions are drawn from established principles and proven facts, or through inductive reasoning, in which broader conclusions are derived from specific observations. For an inference to be valid, the underlying syllogism must

be firmly anchored in the evidence on record. Where the court acts on mere feelings, assumptions, or suspicions unsupported by evidence, such reasoning remains in the realm of conjecture. It cannot form the basis of a judicial finding.

55. Whereas the court may, in a broader philosophical sense, engage with questions of epistemology, namely belief, truth, evidence, and justification, only evidence and legally cognizable justification are admissible within the domain of jurisprudence. Matters grounded purely in belief, speculation, rhetoric, or subjective persuasion properly belong to the realms of academia, religion, or philosophy, and not to judicial determination. The court must therefore anchor its conclusions strictly on admissible evidence and sound legal reasoning, eschewing conjecture and impression.

56. Indeed, other than this subjective finding, there is no basis for the court to hold the appellant 50% to blame. Nothing on the record reflects the raison d'être for finding any liability on the pillion passenger. The poor record of the reason gives the appellate court no chance of understanding the basis of judgment. The court was straining to hold the appellant liable, but at the same time prevaricating between the known truths, altruisms, suppositions, and conjecture. In the case of **Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR)**, Mativo J aptly observed that where a judgment is poorly reasoned, the reasons become so inadequately expressed that a reader is left to speculate as

to the path by which the court arrived at its conclusion. Such a deficiency undermines the very essence of judicial reasoning and renders the decision incapable of meaningful appellate scrutiny. His Lordship stated as follows:

> 54. If it is not possible to understand from the judgment how the final orders were arrived at, then plainly those reasons will be inadequate. The reasons should trace the major steps in the reasoning process so that anyone reading them can understand exactly how the decision-maker reached his or her conclusion. The legal principles applied should be evident from the judgment.
>
> 55.If the reasons are poorly expressed, and anyone reading them is left to speculate as to the possible route by which the result was achieved, the reasons will fail. The reasons must demonstrate that a finding of fact was based upon logically probative evidence. If they do not do so, an appellate court will not strain to find a basis upon which the decision can be upheld. The duty to give reasons is, of course, an integral part of any courts task in deciding a case. I would add that it is also an important part of any courts task in ruling upon a procedural question, an interlocutory issue, or determining an evidentiary point. The absence of reasons is a serious omission which renders the award on damages arbitrary and undefendable in law.

57. The pillion passenger cannot be held liable for an accident as found by the court below. Therefore, apportioning 50% to the appellant/rider was without any basis. If the Second Respondent wished that the rider be held liable, then proceedings under Order 1 Rule 15(1) were inevitable. The said rule provides 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 plaintiff; 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 plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for

by summons in chambers *ex parte* supported by affidavit.

58. The first known unknowns are that there will be objections that the third-party cyclist was unknown. The second respondent and their insurers stood to lose most. the driver of the motor vehicle did not die. He saw the motorcycle; they were involved in a simple inquiry that would have yielded both the rider's name and the owner. The appellant boarded a motorcycle at Lenmek hospital, which must have been known. By being reckless in their own investigations, they cannot blame anyone. They had the highest take and thus the highest responsibility to protect their own interests, which they failed.

59. In any case, the court deals with parties in court. The court cannot blame a non- party. The principle of *audi alteram partem* is a cornerstone of natural justice, requiring that the adjudicating authority hear the other side. The motorcyclist deserves the opportunity to present his case, respond to allegations, challenge the evidence, and summon witnesses. They cannot be judged without proper third-party notice being served upon them, giving them a fair opportunity to defend themselves and to respect due process.

60. The court cannot, at this level, find the unknown motorcyclist liable when they are not parties. How will the parties execute against them? The invitation by the second

respondent to do so, is not tenable. In affirming the decision of the high court, the court of appeal in **Kenya Bus Services Limited & Another v Githae Gatururi [2013] KECA 346 (KLR)**, stated as follows:

> The learned judge (Ang'awa, J.) considered the evidence presented before her and in holding that the appellants were liable to the respondent, stated as follows:
>
> > As a court, I am not permitted to find contributory negligence against a party who is not named in the plaint but has been merely mentioned by the defendants. As stated elsewhere this is the principle of Audi altercum pastime. (sic) "No man should be condemned without being heard and offer his side of his story."
>
> We therefore come to the conclusion that the respondent proved the particulars of negligence as pleaded. In any case, the fact that the deceased was a passenger on the 1st appellant's public carrier cast a duty on the 1st appellant to carry the deceased safely as far as reasonable care and forethought could attain. If indeed a third party was involved, the appellants ought not to have abandoned the third proceedings.

61. Recently, in the case of **Macharia v Kamau [2024] KEHC 8280 (KLR)**, this court, J. N. Njagi,

addressed the issue of a non-party or not joining a third party as follows:

> 24. The purpose of serving third party notice on the third party is to avoid a multiplicity of suits. In my view, a party who in his statement of defence blames a third party for the act complained of by the plaintiff and fails to serve a third-party notice on such third party is, for all purposes, deemed to have abandoned the defence raised in the statement of defence.
>
> 25.The appellant herein having blamed a third party, the rider of the subject motor vehicle, for causing the accident and failed to serve a third-party notice can only be deemed to have abandoned the defence that the rider is the one who was to blame for causing the accident. As such the court cannot determine the issue between the appellant and the motor cycle rider as to who between them was to blame for causing the accident. That would amount to condemning the rider unheard. In the final end, the appellant`s defence is of no consequence and the evidence of the respondent that the appellant was the one to blame for causing the accident stood uncontroverted. In the premises, I hold that the appellant was wholly liable for causing the accident. Liability at 100% is therefore confirmed against the appellant.

62. Indeed, in this matter, the rider and the first respondent were not involved. The court cannot find them liable. In the case of **Daniel Nyandika Kimori v Monicah Achieng Ogola [2016] KEHC 1111 (KLR)**, this court, H. A. Omondi, held as follows:

> 32.I agree with the Respondent's counsel that the issue of liability and / or contribution can only be determined between the Appellant and the Third Party as there was no evidence attributing contribution on the Respondents. In deed the cause of HARRISON WAFULA KHAMALA -vs- ISAAC NDARWA KIARIE (supra) offers a useful guide where the Court of Appeal commented as follows:-
>
> "…. the appellant faulted the Learned Trial Magistrate for failing to find that the third party contributed to the occurrence of the accident. That notwithstanding, the appellant did not serve a notice of appeal upon the third party….. If the appellant wanted this court to make adverse findings against the Third party in the High Court matter, nothing would have stopped him from serving him with a notice of appeal. The appellant decided to leave out the Third Party and served the notice of appeal upon the Respondent only. In the circumstances we cannot make adverse findings

against a person who is not a party to this appeal, not having been afforded an opportunity to be heard."

33.The present situation is on all fours with what the Court of Appeal noted in the Khamala case. The appellant had a very good opportunity of passing the burden of liability largely to the Third Parties had they been served with the memorandum of Appeal – unfortunately the failure to do so has resulted in a costly omission – I adopt the sentiments by the Court of Appeal in the Khamala case.

63. On a more fundamental basis, the appellant had a burden of proof on the aspect of negligence. This is not a criminal trial. It is a civil trial where the court has to find for one part or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

"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."

64. This was further enunciated in the case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR),** where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. 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 the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

65. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellant 50:50 to blame. Either side seek that the court finds the other side to blame. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In this case, it was the appellant who had a burden of proof. 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 case 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."

66. It follows that the initial burden of proof lies on the Plaintiffs, 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 preposition 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."

67. The Second Respondent bore the burden of proving contributory negligence. The next question, therefore, is whether, after the respondent established negligence on the part of the appellant. The appellant was able to prove contributory negligence. 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. All that is necessary to establish such a defence is to prove that the injured party failed to take reasonable care for their own safety and that such failure contributed, in some degree, to the accident or the damage suffered.

68. The essence of contributory negligence lies not in a breach of duty to the defendant, but in a failure to take reasonable precautions to avoid foreseeable harm to oneself. See ***Davies v. Swan Motor Co. Ltd*** **or** ***Nance v. British Columbia Electric Railway***. It was the duty of the

respondent to prove contributory negligence on the part of the Appellant It was not shown the appellant contributed to the accident in any way. 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 plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

69. The accident can therefore not be said to have occurred by magic. Or unidentified flying object. In a court room situation, we deal with empirical evidence on what is more probable than the other. The court can possibly get it wrong but if better still 50.01:49.99, there can be no better equal chance. 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* that; -

> "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).

70. The second respondent was vicariously liable for the actions of the driver as submitted by the Appellant. In that regard the finding in the case of Kansa v Solanki (1969) EA 318, is apt. The court stated as follows:

> Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard v Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being.

71. Having failed to prove contributory negligence, the defence became bare. This was more so by the failure of the

second respondent's driver to rebut evidence tendered by the appellant. In all circumstances, considered, the court below erred in holding parties 50: 50. The finding on liability is therefore set aside and substituted with 100% liability against the second respondent. The second Respondent was dismissed for lack of merit.

72. The court now turns to the quantum of damages. this will be addressed in four limbs as discussed in the appeal and submissions. the last part is for reprimand only. It is also only valid given the finding I have just made on liability. General damages are awarded at the discretion of the court, which must exercise that discretion judiciously, guided by the nature and extent of the injury, comparable awards in similar cases, and the overarching principle of fairness. In **Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR**, Justice D.S Majanja held as follows:

> General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.

73. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally

and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

74. Finally, in determining whether to interfere with the quantum of damages awarded by the lower court, the appellate court must remain mindful of the limits of its mandate. An award of damages is an exercise of judicial discretion, and such discretion should only be interfered with where it is shown that the trial court acted on wrong principles, misapprehended the evidence, or arrived at an award that is so inordinately high or so inordinately low as to amount to an erroneous estimate of the damages.

75. The Court of Appeal pronounced itself succinctly on these principles in **Kemfro Africa Ltd t/a Meru Express Service & Another v A.M. Lubia & Another [1987] KLR 30**, the Court of appeal set out the guiding principle on appellate interference with an award of damages as follows:

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

76. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, In **Nance v British Columbia Electric Railway Co Ltd [1951] AC 601**, as cited with approval in **Henry Hinga v Manyoka [1961]** EA 705, **713**, the court stated the governing principle thus:

> 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…

77. Therefore, for me 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. So, my duty as the appellate court is threefold regarding quantum of damages: -

a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
c. The award is not justified by evidence.

78. To be able to do this, I need to consider similar injuries, take into consideration inflation, and other comparable awards. The injuries that were pleaded and provided were:
    a. Crushed right leg leading to amputation.
    b. Deep cut wounds on the left knee.
    c. Bruises on both elbows.
79. The appellant submitted that a sum of Ksh 2,800,000/= will suffice. The respondent submitted that the Ksh 1,000,000/= granted was more than sufficient. The second Respondent did not raise any appeal regarding the quantum of damages or the extent of the injuries.

80. The difficult court notes are the strict adherence to the doctrine of stare decisis. For the uninformed, stare decisis is a constitutional imperative, drawn from common law but now enshrined in Article 163 of the Constitution, that decisions of superior courts are binding on the courts below, with the Supreme Court at the apex. The doctrine of stare decisis obliges this Court to follow the binding decisions of the Supreme Court and the court of appeal. The court is obligated to follow binding decisions of the superior courts. Article 163(7) of the Constitution provides that:

> " all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."

81. The court found that the most apt decision, which was also in all fours with the injuries suffered by the appellant, was **Simba Platinum Limited v Nicholas Auma Wandera [2021] KEHC 1235 (KLR)**, where J. Kamau J upheld an

award of Ksh. 2,000,000/= for a claimant who sustained multiple fractures on the left arm, leading to complete amputation of the left arm at the shoulder joint. The court, in arriving at the decision, relied two other cases as follows:

> In arriving at the said figure, this court had due regard to the following comparable precedents:
>
> 1. **Roba Doti Guyo vs. Jiang Zhongemei Engineering Company [2015] eKLR**, the plaintiff, therein suffered a crushed hand which was amputated leaving him with an ugly stump. In 2015 the plaintiff was awarded Kshs. 2,500,000/= as general damages for his pain, suffering and loss of amenities.
>
> 2. In **Umoja Rubber Products Limited vs. Bobson Rimba Lewa [2015] eKLR**, the Respondent therein suffered an amputation of the left hand below the elbow. In 2015, he was awarded Kshs 2,200,000/= as general damages for his pain and suffering which sum was upheld on appeal.

82. Instead of taking into consideration inflation and the time lapse between the decision and the courts' decision, an award of Ksh 1,000,000/= was made. This gave rise to the two appeals before me. Effectively, the lower court overruled a superior court's judicial decision. Indeed, if the court intended to deviate from directions given by a higher

court, it was simply to note the marked differences between the decisions and even pretend that the decision did not apply, as it covered more serious injuries. In that case, no reason was given completely. As a fact, the injuries suffered in **Simba Platinum Limited v Nicholas Auma Wandera** [supra] were more severe than those of the appellant herein. In that case, the disability was given at 100%

83. The appellant suffered 75% permanent disability according to Dr. Morebu. However, other factors to consider include inflammation, the victim's condition, and relevant circumstances. None of the circumstances were considered. This robs the parties of the right to have a court that saw the witness assess damages. The High Court has in the past, given the reasons why assessment must be done. In **Lei Masaku v Kalpama Builders Ltd [2014] KEHC 1196 (KLR)**, A Mabeya noted as follows:

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess

damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

84. In **C M (a minor suing through mother and next friend M N) v. Joseph Mwangangi Maina [2018] eKLR**, Meoli, J. awarded Ksh.2,000,000/- in general damages for pain and suffering for a child aged seven at the time of the accident for amputation of the right leg, in addition to damages for loss of earning capacity of Ksh.900,000/-.

85. The claimant in **John Kipkemboi & Another v Morris Kedolo [2019] eKLR** sustained the following injuries - amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury and crush injury. The doctor assessed incapacitation at 50 % due to the amputation. The High Court (Musyoka J) reduced the award of Ksh. 3,000,000 in general damages made by the lower court to Ksh. 2,500,000 in 2019.

86. In **Kurawa Industries Limited vs. Dama Kiti & Another** (supra), Based on the above, it is the finding of this court that the award of Ksh. 3,500,000 was inordinately high and amounted to an erroneous estimate of damages.

87. In the case of **Mbatia & another v Maina alias Boniface Karanja Maina alias Boniface Mwangi Maina alias Boniface Mwangi [2025] KEHC 8265 (KLR),** the court awarded a sum of Ksh.2,500,000/= for amputation of the right leg below the knee with a 23 cm-25 cm stump.

88. In the case of **Dolphine Freighters Ltd v Shingoli** [2025] KEHC 5216 (KLR), the court affirmed an award of Ksh 2,500,000/= where a claimant's right leg was amputated.

89. In the case of **Muchina v Wanjiku & 4 others** [2025] KEHC 1817 (KLR), the court awarded general damages Kshs 3,000,000/= for a compound fracture of the left tibia and fibula, fracture of the socket of the left hip joint, and amputation of the left leg below the knee.

90. All factors considered, a sum of Ksh 2,500,000/= is sufficient for the injuries suffered. Compensation for personal injury suffered, so far as money can do so, to restore the plaintiff to his position before the accident – see Lord Dunedin in **Admiralty Commissioners v. Valeria (Owners)** [1922] 2 A. C. 242, 248:

> "If by somebody's fault I lose my leg and am paid damages, can anyone in his sense say I have had **restitutio in integrum**? The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, **so far as money can do so**, the loss which he has suffered as the natural result of the wrong done to him."

91. This was the same holding in T**errell's Law of Running Down Cases**, 3rd ed. London Butterworths (1964) at p.75,

and dictum of **Lord Morris Borth-y-Gest in *H. West & Son Ltd. v. Shephard* (1964)** AC 326, 345:

> "But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the 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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional."

92. An award of 1,000,000/= was so inordinately low as to amount to an erroneous estimate of damages. In the lower court, the second Respondent submitted that an award of Ksh 2,000,000/= would suffice. The court decided to ignore both and award an arbitrary figure. The amount is therefore set aside and substituted with a sum of Ksh 2,500,000/=.

93. There was no appeal on special damages. The appellant raised issue with the judgment for a sum of Ksh.124,000[actually 124,500]. They submitted that the same was correctly awarded, but the court was wrong in subjecting it to contribution. Though this is a correct exposition of the law, I will dismiss this limb upfront. It is

not raised in the appeal. Order 42 Rule 4 provides as follows:

> The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the
> court under this rule:
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

94. These matters are raised at the submissions level. Mwera J posited the following when considering the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim in the case of **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi** Nairobi HCCC No. 36 of 1993:

> Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny

in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.

95. Submissions are not, strictly speaking, part of the case, the absence of which may prejudice a party. Their presence or absence does not in any way prejudice a case, as held in **Ngang'a & Another vs. Owiti & Another** [2008] 1KLR (EP) 749, the Court held that:

> As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.

96. The Court of Appeal was more succinct in that **Submissions cannot take the place of evidence** when they addressed the question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

> Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' ***marketing language***, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.

97. In any case, the question is now academic in view of my earlier finding. The court did not decide, or only partially decided, on one aspect of loss of future earning capacity.

98. The court posited that there was no evidence of what the appellant was doing to warrant a loss of the future. With all due respect, the court confused two interrelated limbs: loss of earnings and loss of earning capacity. The latter is more of a general damages claim. The former is decidedly more of special damages.

99. The Court of Appeal in the case of **Butler v Butler [1984] KLR 225** enumerated the following principles to be considered in respect of a claim for loss of earning;

1. That a person's loss of earning capacity occurs where as a result of 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
2. That loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.
3. That damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now qualified separately and no interest is recoverable on them.
4. That loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and / or at the date of the trial.
5. That loss of earning capacity or earning power may and should be included as an item within general

damages but where it is not so included it is not improper to award it under its own heading; and

6. That the factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

100. It is, therefore, cavalier to require a man whose limb has been amputated to show how he lost the capacity to work. It is neither sensitive nor edifying to so hold. The good doctor had already indicated that the Appellant had lost 75% capacity. However, the appellant did not plead the prayer for loss of future earning capacity at all.

101. In **Alpharama Ltd v Joseph Kariuki Cebron** [2017] eKLR, the court held as follows;

> '...To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net

loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a “multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired”. According to the bank statements produced, the plaintiff indeed had money flow into her account. The flow showed a steady growth. While taking an average for the entire period of banking shown in the bank statements may not be the most accurate formula to determine the monthly income that alone should not be the basis to conclude that ascertaining a monthly income is difficult and therefore the court is unable to assess the damage. On the same vein the multiplier approach is just but one aid the court applies in assessment of damages. It is not the only one. The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors…”

102. The above position indicates that where a person's loss of diminished earning capacity can be determined based on a salary or determinate income, then a multiplicand approach is preferable. Still, where the income is indeterminate, then a lump sum or global award is preferable.

103. However, there was no pleading or prayer for this award. This came for the first time in submissions. I have already addressed the role of submissions in cases. The court cannot deal with matters that were not placed before it. There was indeed diminished capacity, but the court was not moved by way of pleadings. the question was also not left to the court to determine. The court could only determine an unpleaded issue if it appeared to have been left to the court. in the case of **Odd Jobs Vs. Mubia** [1970] E.A. 476, the former court of appeal for East Africa held as follows:

> "A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;

104. Parties are bound to plead their cases fully. they cannot base them on submissions. In the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, Justice A C Mrima stated as doth: -

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for

rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is

equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

105. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition: -

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither

desirable nor permissible for a court to frame an issue not arising on the pleadings…

106. The appellant must therefore, before proceeding to prove, deal first with pleadings. Although the appellant indicates that the plaintiff has the claim, the plaintiff's claim, which is in the lower court file and on pages 27-29 of the record, does not include such a prayer. The prayer for future earning capacity is accordingly dismissed. Even where the court is dismissing a claim, it is bound to assess. Had the appellant pleaded the same, it would have awarded minimum wages for 10 years, at 75% diminished capacity. The appellant is a resident outside the municipality, hence as at 12.09.2019, the **Regulation of Wages (General) (Amendment) Order, 2018**, row 1 applies. This would have worked as follows;

75% X 10 5 VVV = 888

107. However, this was not pleaded. The claim is therefore dismissed for not being pleaded. The claim was not even prayed for at all. The court is equally bound by the pleadings of the parties.

108. On future medical expenses, the appellant prayed for one thing and ought to get a different one. The pleadings relate to an artificial limb. there were no pleadings for any other limbs. The medical report indicated that they were to be replaced. The claim for future medical expenses is of the

nature of special damages but of a different type. They have nor been incurred. They cannot, however, be thrown to the court. They must be pleaded and proved. There is no need to prove or plead in a specific amount. however, there must be pleadings laying basis for the same.

109. special damages generally were discussed in the case of **David Bagine V Martin Bundi [1997] KECA 54 (KLR)**, the court of Appeal [E. Gicheru, A.B. Shah and G. S. Pall], posited as follows:

> It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> “Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

110. The examining doctor indicated the cost of the artificial limb was Ksh. 400,000/=. There was no dispute over this

amount. however, there was no scientific basis given for the replacement of artificial limbs for adults. Secondly, only one limb was pleased. A party cannot just throw figures to the court without supporting pleadings.

111. This Court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in **Shah and Another vs. Shah and Others [2003] 1 EA 290**:

> "The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

112. Further, the Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that:

> "… such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other

available evidence there is proper and cogent basis for doing so."

113. Courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts, and the courts must accept them as stated in **Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29,** it was held that:

> "It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of ***Elizabeth Kamene Ndolo vs. George Matata Ndolo***, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
>
> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for

> its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

114. Had the appellant wanted the court to award more than one limb, there should have been pleadings to that effect. Secondly, the doctor must testify and justify the basis for the period. The expert report must also indicate the basis for replacement. The court needs materials to go with. Without materials, only a sum of Ksh.400,000/= for an artificial limb was proved.

115. The appeal in E106 OF 2022 is allowed, on the other hand, Civil Appeal No. E006 OF 2023 lacks merit and it is dismissed.

116. Who then bears the costs for the two appeals? The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit

shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

117. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> "It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

118. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

119. The two appeals largely raised the same question. Further, the appeal was caused by the court's prevarication regarding the correct finding on liability, which left doubt about what the court was finding. Therefore, in exercise of the court's discretion and to avoid duplication of costs, each party will bear their own costs in respect of Civil Appeal No. E006 OF 2023. On the other hand, the appellant was the successive party. He is entitled to the costs. A sum of Ksh 145,000/= will suffice.

Determination

120. In the upshot, I make the following orders: -

a) Civil Appeal No. E006 OF 2023 lacks merit, and it is dismissed.

b) Civil Appeal No. E106 OF 2022, on the other hand, is allowed, in lieu thereof, judgment and decree given in Ogembo MCCC 51 OF 2020 delivered on 6.12.2022 by Hon. G.N. Barasa, SRM(PM) is set aside and substituted with the following orders:

i. The suit against the first respondent is dismissed as the proceedings against the first respondent were a nullity.

ii. Judgment is entered on liability for the appellant against the second respondent at 100%.

iii. Judgement of the lower court awarding general damages of Ksh. 1,000,000 is hereby set aside and substituted with an award of Ksh. 2,500,000.

iv. The claim for diminished capacity is dismissed for not being pleaded.
v. Special damages of Ksh 124,500/=,
vi. Award of Ksh. 400,000/- for future medical expenses of for an artificial limb is awarded.
vii. Each party to bear their own costs in Civil Appeal No. E006 OF 2023.
viii. Appellant to have costs of Ksh 145,000/= in Civil Appeal No. E106 of 2022.

c) 30 days' stay of execution.
d) The second Respondent to bear the appellant's costs in the court below.
e) 14 days Right of Appeal.
f) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** virtually this **19th** day of **January, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Were for the Appellant

No Appearance for the Respondent

Court Assistant- Michael