Karuri & 6 others v Karuga (Civil Appeal E089 of 2023)
[2026] KEHC 318 (KLR) (22 January 2026) (Judgment)

Neutral citation: [2026] KEHC 318 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E089 OF 2023

SM MOHOCHI, J

JANUARY 22, 2026

BETWEEN

CHARLES NDUNGU KARURI ..... 1ST APPELLANT

ROSE WANGUI T/A MOTHER OF MERCY SECONDARY SCHOOL ..... 2ND APPELLANT

SISTER ROSE WANGUI, VHM ..... 3RD APPELLANT

JOHN NJOROGE ..... 4TH APPELLANT

DAVID MUTHEU ..... 5TH APPELLANT

SISTER ESTHER WAIRIMU, LSOSF ..... 6TH APPELLANT

MARGARET NJOKI ..... 7TH APPELLANT

AND

RUTH WANJIRU KARUGA ..... RESPONDENT

(Being an Appeal against the entire Judgment/Decree in Nakuru C.M.C.C No 1041 of 2018 by Hon. Lilian A. Arika Chief Magistrate, delivered on 26th April, 2023)

JUDGMENT

Introduction

1. Before me is an Appeal emanating from CMCC No. 1041 of 2018 – Ruth Wanjiru Karuga v. Charles Ndungu Karuri & 6 Others arises from a road traffic accident that occurred on 24th January 2017 along the Njoro–Nakuru Road, in which the Respondent, a lawful pillion passenger on motorcycle KMCG 495N, sustained serious injuries after being hit by motor vehicle KAW 087K, driven by the 1st Appellant. As a result, the Respondent suffered multiple fractures, degloving injuries, and a below-knee amputation of the right leg, leading to 80% permanent disability.

2. After trial Judgment was delivered on 26th April 2023 by Hon. L. A. Arika, CM, finding the Appellants 100 percent liable for the accident and awarding the Respondent general damages for pain and suffering of Kshs. 4,000,000/=, Kshs. 1,000,000/= for future medical treatment, Kshs. 4,032,000/= for diminished earning capacity, Kshs. 1,368,000/= for loss of income, Kshs. 128,000/= for the cost of hiring domestic help, and Kshs. 1,917,787/= as special damages, together with costs and interest.

3. Being aggrieved by both the finding on liability and the quantum of damages the Appellants filed their Amended Memorandum of Appeal dated 9th July 2025. The appeal primarily challenges the learned trial magistrate's findings on liability and the assessment of damages, which the Appellants contend were excessive, erroneous in principle, and unsupported by evidence on record.

4. The Appeal proceeded to be heard by way of filed written submissions.

Appellants Case

5. The Appellants have in submissions refined four (4) issues for consideration as follows;

    i. Whether the learned trial magistrate erred in law and fact in finding the Appellants 100% liable for the accident?

    ii. Whether the learned magistrate applied the correct principles in assessing damages for loss of income, loss of dependency, diminished earning capacity, and future medical expenses?

    iii. Whether the trial court erred in failing to consider the Appellants' submissions and the applicable legal principles in assessing quantum?

    iv. Whether the awards made were excessive and based on unproven or speculative evidence, thereby warranting interference by this Honourable Court?

6. The Appellants submit on the 1st issue as to whether the learned trial magistrate erred in holding the Appellants 100% liable?

7. That at page 2 of the impugned judgment, the trial magistrate held that the Respondent, being a pillion passenger, bore no contributory negligence and that the Appellants were wholly to blame for the accident. The learned magistrate further relied on the conviction of the 1st Appellant in Nakuru Traffic Case No. 1012 of 2017 as proof of negligence.

8. That with respect to the issues as to whether the learned trial magistrate fell into error by failing to consider the pleaded defence of contributory negligence. The Appellants contend that at paragraph 4(a) of their defence dated 20th September 2019, specifically pleaded that the Respondent negligently exposed herself to risk by boarding the motorcycle without a helmet, thereby voluntarily assuming the risk of injury.

9. That the trial court was bound to consider this pleaded defence but failed to do so. The law is clear that contributory negligence can attach even to a pillion passenger depending on the circumstances.

10. The Court of Appeal in Mombasa Maize Millers Ltd & Another v Elius Kinyua Gicovi [2021] eKLR (citing Nance v British Columbia Electric Railway Co. Ltd [1951] AC 601) held that once contributory negligence is raised, the court must determine whether the plaintiff failed to take reasonable care for their own safety and whether such failure contributed to their injury.

11. That, similarly, in Ondieki vs Omoi & 3 others [2023] KECA, the Court reaffirmed that contributory negligence is not dependent on a duty owed to the defendant but on the plaintiff's own failure to act prudently for personal safety. In that case, the Court considered the issue of contributory negligence

as raised against a pillion passenger and elaborated on the evidential standard applicable where such a defence is pleaded. The judgment underscores that a defendant need only demonstrate a want of care on the part of the claimant which materially contributed to the occurrence of the injury. An excerpt from the said case is as follows:

> " I am in full agreement with the reasoning of the Court in Mombasa Maize Millers Limited & Another v Elius Kinyua Gicovi [2021] eKLR, where Nyakundi J, while referring to Wayne Ann Holdings Limited (t/a Superplus Food Stores) v Sandra Morgan, held as follows: "In this case, contributory negligence was raised as a defence. When such a defence is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601 at page 611, Lord Simon observed: " 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 did not, in his own interest, take reasonable care of himself, and contributed, by this want of care, to his own injury. For when contributory negligence is set-up as a shield against the obligation to satisfy the whole of the plaintiffs claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

12. That, while it is indeed correct that in the above-cited decision the appellate court ultimately found that the passenger did not contribute to the accident, that conclusion was influenced purely by the fact that the appellant therein had not specifically pleaded that the claimant was travelling as an excess passenger. The decision, therefore, turned on the pleadings rather than on the broader question of whether a pillion passenger can, in law, be found contributorily negligent.

13. That applying the foregoing principles to the present appeal, it is evident that the learned trial magistrate failed to properly evaluate the evidence and the applicable law on contributory negligence. The Appellants had expressly pleaded, at paragraph 4(a) of their defence, that the Respondent negligently exposed herself to risk by boarding the motorcycle without a protective helmet and thereby failed to take reasonable care for her own safety. This allegation was never rebutted by the Respondent during trial, nor was there any evidence to show that she had taken the basic precaution expected of a reasonable passenger.

14. In those circumstances, the learned magistrate ought to have considered the Respondent's omission as contributing, at least in part, to the extent of her injuries. The law does not absolve a pillion passenger from the duty to exercise reasonable care for their own safety. As such, the finding of 100% liability against the Appellants was erroneous and unsupported by the evidence on record. A proper evaluation of the facts and the authorities would have led to a finding of shared liability, which this Honourable Court is now invited to determine at a fair and just apportionment.

15. The Appellants respectfully submit that, the trial court erred in holding the Appellants wholly liable for the occurrence of the accident. The evidence on record, coupled with the applicable legal principles, clearly supports a finding of contributory negligence on the part of the Respondent.

16. That justice would best be served by an apportionment of liability at 80:20, in favour of the Respondent. Such a finding would appropriately reflect the Appellants' primary role in the occurrence of the accident while acknowledging the Respondent's contributory fault in failing to take reasonable precautions for her own safety.

17. The Court is thus urged to interfere with the trial court's finding on liability, set aside the finding of 100% liability, and substitute it with a finding of 80:20, or such apportionment as this Court may deem fair and just in the circumstances of the case.

18. On the 2nd issue as to whether the learned trial magistrate applied the correct principles in assessing damages? The Appellants submit under the award head of Loss of Income / Loss of Dependency that the learned trial magistrate, at page 8 of her judgment, observed that the Respondent stated she used to earn "about Kshs. 72,000 per month."

19. That the use of the prefix "about" in the Respondent's assertion is itself indicative of the uncertainty and lack of evidentiary proof as to her alleged monthly earnings from the salon business. The statement clearly conveys an estimate rather than a definite figure. It is trite law that where a claim for loss of income or earning capacity is made, such income must be proved strictly by credible documentary or other cogent evidence. In the absence of such proof, the court ought not to rely on speculative figures in assessing damages under this head.

20. That the trial court proceeded to adopt a monthly income of Kshs. 72,000 allegedly earned by the Respondent from her salon business which figure was speculative and unsupported by credible evidence.

21. That the Respondent merely testified that, she earned about Kshs. 72,000 per month without producing any corroborative records such as audited accounts, Mpesa statements, tax records, or bank statements. Section 107–109 of the *Evidence Act* (Cap 80) squarely places the burden of proof on the party asserting the existence of a fact.

22. The Appellants rely on the Court of Appeal in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 held that:

> "the legal and evidential burden lies on the party asserting a fact and that mere averments do not discharge this burden. Further, the court in Bonham Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177 observed: "The plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage. It is not enough to write down particulars and throw them at the court saying: this is what I have lost."

23. That the Respondent's handwritten record book of earnings, devoid of monthly computations or corroborating documentation, did not meet the standard of proof required. A close examination of the said record book reveals that at the end of each monthly entry, the Respondent did not indicate or compute the total earnings for the respective month. Consequently, the record lacks any conclusive or reliable basis upon which the alleged monthly income could be ascertained.

24. That the learned magistrate erred in relying on such unproven income to compute damages and misdirected herself both in law and in fact by relying on unproven and speculative income figures in assessing damages under this head. The Respondent's alleged monthly earnings were not established by credible evidence as required under Sections 107–109 of the *Evidence Act*. The resultant award was therefore based on conjecture rather than proof, accordingly inviting this Court to interfere with the said finding, set aside the award made for loss of income, and substitute it with a reasonable and modest global sum that reflects the evidential shortcomings of the Respondent's claim.

25. Under the head of Diminished or loss of earning capacity it is submitted that the award will arise where an injured plaintiff's ability to earn income in the future is impaired by the injuries. It is trite law, as held in Butler v Butler [1984] KLR 225 and reaffirmed by the Court of Appeal in Mumias Sugar Co. Ltd v Francis Wanalo [2007] eKLR, that damages for diminished earning capacity are awardable as general

damages where a claimant's ability to earn a livelihood has been curtailed or weakened by reason of the injuries sustained. The measure of such damages is a matter of the court's discretion, to be assessed globally, guided by the claimant's age, occupation, and extent of permanent disability.

26. In the instant matter, the learned magistrate awarded Kshs. 4,032,000 under this head, having applied a multiplicand of Kshs. 72,000, a dependency ratio of one-third, and a multiplier of 14 years. In arriving at the said figure, the learned trial magistrate observed that she was persuaded the Respondent was a businesswoman aged 51 years who could have continued working until the age of 65, taking into account the vicissitudes of life. With respect, this approach was erroneous.

27. As was held in the above quoted case of Mumias Sugar Company Ltd v Francis Wanalo [2007] eKLR, there is a clear distinction between loss of future earnings and diminished earning capacity. The latter is compensable as general damages and should ordinarily be awarded globally, not through the multiplier method unless there is precise proof of income. The court in the stated precedent emphatically clarified this distinction by citing with approval the words of Lord Denning MR in Fairley v John Thompson Ltd [1973] 2 Lloyd's Rep. 40 at page 41:

> " It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

28. Conversely drawing from the above, the Appellants take issue with the learned trial magistrate's adoption of the multiplier approach in assessing damages for diminished earning capacity. As earlier submitted, the Respondent's alleged earnings were speculative and not proved to the required legal standard. that under Kenyan jurisprudence it is not inherently erroneous for a court to apply the multiplier method in assessing diminished earning capacity, such an approach is generally discouraged. This is because diminished earning capacity constitutes a head of general damages, not special damages requiring strict proof.

29. That Kenyan courts have consistently held that the multiplier method may be resorted to only where the claimant's income and the extent of loss are clearly established by credible evidence. In the absence of such proof, as was the case in the trial court, the global (lump sum) approach is preferred.

30. That, by resorting to the multiplier approach, the learned trial magistrate improperly imported the element of strict proof applicable to special damages into a head of general damages. In light of the Respondent's unproven income, the adoption of the multiplier method amounted to a clear error in principle.

31. Guided by the foregoing, the trial court ought to have awarded a reasonable lump sum as general damages under this head rather than applying a mathematical multiplier. In adopting the multiplier approach, the learned magistrate erroneously imported the strictness applicable to special damages into what is, by law, a general damage claim.

32. Given that the alleged income of Kshs. 72,000 per month was never proven, and the court proceeded on a wrong principle in assessing the award, which the Appellant urge this Court to set-aside the award for diminished earning capacity and substitute it with a modest global sum, commensurate with the nature of the injuries and the evidence on record.

33. As for the multiplier adopted of 14 years (up to age 65), the Appellants contend the same to be unreasonable failing to account for the vicissitudes of life—natural uncertainties such as illness, market changes, and life expectancy. That Courts take these ——vicissitudes‖ into account when estimating

the multiplier (the expected remaining working years) for assessing loss of dependency or future earnings — or when determining an appropriate lump sum for diminished earning capacity.

34. The Court of Appeal in Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another [2014] eKLR, quoting Cornelia Eliane Wamba v Shreeji Enterprises Ltd (HCCC No. 754 of 2005), held that the choice of multiplier must be exercised judiciously and account for imponderables of life. The court observed that:

> " This court has given due consideration to the aforeset out rival arguments on the issue of choice of a multiplier and in its opinion the following are the guiding principles:-
>
> a. The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.
>
> b. It is common ground that since the deceased was not permanently employed in an establishment with a retirement age bracket for its staff it is not possible to fix a retirement age.
>
> c. The nature of the profession engaged in also counts. Herein it is common ground that there is no fixed retirement age in the profession of journalism. One can work as long as he wished.
>
> d. Death through natural causes and departure for greener pastures elsewhere is also a factor."

35. That applying these principles to the present case, the learned trial magistrate did not exercise her discretion judiciously in the choice of multiplier. The Respondent testified that she was engaged as a salonist or hairdresser — a form of self-employment without a fixed retirement age or institutional framework governing the duration of active work. Consequently, the adoption of 65 years as the presumed retirement age, and the corresponding multiplier of 14 years, was not grounded on the realities of the Respondent's trade or the evidence before the court.

36. That the finding that the Respondent, then aged 51 years, would have continued working up to the age of 65 failed to properly account for the vicissitudes of life, including the uncertainties of self-employment, health, and market fluctuations inherent in informal business. Given the Respondent's age (51 years) and her informal occupation as a salonist, which lacks a fixed retirement age, a multiplier of 14 years was manifestly excessive. A fair multiplier, if any, should not exceed 8 years.

37. The Appellants thus submit, that the trial court's exercise of discretion in adopting the said multiplier was misinformed and unreasonable, thereby warranting the intervention of this Court.

38. The Appellants thus submit, the learned trial magistrate erred in principle by adopting a multiplier of fourteen (14) years, which was manifestly excessive and devoid of evidential or legal foundation. The Respondent's occupation as a salonist was informal in nature, without a fixed retirement age, and thus incapable of sustaining a rigid multiplier approach. The trial court's failure to factor in the vicissitudes of life — including the uncertainties of health, market conditions, and the fluctuating nature of self-employment — rendered the award speculative and unjustified.

39. The Court is thus invited to interfere with the assessment of damages under this head, set aside the multiplier of 14 years, and substitute it with a reasonable multiplier not exceeding eight (8) years, or, in the alternative, award a fair and modest global sum commensurate with the circumstances of the case.

40. Under the Award head of cost of hiring a domestic house help, the learned trial magistrate awarded a sum of Kshs. 128,000. In reaching that determination, the trial court found that the Respondent had paid her domestic worker a monthly salary of Kshs. 8,000, and although this figure was below the statutory minimum wage, the court held that parties are bound by their pleadings. The learned magistrate therefore multiplied the said amount by 16 months, arriving at the total award of Kshs. 128,000.

41. That the learned magistrate awarded the aforementioned amount based on unproven petty cash vouchers. Petty cash vouchers, standing alone, are not proof of payment without corroborating evidence such as receipts, Mpesa statements, or testimony from the alleged employee. The Respondent did not call the alleged house help as a witness. Accordingly, the award under this head was based on insufficient proof and should be set-aside entirely.

42. The Appellants thus submit, that the learned trial magistrate erred in law and in fact in awarding Kshs. 128,000 under this head in the absence of cogent and credible proof of payment. The reliance on unverified petty cash vouchers, unsupported by receipts, Mpesa records, or corroborating testimony from the alleged house help, fell short of the evidentiary threshold required under Sections 107–109 of the *Evidence Act*. The finding was therefore speculative and not grounded on proper evidence

43. The Appellants thus, urge this Court to interfere with the said award and set it aside in its entirety.

44. Under the Award head of damages for future medical expenses/treatment. That the learned trial magistrate addressed this head of claim at page 6 of the judgment, the same having been pleaded at paragraph 9 of the Respondent's amended plaint. Upon a comparative evaluation of the medical evidence tendered by the Respondent's witness, PW2, Dr. Kiamba, and that of the Appellant's expert, Dr. Malik, regarding the estimated costs of hip replacement surgery and a prosthetic limb, the learned magistrate preferred the Respondent's evidence. She consequently held that the Respondent had proved the claim for future medical expenses to the required standard.

45. However, it is noteworthy that the learned magistrate did not provide any analysis or justification demonstrating how the Respondent's evidence met the requisite standard of proof, nor did she set out the principles of law or judicial precedents guiding the assessment of future medical expenses. The judgment further fails to explain the basis upon which the trial court found the Respondent's medical evidence more persuasive than that of the Appellant's expert.

46. That a closer reading of the learned magistrate's findings on this head reveals that her conclusion was primarily based on a comparative analysis of the two medical experts' opinions, after which she preferred the testimony of the Respondent's doctor. The said doctor merely relied on his personal experience in referring patients for similar procedures and his general knowledge of the attendant costs. It is evident that the learned magistrate did not cite, nor did the Respondent produce, any documentary evidence in support of the alleged cost of future medical treatment.

47. That, there ought to have been documentary proof substantiating the alleged costs, such as invoices, pro forma quotations, or receipts demonstrating that the price of a hip replacement and prosthetic limb ranged between Kshs. 1,000,000 and Kshs. 2,000,000 as claimed by Dr. Kiamba.

48. Similarly, no documentation was tendered to verify the assertion that the cost of similar procedures in the international market ranged between USD 40,000 and USD 50,000, or that the PCEA Hospital charged Kshs. 416,000 for an artificial limb and an annual servicing cost of Kshs. 50,000.

49. That in the absence of such documentary evidence, the Respondent's claim for future medical expenses fell short of the evidentiary threshold required by law. The Court of Appeal in Tracom Limited &

Another v Hassan Mohamed Adan [2009] eKLR held that an award for future medical expenses must be specifically pleaded and proved, and that the quantum must be supported by credible evidence, whether documentary or expert-based.

50. Similarly, in SimonTaveta v Mercy Mutitu Njeru [2014] eKLR, the Court reiterated that while future medical expenses may be pleaded as a special or general head depending on the circumstances, they must nonetheless be proved with a reasonable degree of certainty and not left to conjecture.

51. That in the instant case, the learned trial magistrate awarded substantial sums purely on the basis of unverified estimates, unsupported by any written quotation, invoice, or receipt. This amounted to a misdirection in principle, as the court effectively elevated speculative assertions to the level of proof, contrary to established jurisprudence. The award under this head was manifestly excessive and should be reduced to Kshs. 400,000, in line with comparable authorities.

52. That in view of the foregoing, the Appellants submit that, the learned trial magistrate erred in law and in principle by awarding future medical expenses in the absence of documentary or otherwise verifiable proof of cost. The Respondent's claim under this head was founded solely on speculative estimates unsupported by evidence therefore urge this Court to set-aside the award for future medical expenses as unfounded, or in the alternative, to substitute it with a modest and reasonable global sum of Kshs. 400,000), reflective of the uncertainty of proof and consistent with established judicial precedent.

53. On the 3rd issue as to whether the trial court failed to consider the appellants' submissions? That a perusal of the Appellants' written submissions dated 23rd May 2023 (at page 272 of the Record of Appeal) reveals that the Appellants expressly submitted that the Respondent, together with the motorcycle rider, was negligent and contributed to the occurrence of the accident. In the Respondent submissions, counsel for the appellants referred to paragraph 4 of the Appellants' defence dated 20th September 2019 (page 247 of the Record of Appeal), wherein it was pleaded at paragraph 4(a) that the Respondent was contributorily negligent in riding the motorcycle without wearing a helmet and knowingly exposing herself to danger, thereby voluntarily assuming the risk of injury.

54. That, the learned trial magistrate failed to address or make any determination on the Appellants' submissions and pleadings on contributory negligence as enumerated above. In disregarding the same, the court overlooked a material aspect of the defence, despite the fact that the Respondent did not controvert the assertion that she was not wearing a helmet at the time of the accident. The learned magistrate further remarked that submissions, however well written, cannot take the place of evidence. Respectfully, while that may be true, the court failed to appreciate that the Appellants had specifically pleaded and substantiated contributory negligence, which warranted apportionment of liability. The omission to consider this issue occasioned a misdirection and resulted in an erroneous finding on liability.

55. Similarly, a review of the judgment demonstrates that the learned magistrate did not adequately consider or analyse the Appellants' submissions on quantum. The Appellants' written submissions (page 273 of the Record of Appeal) undertook a detailed comparative analysis of the medical reports by Dr. Kiamba and Dr. Malik, noting that both reports substantially agreed on the nature of injuries, save for the variance on the estimated cost of future medical expenses, which Dr. Malik placed at Kshs. 750,000. The Appellants therefore proposed an award of Kshs. 800,000 in general damages and supported this proposal with relevant authorities.

56. The learned magistrate's judgment, however, makes no reference to or discussion of these submissions. There is no indication as to why the Appellants' position was rejected or how the trial court arrived at the higher figure awarded. This omission, in our respectful view, amounts to a failure to consider material submissions, thereby leading to an erroneous and excessive assessment of damages.

57. That the trial court erred in dismissing the Appellants' submissions as mere arguments incapable of displacing the Respondent's evidence, contrary to the principles in Kenya Power & Lighting Co. Ltd v Nathan Karanja Gachoka & Another [2016] eKLR, where the Court of Appeal held that failure to consider a party's submissions amounts to a miscarriage of justice.

58. The Appellants had presented a detailed analysis of the medical evidence and cited authorities proposing reasonable awards. The learned magistrate's failure to consider these submissions demonstrates non-direction and warrants appellate interference. Accordingly, the Appellants submit that the learned trial magistrate erred both in law and in principle by failing to consider the Appellants' submissions on liability and quantum, an omission that occasioned a miscarriage of justice and resulted in an unjustly excessive award against the Appellants.

59. As to whether the awards were excessive and warrant interference? The Appellants affirm that this Court has the jurisdiction and duty to interfere with the trial court's discretion in assessment of damages where the same was based on wrong principles or where the award was inordinately high — this position is reiterated in Kemfro Africa Ltd t/a ——Meru Express Services‖ & Another v Lubia & Another (No. 2) [1987] KLR 30, wherein the court observed that:

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

60. Given the speculative multiplicand, inflated multiplier, and disregard of evidentiary burden, the total award of Kshs. 13,851,599 was inordinately excessive and based on wrong principles.

61. In light of the foregoing, we respectfully submit that this Court is perfectly entitled to interfere with the trial court's assessment of damages. As stated in Kemfro Africa Ltd t/a Meru Express Services & Another v Lubia & Another (No. 2) [1987] KLR 30 (supra), an appellate court will intervene where the trial court acted on wrong principles of law, considered irrelevant matters, or failed to consider relevant ones, thereby arriving at an inordinately high or erroneous estimate of damages. The learned magistrate's reliance on a speculative multiplicand, an inflated multiplier, and unproven income figures resulted in an award of Kshs. 13,851,599 that was manifestly excessive and unjustified in the circumstances, therefore urge this Court to set-aside the award and substitute it with a fair and reasonable assessment based on the evidence on record.

62. The Appellants equally pray for costs of the Appeal

Respondents Case

63. The 1st Respondent opposed the Appeal submitting against all grounds of Appeal as follows;

Ground 1 – Error in finding the Appellants 100% liable

64. The Respondent submit that the finding was correct on both the facts and the law and that the Appellants did not prove any contributory negligence. The Respondent, as a pillion passenger, had no control over speed, direction or handling, and could not have contributed to the accident.

65. That, the Appellants overlook settled law in Olando v Gemini Stores Ltd [2023] eKLR, West Kenya Sugar Co. Ltd v Lilian Auma Saya [2020] eKLR, and Paul Lawi Lokale v Auto Industries Ltd [2020]

eKLR make it clear that a pillion passenger is not to blame unless contributory negligence is specifically pleaded and strictly proved, and any contribution should be pursued against third parties.

66. The Respondent submits that the first-appeal standard restraints interference to cases of wrong principle or plainly wrong appraisal. The magistrate relied on the 1st Appellant's conviction in Nakuru Traffic Case No. 1012 of 2017 and on uncontroverted evidence that the Respondent had no control. There is no basis to disturb liability.

67. That the Appellants cite Mombasa Maize Millers Ltd & Another v Elius Kinyua Gicovi [2021] eKLR and Ondieki v Omoi & 3 Others [2023] KECA which authorities still require a causal link. The "no helmet" point cannot explain pelvic/femoral fractures and a below-knee amputation; a helmet relates to head injury, not the orthopaedic injuries here.

68. That the Nance v British Columbia Electric Railway Co [1951] AC 601 relied upon by the Appellants requires proof that any want of care contributed to the damage. None was shown.

69. That contributory negligence can only be found where it pleaded and proved and with a standing traffic conviction against the 1st Appellant, the 100% liability finding should stand.

Grounds 1A, 2B & 2C – Complaint on earnings and multiplier

70. That the Appellants take issue with adopting Kshs. 72,000 per month as income and a 14-year multiplier which the Respondent submit that their arguments simply re-litigate matters the trial court already resolved and identify no legal error.

71. That the Appellants insist on documentary proof. We submit that the Respondent gave credible evidence that she ran a salon, earning Kshs. 1,300–2,500 per day, and the court fairly adopted Kshs. 72,000 per month as a cautious average. No contrary evidence was tendered. Kenyan courts accept credible oral testimony to prove income for the self-employed—see Kimatu Mbui t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR. The trial court, having seen and heard the Respondent, was entitled to accept her evidence.

72. That the case of Bonham Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177 relied upon by the Appellants requires proof on the balance of probabilities—not audited ledgers. The Respondent proved her loss through credible daily-takings evidence and medical proof of incapacity; the court then adopted a cautious Kshs. 72,000 monthly average. Audited accounts were not a prerequisite, particularly for a self-employed salon operator.

73. On the 14-year multiplier adopted the Respondent submit that it was reasonable as the Respondent was 51 and could fairly be expected to work to 65. The court expressly accounted for the vicissitudes of life and adopted a conservative figure. No misdirection of principle or misapprehension of evidence has been shown.

74. That the cases of Butler v Butler [1984] KLR 225, Mumias Sugar Co. Ltd v Francis Wanalo [2007] eKLR, and Fairley v John Thompson Ltd [1973] 2 Lloyd's Rep 40 relied upon by the Appellants to fault the multiplier permit either multiplier or global assessment depending on the evidence. Where earnings and incapacity can be reasonably assessed—as here—the multiplier is proper.

75. That the case of Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another [2014] eKLR relied upon by the Appellants to press for a shorter working life emphasizes judicial discretion. The magistrate considered age (51), occupation, and vicissitudes, and still tempered the award with a 1/3 ratio. A 14-year multiplier to age 65 is appropriate in the circumstances.

76. That the cases of Kemfro Africa Ltd t/a Meru Express Service & Another v A.M. Lubia (No.2) [1987] eKLR and Butt v Khan [1981] eKLR confine interference to instances of wrong principle or an inordinately high/low figure. Neither has been shown.

Ground 2 – Alleged Excessive Damages for Loss of Dependency

77. That the Argument by the Appellants that the award for loss of dependency or diminished earning capacity was excessive lacks merit. The Respondent's disability—80% permanent incapacity following a below-knee amputation—completely deprived her of her livelihood. The damages awarded were proportionate to the gravity of her injuries and the impact on her future earning ability.

78. That the trial court relied on comparable authorities, including James Muriithi v MV Beauty Transporters Ltd [2018] eKLR and David Kariuki v Peter Wambui [2014] eKLR, which support awards within the same range for similar injuries. The Appellants have not cited any binding authority showing that the sum awarded was inordinately high or based on a wrong principle.

Grounds 2A & 3 – Loss of Future Earning Capacity and Loss of Income

79. That the argument by the Appellants that the trial court erred in awarding both loss of income and loss of earning capacity is misplaced. The difference between these two heads is well established in Kenyan law. As the Court held in Butler v Butler [1984] KLR 225 and Mumias Sugar Co. Ltd v Francis Wanalo [2007] eKLR: • Loss of income compensates for actual earnings lost up to the date of judgment; and • Loss of earning capacity compensates for the future handicap in the labour market arising from permanent incapacity.

80. That, the trial court applied these principles correctly. The Respondent was completely incapacitated for 19 months, justifying compensation for that actual loss, and her 80% permanent disability warranted further compensation for her future inability to earn. Each head was distinct and supported by both medical and factual evidence.

81. The Appellants allege double recovery which the Respondent submit that, even the Appellants own authorities reject that position. Fairley v John Thompson Ltd [1973] 2 Lloyd's Rep 40 draws a clear line between past earnings and future handicap, while Butler v Butler [1984] KLR 225 and Mumias Sugar Co. Ltd v Francis Wanalo [2007] eKLR expressly approve awarding both where the evidence supports it. The trial court followed that approach: 19 months' incapacity as past loss and 80% disability as future handicap—no duplication arises.

82. That the case of Kenya Power & Lighting Co. Ltd v Nathan Karanja Gachoka & Another [2016] eKLR relied upon by the Appellants to allege that the magistrate ignored their submissions applies only where a court's failure to consider an argument results in a wrong decision. Here, the judgment analyzed each claim comprehensively and gave clear reasons. There was no omission or misdirection.

Ground 4 – Loss of Income Allegedly Out of Line with Facts

83. That the award of Kshs. 1,368,000 for loss of income was logically derived from the period of total disability by Dr. Kiamba and confirmed by Dr. Malik's report (The Appellants doctor). The calculation of Kshs. 72,000 × 19 months was arithmetically correct and consistent with the evidence.

84. The Appellants' claim that the amount was speculative is unsustainable. The Respondent's business was her only source of livelihood, and her medical condition rendered her unable to work for the said period. The award was therefore both justifiable and moderate.

Ground 5 – Future Medical Expenses

85. That the argument by the Appellants that, the award of Kshs. 1,000,000 for future medical expenses was speculative and unsupported overlooks the clear medical evidence on record. Both Dr. Kiamba and Dr. Malik confirmed that the Respondent would require future medical interventions, including periodic replacement of her prosthesis and possible surgical correction.

86. That, the learned magistrate made a reasonable estimate based on medical opinion and awarded a modest figure well within the suggested range. The law does not require actual receipts for anticipated expenses; what matters is credible medical proof of the likelihood and cost of future treatment.

Ground 5B – Alleged Failure to Consider Gross Income and Lack of Remittance Evidence

87. The Appellants argue that the Respondent's income could not have been gross without proof of tax remittances or bank deposits. We submit that this argument misconceives both the law and the nature of the Respondent's trade. The Respondent testified that she operated a small salon business in Nakuru and was self-employed. It is trite that small-scale traders and self-employed persons in the informal sector often transact in cash and are not required to produce formal payroll records or bank statements to establish income.

88. Reliance is placed on the case of Kimatu Mbui t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR, the Court of Appeal affirmed that credible oral evidence may suffice to prove earnings where documentary evidence is unavailable, particularly for self-employed persons. The Respondent's evidence of daily earnings, coupled with her consistent work history before the accident, met that threshold.

89. Moreover, the Appellants' argument about taxation or remittance is irrelevant to the issue of quantum. The purpose of the court's inquiry was not to audit the Respondent's tax compliance but to assess fair compensation for loss of earning capacity. The trial court, applying a balanced approach, accepted Kshs. 72,000 as a moderate and reasonable figure—far below what her evidence would strictly justify.

90. The learned magistrate therefore acted within sound judicial discretion. The income adopted was not "gross" in the accounting sense but a fair average, reflecting net daily takings, and the Appellants have not demonstrated any error of law or fact in that finding.

Ground 6 – Alleged Failure to Consider the Appellants' Submissions

91. That the Appellants allege that their submissions were not considered by the trial court. This ground is entirely unfounded. The judgment, spanning ten pages, expressly summarized the positions of both parties and cited several of their authorities. A court need not agree with a party to demonstrate consideration.

92. That, the trial court's reasoning was detailed, logical, and consistent with both evidence and precedent and that disagreement with the outcome is not a ground for appeal.

93. That the principles guiding appellate interference are well settled. In Mbogo v Shah (1968) EA 93, the Court of Appeal held that an appellate court should not interfere with the exercise of a trial court's discretion unless it is satisfied that the trial court misdirected itself in some matter, and as a result arrived at a wrong decision, or that it was clearly wrong in the exercise of its discretion, thereby causing a miscarriage of justice.

94. Similarly, in Kemfro Africa Ltd t/a Meru Express Service & Another v A.M.M. Lubia & Another (1982–88) 1 KAR 777, the Court of Appeal reaffirmed that an appellate court will not disturb an

award of damages unless it is shown that the trial court acted on wrong principles of law, took into account an irrelevant factor, failed to take into account a relevant factor, or that the award is so inordinately high or low as to represent a wholly erroneous estimate.

95. That in applying these settled principles, it is evident that the learned trial magistrate properly exercised her discretion, evaluated the evidence correctly, and reached fair and reasoned findings based on the record.

96. That the Appellants have not demonstrated any misdirection, misapprehension, or erroneous estimate to justify appellate interference.

97. That the trial court's judgment was detailed, reasoned, and grounded on both fact and law and Appellants have not shown any misdirection or error to warrant interference.

98. The Respondent prays that this Court dismisses the appeal with costs and upholds the judgment and decree of Hon. L. A. Arika (CM) in Nakuru CMCC No. 1041 of 2018 in its entirety

99. The Respondent urges to be granted the costs of this appeal and the trial court to the Respondent.

Analysis and Determination

100. Being a first appeal this Court lays emphasis on the principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123:

> "...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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

101. I have carefully reviewed the Appellant's memorandum of appeal filed herein, the pleadings and proceedings from the lower court as well as the submissions by the parties in support of their respective positions.

102. I adopt the Appellants refined issues as the issues to consider as follows;

i. Whether the learned trial magistrate erred in law and fact in finding the Appellants 100% liable for the accident?

ii. Whether the learned magistrate applied the correct principles in assessing damages for loss of income, loss of dependency, diminished earning capacity, and future medical expenses?

iii. Whether the trial court erred in failing to consider the Appellants' submissions and the applicable legal principles in assessing quantum?

iv. Whether the awards made were excessive and based on unproven or speculative evidence, thereby warranting interference by this Court?

103. It is trite law that, an appellate court ought not to interfere with a trial court's assessment of damages unless it is persuaded that, the award was made on the wrong principles of law, or that the same is either inordinately high or inordinately low as to make an entirely erroneous estimate of the damages. This

is a principle established in the age-old case of Butt v Khan [1981] KLR 349 which has been replicated in so many cases on first Appeals and where it was held that:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

104. As to the 1st issue whether the trial court erred in finding the Appellants liable at 100%, this court finds the finding sound, the evidence on record was to the effect that the 1st Appellant drovemotor vehicle KAW 087K recklessly and dangerously off the road to where the Respondent was seated as a lawful pillion passenger on motorcycle KMCG 495N. She had no control of Motorcycle KMCG 495 and hasten to add that no contributory negligence can be deduced upon a pillion rider where a Motor vehicle causes a road traffic accident and hits a motorcycle from the rear. in this case the Respondent had no opportunity to contribute anything to the accident that occurred she was found "sitting duck" I thus dismiss this ground of appeal.

105. The Appellants argues that, the Respondent was without a helmet at the time of the accident and that this was her contribution. I reject this argument to the extent that, no evidence was adduced in this regard. In any case, this position equally lacks a causal link to the extensive injuries suffered.

106. The scope, magnitude and extent of injuries suffered in this case cannot be understated or overlooked, the Respondent is crippled at the age of 55 years old she operated a hair salon and had children dependent on her, she will never work again and requires medical support for the rest of her life.

107. The evaluation of the record of appeal indicates that, the Appellants called only one(1) witness whose evidence was insignificant to the issues at hand and revolved on the Respondents admission to hospital and treatment, the Appellants for all intents and purpose failed to tender evidence either in rebuttal or in support of their assertion in the case of Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] KLR where the court found that;

> where Defendant fails to call evidence in support of his case, the evidence adduced by the Plaintiff against the defence remains uncontroverted as even if the Defendant cross-examines Plaintiff's witness, he can only rebut the issues raised during cross-examination by calling witnesses and hence failure to call witness leaves the Plaintiff's evidence on liability unchallenged.

108. The 2nd issue resolves around whether the trial court erred in applying wrong principles or that he misapprehended the evidence in some material respect?unproven income to compute damages and misdirected herself both in law and in fact by relying on unproven and speculative income figures in assessing damages under this headLoss of Income / Loss of Dependency.

109. The Contestation by the Appellants revolves around the Respondent's capacity to earn ksh 72,000/- per month as a hair salonist while the only documentary records she tendered were handwritten daily ledger notes of the services she offered, the various amounts she charged her clients and so-forth, this court is of the view that the Respondent tendered her evidence the Appellants had their opportunity to cross examine and rebut the same. The Appellants have not show-cased a deployment of a wrong principle there by giving rise to a figure which was either inordinately high or low. The court declines the invite to tinker with the multiplier of between 14 and 8 year as the same shall be akin to a bargaining exercise.

110. On the 3rd issue as to whether the trial court ignored the written submissions by the Appellants? this court finds and concurs with the Respondent, that this ground is entirely unfounded my evaluation of the judgment, reveals the assertion of consideration of written submission of the parties by the trial court.

111. The presence or absence of written submissions does not in any way prejudice a case as held in Ngang'a & Another v. Owiti & Another [2008] 1KLR (EP) 749, where 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, crystallize 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."

112. The submissions in themselves are not evidence as was held in PMM (minor suing through the mother and next friend MNM v Family Bank Limited & another [2018] KLR where the court held that;

> "submissions cannot take the place of evidence and therefore where a party fails to prove their case by evidence, submissions cannot come to their aid since submissions are generally parties' "marketing language" each side endeavoring to convince the court that its case is the better one but do not constitute evidence,

113. The Appellants did not in any material way, displace the Respondent's case on the balance of probability, the 1st Appellant elected not to testify while he pleaded guilty in a traffic court and was convicted and sentenced. He was the driver of the ill-fated motor vehicle and an eye-witness and as such the trial court judgment was sound on a balance of probability.

114. Due to the foregoing reasons, the Appellants have failed to demonstrate any irrelevant factor considered in making the award or any relevant factor left out. The Appellants have also failed to demonstrate how the trial court acted on wrong principles of law, considered irrelevant matters, or failed to consider relevant ones, thereby arriving at an inordinately high or erroneous estimate of damages. I decline to interfere with the decision of the Trial Court on the award of damages and finding on liability.

115. I therefore find that the Appeal is not merited and it is hereby dismissed with costs to the Respondent.

It is So Ordered

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 22ND DAY OF JANUARY 2026.

_____

MOHOCHI S. M.

JUDGE