



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

CIVIL APPEAL NO. E202 OF 2023

PATRICK MUSYOKI NZAU.....1ST

APPELLANT

PASHA ENTERPRISES LIMITED.....2ND

APPELLANT

VERSUS

AMOS MAINGI.....

RESPONDENT

**(Being an Appeal from the Judgment of Hon. L. Mutai (C.M) in
Isiolo CMCC No. 47 of 2015 delivered on 24th of October, 2023)**

JUDGEMENT

1. This Appeal arises from the judgment of the learned Chief Magistrate Hon. L. Mutai delivered on 24.10.2023 in Isiolo Civil Suit No. 47 of 2015 wherein judgment was entered in the following terms;

1. Liability 100%
2. Pain and Suffering Ksh. 3,000,000
3. Special Damages Ksh. 748,445

4. Loss of earnings and earning capacity Ksh. 1,140,000
 5. Future medical expenses Ksh. 200,000
 - i. Less Ksh. 2,079,323 paid to counsel for the Respondent on 18/10/2017 = Ksh. 3,009,122.
2. Aggrieved by the said Judgment, the Appellants set forth the following grounds in the Memorandum of appeal dated 13th November, 2023;
1. The learned magistrate erred in fact ended up misdirecting herself in awarding exorbitant quantum of damages of Ksh. 3,009,122/= for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards, granted the prevailing injuries sustained by the respondent herein.
 2. The learned magistrate erred in fact and law by issuing a conflicting decision that is erroneously higher than the decision that had been made previously by the same court with similar jurisdiction.
 3. The learned magistrate erred in law and fact by disregarding the proceedings of the court and the judgment/orders that had been issued therein on the same subject matter, issued by a magistrate of similar jurisdiction.
 4. The learned magistrate erred in law and fact in the manner she apportioned liability at 100% against the appellants which was against the weight of the evidence adduced.
 5. The learned magistrate misdirected herself into using wrong principles in the assessment of quantum payable to the

respondent and thus awarding sums that are inordinately high in the circumstances.

6. The learned magistrate erred in law and fact in not finding that the respondent failed to prove liability on the part of the appellants.
7. The learned magistrate erred in law and fact in failing to analyze the evidence adduced by the appellants.
8. The learned magistrate erred in law in making such a high award as to show that the magistrate acted on a wrong principle of law.
9. The learned magistrate's award on general damages was so high as to be entirely erroneous.
10. The learned magistrate's award for general damages was made without considering the evidence before the Court and failed to appreciate the nature of injuries sustained by the respondent, and authorities on comparable awards and hence ended up making an excessive award.
11. The assessment and award of general damages is manifestly excessive and inordinately high so as to amount to a miscarriage of justice.
12. The learned magistrate erred in law and fact by awarding damages that were inordinately high.
13. The whole judgment and award on damages was against the evidence before the court.

Oral evidence

3. **PW1 Amos Maingi**, the Respondent herein, adopted his statement recorded on 23/6/2015 as his evidence in chief and produced the documents filed therewith as exhibits. He told the court that he had not fully recovered, he could not run his business as he did prior to the accident and his right hand, had metal implants which needed to be removed. He used a wheelchair for almost 2 years, and he depended on somebody.
4. **PW2 PC Charles Mwita**, told the court that he was not the investigating officer in this case, and the driver of the accident motor vehicle could not be charged because he escaped.
5. **PW3 Dr. John Kimani Macharia** told the court that the Respondent required 3 major procedures with an extensive period of management for his near-fatal injuries, and the degree of injury was assessed at 75%. The Respondent was dependent on a caretaker as he could not perform major tasks, and he required further medical surgery to remove the equipment, at a cost of Ksh. 200,000.
6. **PW4 Dr. Nicholas Guantai**, produced the medical report for the Respondent as an exhibit. He told the court that when he examined the Respondent 2 years after the accident, he required a further surgery for the removal of the implants at a cost of Ksh. 200,000 and assessed the permanent disability at 70% as the Respondent was unlikely to recover fully due to the seriousness of the injuries.
7. **DW1 Jane W. Wairimu** adopted her statement dated 17/7/2023 as her evidence in chief and produced the list of documents as exhibits. They settled the decree, which was subsequently set aside,

because they had insured the motor vehicle involved in the accident.

Submissions

8. The Appellants did not file any submissions.
9. The Respondent, through the firm of Kiautha Arithi & Co. Advocates, filed submissions dated 8/11/2025, citing **Abok James Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR**, on the duty of a first appellate court. Counsel submitted that the award of Kshs. 3,000,000/= for pain, suffering and loss of amenities was grounded in uncontroverted medical evidence and a clear appreciation of the Respondent's prolonged immobility, multiple surgeries, and incapacity assessed at 75%, and cited **Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR, Agatha Wanjiru Njuguna v Mary Wanjiku Ikiki & 3 Others [2006] KLR and S J v Francesco Di Nello & Another [2015] eKLR**. Counsel contended that the awards for loss of earnings and earning capacity and future medical expenses were neither speculative nor inflated, and cited **Tracom Limited & v Hassan Mohamed Adan [2009] eKLR and Forwarding Company Limited & another v Kisilu; Gladwell (Third party) [2022] KECA 96 (KLR)**. According to counsel, the trial court rightly found that the Respondent bore no contributory fault, having been a passive passenger in a vehicle that was lawfully on the road, and cited **Rukwaro & another v Maina [2025] KECA 177 (KLR) and James (Suing as the Legal Representative of the Estate of**

James Kayongi King'ori) v M'Mbirithi & another (Civil Appeal E033 of 2024) [2025] KEHC 10642 (KLR).

Analysis and Determination

10. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions on the same.
11. In **Selle & another v Associated Motor Boat Co. Ltd [1968] EA** the court held as follows: ***“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of 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 allowance in this respect.”***
12. I have considered the appeal herein, the trial court's judgment, which is the subject of this appeal, as well as the submissions on record.
13. The issues for determination therefore, are whether apportionment of liability at 100% was proper and whether the awards made by the trial court were manifestly exorbitant.
14. Section 107 (1) of the Evidence Act provides that; ***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

15. The general rule is that a trial court's apportionment of liability should not be interfered with except in exceptional cases, since it is an exercise of discretion. In ***Khambi and Another v Mahithi and Another [1969] EA 70***, it was held thus: ***“(i) An apportionment of liability made by a trial Judge will not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous (Brown v. Thompson (3) and Shariff v. Shethna (2) followed; (ii) the trial Judge had taken into account all material facts and considerations and his apportionment should not be disturbed and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”***
16. The Respondent pleaded that he was travelling in motor vehicle Registration No. KBS 962 N when the 1st Appellant so negligently drove motor vehicle registration No. KBT 715 T occasioning him severe multiple bodily injuries. Those averments remained uncontroverted, as evidently from DW1's testimony, she did not witness the accident.
17. The Court of Appeal in ***Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] KECA 153 (KLR)***, espoused that; ***“We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff***

has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in Karugi & Another v. Kabiya & 3 Others (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgement, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis."

18. In the absence of any rebuttal by the Appellants that the Respondent was contributorily negligent, I am satisfied that the Appellants were wholly to blame, and trial court's apportionment of liability was proper.

19. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the *locus classicus* case of **Butt v Khan [1978] eKLR** thus; ***“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.”***

20. The injuries sustained by the Respondent are particularized in the medical report of Dr. Nicholas Koome dated 5/4/2016 as mild head injury with GCS of 13/15, deep laceration on the forehead approximately 5 × 2 cm, chest injury with fracture of 4 ribs on the right, fracture of the midshaft left humerus, laceration on the dorsal surface of the left hand, right femur segmental fracture and fractures of 2 molars on the upper jaw and premolar and molar on the left upper jaw.

21. At the time of examination, the Respondent had scar over the forehead and left hand, surgical scar on lateral aspect of right upper and lower limb, implants in situ in the humerus and right femur, reduced range of motion in the right shoulder, reduced range of motion in the right knee, reduced power in the right upper limb and partial weight bearing crutches for ambulation.

22. In his opinion, the Respondent, who was dependent on a caregiver since he could not perform most menial tasks, he required 3 major

operation procedures and an extensive convalescent period as an outpatient and 2 further major operations to remove the implants at a cost of sh. 200,000. He assessed the degree of harm as grievous and the permanent incapacity at 75%.

23. The Respondent recorded in his further statement that, ***“I lost my conscious and regained it on 28th December 2013. I found myself admitted at St. Teresa’s Kiirua hospital. I suffered several severe injuries and head, chest, fractured right humerous, fracture right segment fraction on the femur, teeth (pre-molar) and rib multiple soft tissue injuries. I also suffered teeth injuries. Two broken teeth and cracked teeth on the lower side. I also fractured the ribs. I was discharged on 1st January 2014 on a wheelchair. To date I have not recovered and not resumed work. I had incurred tremendous medical expenses for my treatment and still require future medical treatment. I have so far incurred in medical expenses in Kshs.1,296,745/=. I will require Kshs. 200,000/= for future medical expenses. My two daughters left school in which they were, and had to shift to other schools due to financial constricts. My wife had to leave her work and take care of me. She had a saloon and boutique. I also had to hire a helper at Kshs. 5,000/= per month from March 2014 to June 2015 totalling to Kshs.75,000/= when I was able to walk with the aid of clutches. I had an electronic shop, mobile sales and computer school that run out of business after the accident. I usually earned about Kshs. 3,000/= a day. I have***

lost all that. I also had to shift my home to cheaper uncondusive premises.”

24. In ***Moi Teaching and Referral Hospital Board & Christopher K.***

Kinyua v Leonard Kibiwott Kosgei [2020] KEHC 8049 (KLR),

the court (*H.A Omondi J, as she then was*) upheld an award of general damages of Ksh. 2,000,000 where the claimant sustained head injury-semi-conscious after accident, the forehead and face were swollen and tender with multiple cut wounds, lost one upper jaw tooth, fractures of the nasal bone, a cut wound on the nasal ridge, fractures of the mandible and maxilla, swollen and tender legs with bruises and cut wounds, a fracture of the left tibia and a fracture of the right tibia plateau lateral.

25. In ***Leonard Njenga Ng’ang’a & another v Lawrence Maingi***

Ndeti [2018] KEHC 2718 (KLR), the court (*G.V. Odunga, J as he*

then was) substituted the trial court’s award of general damages of Ksh. 2,150,000 with Ksh. 1,500,000 where the claimant sustained a deep cut on the forehead which was stitched, fracture of the right collar bone (clavicle), compounded fractures on the right hand (both bones of right radius spinal bones and fracture of the femur, deep cut on the lower lip, loss of the lower teeth denture and injury to the gums, fracture on the left ankle, dislocation to the ankle joint and generalised body pain.

26. I find that the award of Ksh. 3,000,000 for pain, suffering and loss of amenities was excessive in the circumstances, particularly in view of the favourable medical prognosis of Dr. Nicholoas Koome, rendered

- three years post accident indicating that the Respondent had regained partial mobility and was undergoing rehabilitative therapy.
27. I find that an award of Ksh. 2,000,000 would suffice under this head.
28. There is no much contestation about the award of Ksh. 200,000 as proposed by PW4, and thus the same was properly awarded.
29. On loss of earning capacity, the Court of Appeal in **S J v Francesco Di Nello & another (2015) eKLR** noted as follows; ***“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.”***
30. The Respondent suffered 70 to 75% permanent incapacity, which significantly impaired his ability to earn a living, and thus deprived him of the ability to engage in gainful employment. Both PW3 and PW4 concurred in their respective testimonies that the injuries sustained by the Respondent were life threatening, which resulted in his partial immobility, thus rendering him wholly dependent on a caregiver.
31. I am satisfied that the trial court’s award of Ksh. 1,140,000 under this head was justified.

32. The upshot from the foregoing is that the appeal is partially merited and it is allowed in the following terms:

1. The award of Ksh. 3,000,000 for pain, suffering and loss of amenities is hereby set aside and substituted with Ksh. 2,000,000.
2. The other awards remain unaffected. Each party to bear own costs of the appeal.

DATED AND DELIVERED AT MERU THIS 27TH DAY OF JANUARY, 2026.

**S.M. GITHINJI
JUDGE**

APPEARANCES:

Ms. Kerubo holding brief for Mr. Kiura for the Respondent

Mr. Muli for the Appellant (absent)