REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E236 OF 2025

-between-

1. KOPPERT BIOLOGICAL SYSTEMS (K) LIMITED
2. JOSEPH KIMANI……..APPELLANTS

-versus-

KELVIN MUTUGI NDERITU…… RESPONDENT

[Being an appeal from the judgment of Hon. Ruguru N. (SPM) in Civil Suit No. E3921 of 2022) delivered on 31st January 2025]

JUDGMENT

Background:

1. The appeal before this Court arises from a road traffic accident that occurred on or about 14th September 2021, involving *Kelvin Mutugi Nderitu,* the Respondent herein, who was the rider of motorcycle registration number KMDF 253K, and the motor vehicle registration number KBN 193L, belonging to *Koppert Biological Systems (K) Limited* and ridden by *Joseph Kimani* the 1st and 2nd Appellants herein respectively. The Respondent instituted *Milimani Chief Magistrates Civil Case No. E3921 of 2022* (hereinafter '*the suit*') alleging that the accident was caused by the negligence of the 2nd Appellant.

2. The Appellants denied liability. They averred that the accident was caused by the negligence of the Respondent. The matter proceeded to full hearing where the Respondent testified and called two witnesses, including a Doctor and PC Nthiga. The Appellants called the 2nd Appellant, PC Mwaniki, and their own doctor, Dr. Waithaka.

3. In its judgment, the trial Court found in favour of the Respondent on liability and awarded him Kshs. 1,000,000.00 in general damages, plus special damages of Kshs. 5,550.00, costs, and interest.

4. Aggrieved, the Appellants preferred this appeal.

The Appeal:

5. Through the Memorandum of Appeal dated 27th February 2025, the Appellants set out the following grounds of appeal:

> 1. *That the Learned Honourable Magistrate erred in law and fact in finding the Appellants 80% liable for causing the accident completely disregarding the circumstances under which the accident occurred especially the fact that the Plaintiff was blamed by the police who investigated it.*
>
> 2. *That the Learned Honourable Magistrate erred in law and fact in finding in favour of the Respondent whereas he had not satisfied his burden of proof.*
>
> 3. *THAT the Learned Honourable Magistrate erred in law and fact in awarding the Plaintiff KES 1,000,000.00 in general damages as compensation for the injuries sustained by him.*
>
> 4. *THAT the Learned Honourable Magistrate erred in awarding a sum in respect of damages which was inordinately high and excessive in the circumstances occasioning miscarriage of justice.*

The Submissions

6. In their written submissions dated 30th May 2025, the Appellants argued that the trial court misapprehended the circumstances of the accident with respect to liability. It was their case that the 2nd Appellant was negotiating a turn at the *Likoni Interchange* when the Respondent, failing to give way, attempted to overtake from the left side.

7. The Appellants relied on the case of *Lawrence Asava v Gesalt Gild Limited & another [2019] eKLR* to submit that the burden of

proof lay with the Respondent to demonstrate how the 2nd Appellant lost control, which he failed to discharge. They pointed out that the physical evidence, specifically damage to the front left bumper, corroborated the 2nd Appellant's version that the Respondent was cutting in from the left, contrary to the Highway Code.

8. Regarding police evidence, the Appellants contended that while *PC Nthiga*, the Respondent's witness, produced an abstract listing the matter as '*pending investigations'* while *PC Mwaniki*, their witness, produced a final abstract blaming the Respondent for wrongly overtaking from the left. They argued the trial court erred in ignoring this evidence without reasons.

9. The Appellant's referred this court to the decision in *Andrew Ochieng & another -vs- Rongai Workshop & Transport & another [2020] eKLR* regarding conflicting police evidence.

10. On quantum, the Appellants attacked the award of Kshs. 1,000,000.00. They submitted that while the Respondent pleaded a patellar fracture and missing teeth, their own doctor, Dr. Waithaka, examined him less than four months later and found no fractures and no missing teeth. It was their case that the Respondent failed to produce X-rays or authenticated treatment notes to prove the fractures. To that end, the drew support from the case of *Climax Coaches Limited v Kavaya [2024] KEHC 6182 (KLR)*, where it was observed that the failure to produce X-rays to substantiate a fracture claim leads to an inference that no such fracture exists. They proposed a reduced award of Kshs. 150,000.00 for soft tissue injuries.

The Respondent's case:

11. The Respondent challenged the appeal through written submissions dated 21st August 2025. It was their case that the trial court's finding on liability was correct as he was hit from behind by the Appellant's vehicle. Drawing support from the case of *Orioki -vs- Kevian Kenya Limited [2023] KECA 780 (KLR)* he submitted that the presumption is that a driver who hits another from behind is at fault.

12. The Respondent maintained he did not contribute to the accident. Based on the finding in the case of *Juma -vs- Rabote [2023] KEHC 2909 (KLR)* he submitted that the 2nd Appellant ought to have anticipated other road users.

13. On quantum, the Respondent argued that he proved his injuries —including the patellar fracture and lost teeth, through the medical report of Dr. J.W. Siboko and the P3 form. He submitted that where two medical reports conflict, the court is justified in relying on the initial treatment notes and the P3 form. He called to his aid the case of *Harrison Kamau Mungai -vs- Kinuthia Ngethe & another [2015] eKLR* to support the position that confirmed injuries in a P3 form and initial notes can sustain an award even in the absence of X-rays in the later report. He prayed for the appeal to be dismissed.

Analysis:

14. This being a first appeal, this Court is tasked with re-evaluating the evidence on record to arrive at its own independent conclusion, bearing in mind it did not see or hear the witnesses.

    i. *The propriety of the apportionment of liability.*

    ii. *Whether the award in general damages was proper.*

15. As a first appellate Court, the role of this Court is settled. In the case of ***Susan Munyi -vs- Keshar Shiani*** [2013] eKLR the Court of Appeal observed thus;

> *…. As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.*

16. Similarly, in ***Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates*** [2013] eKLR the Court set out the role of a first appellate court in the following terms;

…. This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.

17. I will now deal with the above issues.

[a] <u>The propriety of the apportionment of liability:</u>

18. The trial Court found the Appellants 80% liable. It relied on the 2nd Appellant's admission that he did not see the rider in his side mirrors. When the Respondent testified, he admitted that he was on *Southern Bypass* headed towards the same direction with the 2nd Appellant. He conceded that the 2nd Appellant was on his right and him on the left. As regards the occurrence of the accident, he simply stated that the 2nd Appellant failed to slow down and to give way.

19. No. 72198 PC Nthiga Muchiri was PW3. It was his evidence that officers from Industrial Area Police Station visited the scene of the accident. On cross-examination, he admitted that the case was still pending under investigation and that he was not the Investigating Officer. He stated categorically that he did not know where the motor vehicle and the motorcycle were coming from. The 2nd Appellant testified as DW1. It was his evidence that there were two lanes. He was on the right lane and the accident happened at the interchange joining Mombasa Road from the Southern Bypass. He testified that the motor vehicle was hit from the front left and he had indicated and the motorcycle was not visible from either side mirrors.

20. *No. 117008 PC Dennis Mwaniki* was DW2. It his evidence that the motorcycle was in the inner lane and changed to the outer lane thus hitting the motor vehicle on the front left bumper. On cross-examination, it was his evidence that he was the Investigating Officer and was reading the contents of the Occurrence Book.

21. From a reappraisal of the evidence, is not in dispute that the point of impact was the front left of the Appellants' vehicle. Damage to the *front left* corner strongly corroborates the Appellants' version: that the Respondent was undertaking (overtaking on the left) or cutting in while the vehicle was negotiating the Likoni Interchange.

22. ***Sections 51*** and ***52*** of the ***Highway Code*** provide as follows;

> ***OVERTAKING***
>
> ***51. Before overtaking you should make sure:***
>
> *The road is sufficiently clear ahead.*
>
> *Other road users are not beginning to overtake you*
>
> *There is a reasonable distance in front of the road user you plan to overtake*
>
> *Always overtake from the right at a reasonable distance*
>
> ***52. Overtake only when it is safe and legal to do so***
>
> *Only overtake on the left if the vehicle in front is signalling to turn right and there is room to do so*

23. From the foregoing, it is generally prohibited to overtake on the left. The Respondent was doing so, and he did not fall within the exception anticipated in Section 52 of the Highway Code. This Court has also had the opportunity to reassess the evidence of *DW2* and that of PW3. Whereas PW3's evidence had no evidentiary weight, DW2 corroborated the fact that the Respondent was to blame for wrongly overtaking from the left.

24. From a totality of the reappraisal of the evidence, the trial Court, with utmost respect, failed to provide reasons for disregarding the positive evidence in favour of the Appellants. The trial Court ought to have interpreted the Highway Code in favour of the Appellant as opposed to making a finding against them when the Respondent was overtaking from the wrong

side. Accordingly, the trial Court's finding on liability was against the weight of the evidence.

25. Whereas the Respondent is largely responsible for authoring his own misfortune, it must be acknowledged that the 2nd Appellant bore a duty of care.

26. Therefore, I set aside the 80:20 apportionment and substitute it with a finding of 50:50 liability.

[b] <u>Whether the award in general damages was proper:</u>

27. I have had a look at the medical evidence. The Respondent claimed a patellar fracture and loss of 7 teeth (4 upper, 3 lower). The trial Court awarded Kshs. 1,000,000.00, clearly accepting these serious injuries. *Dr. Waithaka Mwaura*, the Appellants' Doctor, who testified as DW3, produced his report as D. Exh. 3. It was his evidence that he examined the Respondent on 29th August 2022, only months later, and found no fractures and no missing teeth8 whereas a fracture takes 6 – 8 months to recover.

28. It was further his evidence that the Medical Report from *Mariakani Cottage Hospital*, the primary hospital, showed a fracture of the patella but indicated no loss of teeth. He was categorical that the Report did not indicate loss of teeth or fracture. He however admitted that *he did not ask the Respondent to open his house to confirm whether the teeth were missing but stated that the he did not complain of a fracture or missing teeth*.

29. *Section 107* of the *Evidence Act* imposes an alleging party with the burden of proof. In cases alleging fractures, the best evidence is the Radiological report (X-rays). The Respondent failed to produce X-rays. This Court finds persuasion by the reasoning in ***Climax Coaches Limited -vs- Kavaya*** *[*2024] KEHC 6182 (KLR), where the Court held that failure to produce X-rays to verify a fracture, especially when challenged by a

second medical opinion, leads to the inference that the X-rays would have shown no fracture. The Court observed thus;

> *…there was no evidence of fracture or dislocation suffered by the respondent and indeed, if there were such injuries which are very serious affecting her bones, why did she not produce the Xray films for verification by the court, noting that DW1 is also a doctor and she subjected the respondent to a second medical examination and xrays which did not reveal any healed fracture? The onus of proof lies on the plaintiff to prove all the injuries sustained. The injuries pleaded must be proved on a balance of probabilities. The respondent having claimed that she sustained a fracture and a dislocation, the burden of proof lay on her to prove those injuries. Having pleaded such serious injuries and failed to produce the xrays to show the injuries, the only inference I make is that had the respondent produced the xrays taken, if at all they were taken of her alleged dislocated or fractured clavicle or shoulder, the xrays would have shown no fracture or dislocation at all.*
>
> *It is for the aforementioned reasons that I hold the view that the treatment notes from Vihiga County Hospital are rather suspicious. I opine that no evidentiary value can be assigned to the said document which is not authenticated. As it was the only document that mentioned the respondent' alleged fracture and with PW3 confirming that there was no such injury detected, I hold the vie that the said fracture was not proved on a balance of probabilities."*

30. Further, the claim of missing 7 teeth is physically verifiable. If the Respondent had truly lost 7 teeth, this would have been obvious to the Appellants' Doctor. As submitted by the Appellants, the loss of incisors is easily noticeable during examination. The Respondent's failure to prove the existence of metal implants or replacement costs further weakens this claim. It appears the trial Court relied on the P3 form which was unauthenticated as to its maker.

31. Having said so, this Court will thus be guided by awards made by Courts for comparable injuries.

32. The Court of Appeal, in ***Samuel Kariuki Nyangoti -vs- Johaan Distelberger*** [2017] KECA 691 (KLR) dealt with a crack of the patella of the left leg. The medical report showed that the appellant sustained a fracture of the left patella and blunt

trauma on the chest, both shoulder joints and left knee joint. The fracture was initially treated conservatively but non-union of the fracture patella occurred and the appellant had to undergo open reduction and internal fixation using metal implants. In disapproving the High Court's award of Kshs. 170,000/- for the injury to the patella, the learned Judges of Appeal observed thus;

> *…. The award of Kshs.170,000/- for fracture of patella in Fredrick Ndolo Matheka (Supra) in June 1998 five years before the award under appeal was brought to the attention of the learned judge. The learned judge wrongly refused to be guided by the award on the basis that it contained itemized award for several injuries. It is on the basis of that award that the respondent's counsel recommended an award of Kshs. 170,000/- for the appellant. The award of Kshs.275,000 in Samuel Gathuru Kamau made five years before was also a relevant guide.*
>
> *On our consideration of the appeal, we are satisfied that the learned judge did not take into account the relevant factors including inflation and the level of awards for comparable injuries and as a result arrived at an erroneously low award in the circumstances. In our view, the appropriate award should have been Kshs. 200,000/-*

33. In ***Bernard Musuu John -vs- Jesman Distributors Limited & another*** [2020] KEHC 6274 (KLR) the injuries suffered were *open fracture and distal femur* and *open fracture of patellar.* The Court awarded Kshs. 450,000/- as general damages. In ***Mbani -vs- Ogalo*** (Civil Appeal 23 of 2020) [2024] KEHC 689 (KLR) (25 January 2024) (Judgment) the discharge summary indicated that the injuries sustained by the respondent were "*soft tissue injuries* and *fracture to the patellar*,". In agreeing with the trial courts assessment of damages awardable for such injuries, the court observed thus;

> *… I do note that the trial court awarded the respondent quantum of Kshs. 350,000 as proposed by the appellant herein which I find to be in line with the comparable injuries sustained by claimants in the cited cases by the respondent's counsel, which I find no reason to interfere with.*

34. Deriving from the foregoing, it is evident that the award of Kshs. 1,000,000/- was based on unproven injuries and is inordinately high. The proven injuries are patellar fracture and soft tissue injuries. Given the change in economic times and the passage of time, this Court finds that comparable awards for the Respondent's injuries range between Kshs. 300,000/- to Kshs. 600,000/-

Disposition:

35. As I come to the end of this decision, I wish to sincerely apologize for the late delivery of this decision. The delay was largely caused by my engagement at the Judicial Service Commission where I sit as a Commissioner.

36. Flowing from the foregoing conclusions, this Court find the appeal to be meritorious. Respectfully, the judgment of the trial Court is hereby set aside and the following final orders hereby issue: -

    [a] Liability is hereby equally apportioned between the Appellants [jointly and severally] and the Respondent.

    [b] The award of General Damages is reduced from Kshs. 1,000,000/- to Kshs. 450,000.00/-.

    [c] Given the above findings, parties to bear their own costs of the appeal.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **29th** day of **January, 2026.**

A. C. MRIMA
JUDGE

Judgment virtually delivered in the presence of:

Mr Kairu, Learned Counsel for the Appellants.

Mr. Kisiangani, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.