

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E002 OF 2025

ALEX MULONZYA MBINDYO.....

APPELLANT

VERSUS

ALEX MWEU MWELU

1ST RESPONDENT

SUKHWINDER SINGH.....2ND

RESPONDENT

(Being an appeal against the decision of Hon. J

Ndengeri (SRM) delivered on 10th December 2024 in

Naivasha MCCC No. 31 of 2019)

JUDGMENT

1. By a plaint dated 16th January 2019, the plaintiff (herein “1st respondent”), sued the defendants (herein “the 2nd respondent and appellant”)

seeking for judgments against them in the following orders:

- a) General damages for pain and suffering.*
- b) Special damages in the sum of Ksh. 745,241.*
- c) Loss of earning capacity and diminished earning capacity.*
- d) Future medical expenses Ksh 400,000 for corrective surgery.*
- e) Ksh 200,000 calculated at every 10 years for artificial leg.*
- f) Loss of consortium.*
- g) Costs of this suit and interest on all items pleaded above.*
- h) Any other or further relief that this Honourable court may deem fit and just to grant.*

2. The plaintiff avers that, at all material time the 2nd respondent was the registered owner of the motor vehicle registration number KBW 955C, while the

appellant was the registered owner of the motor vehicle registration number KBY 434V.

3. That on or about the 19th August 2016 at around 5.00am, he was travelling as co-driver in motor vehicle registration number KBY 434V along Gilgil – Naivasha road. That at Sogea area, the 2nd respondent and appellant by themselves, their agent drivers and/or servants so negligently drove, controlled and/or managed motor vehicles registration number KBY 434V and KBW 955C that they lost control and collided, resulting in an accident in which he sustained severe body injuries.

4. The plaintiff tabulates the particulars negligence on the part of 2nd respondent as follow: -

a) Driving at a high speed in the circumstances.

b) Driving carelessly and/or recklessly without due care to the safety of other road users as

reasonably expected of him and more particularly the plaintiff.

c) Overtaking without due regard to the safety of other road users.

d) Failing to maintain any and/or proper and effective control of the said motor vehicle.

e) Failing to break, slow down or in any other manner possible control the said motor vehicle so as to avoid the accident.

f) Moving into the path of KBY 434V and colliding thereof.

g) Causing the said accident.

h) Driving a defective vehicle.

5. The particulars of negligence on the part of the appellant are tabulated in the plaint as follows:

a) Driving at a high speed in the circumstances.

b) Driving carelessly and/or recklessly without due care to the safety of other road users as

reasonably expected of him and more particularly the plaintiff.

c) Overtaking without due regard to the safety of other road users.

d) Failing to maintain any and/or proper and effective control of the said motor vehicle.

e) Failing to break, slow down or in any other manner possible control the said motor vehicle so as to avoid the accident.

f) Moving into the path of KBW 955C and colliding thereof.

g) Causing the said accident.

h) Driving a defective vehicle.

6. That as a result of the said accident, he sustained severe body injuries and suffered loss, damage and incurred expenses as a result thereof. The particulars of the s injuries sustained are tabulated as follows: -

- a) *Mangled, crushed right leg up to level of the knee.*
- b) *Extensive degloving injury of the perineum involving the penite shaft.*
- c) *Traumatic amputation of the phallus i.e penite shaft distal 1/3*
- d) *Urethral tear at membranes urethra*
- e) *Degloving injury right lower arm.*

7. The plaintiff claims and tabulates particulars of special damages as follows:

- a) *Medical reports-----Kshs 3,000/=*
- b) *Filling of P3 form-----Kshs 1,500/=*
- c) *Motor vehicle search-----Kshs 1,100/=*
- d) *Police abstract-----Kshs 200/=*
- e) *Medical expenses-----Kshs 739,441/=*
- Total-----Kshs 745,241/-*

8. That at the time of the accident he was aged 39 years and working as a driver of motor vehicle registration number KBY 434V Isuzu FRR, earning a

monthly salary of Ksh35,000. However, after the accident, he lost his right leg through amputation, suffered 40% incapacity and is not able to work again.

9. That consequently he lost the ability to earn an income and claims loss for earning capacity and diminished earning capacity. Further that his urethra was damaged and requires a further surgery to reconstruct the abnormality on his urethra (urethroplasty) at an estimated cost of Ksh 400,000, which he prays for.

10. The plaintiff further pleads that his right leg was completely amputated and he need to be fitted with an artificial leg to make life bearable and that the same will cost an estimated sum of Ksh200,000 and be replaced after every ten (10) years which sum he claims.

11. The plaintiff further states that he is married but due to his injury, he has been unable to fulfil

his conjugal responsibilities and thus prays for loss of consortium.

12. However, the plaintiff's claim was opposed by the 2nd respondent vide a statement of defence dated 15th March 2019 wherein he denied all the averments in the plaint attributed to him and in particular, that an accident occurred as alleged, he allegations of negligence and/or recklessness attributed to him and/or his authorized driver, agent and or servant.

13. That further and in the alternative and without prejudice to the foregoing, the 2nd respondent averred that the accident was wholly caused by, and/or was substantially contributed to by the negligence of the 1st respondent and tabulated he following particulars of negligence to him: -

a) Failing to wear a safety belt.

b) Failing to have any sufficient regard for his own safety.

c) Failing to take any reasonable precautions as would be expected of a reasonable man in the circumstances.

d) Exposing himself to the risk of injury.

14. That in the alternative and without prejudice to the foregoing, the accident was wholly caused by and/or was substantially contributed to by the negligence of the driver of motor vehicle registration number KBY 434V. The particular of negligence attributed to the appellant are: -

a) Driving at an excessive speed in the circumstances.

b) Overtaking recklessly.

c) Driving without regard to other road users.

d) Encroaching into the lane of motor vehicle registration number KBW 955C.

e) Failing to take evasive actions to avoid collision with motor vehicle registration number KBW 955C.

f) Failing to stop, slow down, swerve and in any other manner take measures to avoid causing the alleged accident.

g) Failing to adhere to the provisions of the Traffic Act and the provisions of the highway code and

h) Causing the accident.

15. The 2nd respondent stated that he would seek indemnity and/or contribution from the owner and the driver of motor vehicle KBY 434V. In addition, he would place the reliance on the doctrine of *Volenti non fit injuria* in furtherance of the defence.

16. The allegation that the 1st respondent is unable to engage in gainful employment, consequently his claims for loss or earnings and/or loss of future earnings and/or loss of earning capacity and/or diminished earning capacity and loss of consortium were denied. The allegations of monthly earnings of Ksh 35,000, was also denied.

17. The appellant did not file a statement of defence wherein the 1st respondent requested for judgment in default of appearance and/or filing of a defence within the prescribed period. The request was allowed
18. However, the appellant successfully sought for setting aside of that decision with the court setting aside the interlocutory judgment and/or decree entered against the applicant be and condemned the applicant to pay throw away costs in the sum of Ksh70,000 before the date of next activity.
19. Subsequently the appellant filed a statement of defence dated 13th October 2021 in which he denied all the allegation levelled against him in the plaint.
20. He averred that if any accident occurred which is denied, the 1st respondent was adequately compensated by Heritage Insurance Company which had been taken by him.

21. Further that on 19th August, 2016 the 1st respondent was the driver of motor vehicle registration number KBY 434V but not a passenger as alleged or at all, hence the suit herein is malicious, frivolous, devoid of merit and waste of the Honourable court's time.

22. The case was hard and parties filed their respective submissions and upon considering the evidence before it, the trial court entered judgment in favour of the plaintiff/1st respondent as follows:

Liability 100% against the 2nd defendant

a) General damages Kshs 2, 500,000.

b) Loss of earnings Kshs 3, 172,043.28

c) Special damages Kshs 745, 241.

d) Cost of artificial leg Kshs 300,000

e) Future medical expenses Kshs 400,000

f) Total sum -----Kshs 7, 117, 284.28

23. However, the appellant is aggrieved with the afore decision and appeals against it on the following grounds verbatim reproduced: -

- a) *The learned Magistrate erred in law and fact in ignoring material fact and evidence and by relying on extraneous facts and evidence hence arriving at wrong conclusions.*
- b) *The learned Magistrate applied wrong principles of law in arriving at conclusions in respect of both liability and quantum of damages which quantum is high and excessive.*
- c) *The learned Magistrate erred in law and or facts in assuming jurisdiction and or entertaining a suit and or acting without jurisdiction.*
- d) *The learned Magistrate erred in law and or fact in holding that he had jurisdiction to hear the suit.*
- e) *The learned Magistrate erred in law and fact by disregarding sections 2,4,5,7,10 and 17 of the Work Injury Benefit Act (WIBA).*

- f) *The learned Magistrate erred in law and fact in making an award of damages in excess of and or outside his pecuniary jurisdiction.*
- g) *The learned Magistrate erred in law and facts in holding that the 1st respondent was not acting in the course of his employment despite express and clear statements in the pleadings and an admission by the 1st respondent in his evidence in chief as per the adopted witness statement.*
- h) *The learned Magistrate erred in law and fact in holding that the appellant was liable in absence of evidence in respect of vicarious liability.*
- i) *The learned Magistrate erred in law and fact in holding that the 1st respondent was not the driver of motor vehicle registration number KBY 434V.*

24. As a result, the appellant prays that,

- a) *The appeal herein be allowed.*

b) The judgment and decree in Naivasha Magistrate Court Case No. 31 of 2019 be set aside and substituted with an order striking out or dismissing the suit.

c) Costs of the suit and the appeal be awarded to the appellant.

25. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated; 30th May 2025 and argued that the trial court lacked jurisdiction to determine the matter. That 1st respondent having been an employed as a driver by the appellant and being on duty in the subject vehicle at the time of the accident the matter lies under the Work Injury Benefits Act (WIBA).

26. However, the trial Magistrate held that the matter did not fall under WIBA for reason being that at the time of the accident the 1st respondent

was not working as his co-driver was the one driving.

27. The appellant cited section 2 of the Work Injury Benefit Act that defines an accident to mean one arising out of and in the course of an employee's employment and results in personal injury. Further, he cited section 10(4) of the Act on when an occupational accident is deemed to have arisen to include an act done by the employee for the purpose of, in the interest of, or in connection with the business of the employer.

28. The appellant submitted that the afore provisions meant that a driver who is travelling in a motor vehicle driven by a co-driver employed by the same employer for purpose of driving the same vehicle in turns is travelling in the course of his employment. The appellant relied on the case of Musango vs Brinks Securty Services Ltd & Another [2024] KEHC 1797 (KLR) where the High

Court held that the appellant whose work involved carrying booster site keys and accompanying staff to various booster sites travelled from one site to another in the company motor vehicle in the course of his employment as per the provisions of section 10(5) of WIBA and it was therefore not in dispute that at the time of the accident he was on duty as a passenger in his employer's vehicle.

29. The appellant further referred the court to the case(s) of Color Label Limited vs Walubengo [2024] KEHC 3964 and West Kenya Sugar Co Ltd vs Shirandula [2022] KEELRC 13284 where the High Court and the Employment and Labour Relations Court respectively held that Magistrates Court lacks jurisdiction to entertain work injury related claims which is conferred to the Director of Occupational Safety and Health Services under the Work Injury Benefit Act.

30. The appellant further argued that the trial court, being a Senior Resident Magistrate Court acted in excess of its jurisdiction in awarding the sum of Kshs. 7,117,284.28 which exceeded its pecuniary jurisdiction under section 7 of the Magistrate's Act being Kshs. 7,000,000. That in the case of Pelezia Bakari Salim vs Somoire Keen & 2 Others [2020] eKLR, the Court of Appeal held that regardless of the seriousness of the appellant's injuries, the trial court being a resident magistrate could not award a shilling beyond her pecuniary jurisdiction.

31. The appellant submitted that the trial court erred in law and fact in holding that the appellant was vicariously liable for negligence. That, he had disputed that the 1st respondent was a passenger but was rather the driver of the subject vehicle as stated in his witness statement and defence. That his pleadings and evidence was supported by the

claim form of Heritage Insurance signed by the 1st respondent where the 1st respondent stated that he hit a truck/lorry head on while driving the lorry belonging to his boss.

32. That the 1st respondent was paid compensation on the strength of claim form, and therefore he cannot turn around and claim that an undisclosed third party was the driver of the subject vehicle. Further the 1st respondent did not join the alleged co-driver in the suit so as to attribute negligence on his part. Furthermore, the police abstract did not disclose the name of the driver of the subject vehicle. That while failure to name a driver of a vehicle involved in an accident as a co-defendant is not fatal, it was necessary to disclose and/or identify the driver in the circumstances of the instant case so as to allege and prove vicarious liability.

33. The appellant relied on the case of; *In Re Estate of Williamson Kilonzo Mutisya (deceased) [2018] eKLR*

where the High Court cited with approval the case of Joseph Njuguna v. Cyrus Njathi [1999] eKLR and held that the owner or apparent owner of a vehicle can be held vicarious liable for the negligence of his driver even if the driver is not a co-defendant in the suit, however, the plaintiff is required to prove that the owner's driver committed a tort of negligence and that the driver was the owner's servant or agent, That, there is no strict liability on the owner merely because his vehicle caused an accident whilst being driven by someone else.

34. On quantum, the appellant submitted that the trial court erred in assuming the 1st respondent was 100% incapacitated in awarding the sum of Kshs, 3,172,043.28 as loss of earnings. That, the 1st respondent in his pleadings stated that his right leg was amputated and suffered 40% incapacity which was supported by the medical report.

35. Further, that loss of earnings is a special damage that must be specifically pleaded and proved. However, the trial Magistrate treated the same as general damages and proceeded to quantify the same by applying the minimum wage of a driver in the sum of Kshs. 18,881.21. He relied on the cases of Bagala vs Doshi & Company (Hardware) Limited [2024] KEELRC 370 (KLR) and SJ vs Francesco Di Nello & Another [2015] eKLR where it was held that loss of future earnings and loss of earning capacity are distinctively different as loss of income/future earnings is real actual loss that is a special damaged and is to be specifically proved by evidence while loss if earning capacity is an award of general damages.

36. The appellant faulted the trial Magistrate for making an award under general damages and separate award of damages under loss of earnings

and argued that the trial court ought to have awarded a lump sum under loss of earning capacity.

37. On general damages, the appellant relied the court to the case of *Benuel Bosire vs Lydia Kemunto Mokora (2019) eKLR* where High Court reduced an award of Kshs. 2,000,000 to Kshs. 700,000 where the respondent had a single compound fracture and disability assessed at 40%.

38. Further, in *SBI International Holdings (AG) Kenya vs William Ambunga Ongeru (2018) eKLR* the High Court upheld general damages award of Kshs. 800,000 where the respondent sustained 40% permanent disability.

39. Similarly, in the case of *Koyii Obanga & 2 Others [2022] KEHC 9772 (KLR)* the High Court awarded general damages of Kshs. 400,000 where permanent disability was assessed at 40%.

40. The 1st respondent submitted that taking into considerations the provisions of Articles 50 (1) and

159 (2)(b) and (2)(d) of the Constitution and sections 1A, 1B and 3B of the Civil Procedure Act, it will be a gross miscarriage of justice to set aside the trial court judgment and deny the 1st respondent the fruits of judgment over litigation that spanned nine (9) years.

41. Further, that allowing the appeal will be to flush down the judicial resources that went into hearing and determining the matter. Additionally, restarting the matter before the occupational safety officer will delay his compensation as the issue of liability will not be determined and/or taken into account.

42. On the issue of liability, the 1st respondent submitted that the trial court considered evidence of both parties, the investigating officer in reaching its decision. That it was the evidence of the investigating officer that the appellant's vehicle rammed into the stationary vehicle

belonging to the 2nd respondent and that 1st respondent was passenger in the appellant's vehicle. Further that the driver of the appellant's vehicle was identified as James Mbuku Nzuki which was supported by the police abstract produced in the trial court.

43. The 1st respondent further submitted that the appellant has not shown that the finding of facts was not based on any evidence or a misapprehension of the evidence and to warrant it being interfered with. He relied on the case of Mwangi vs Duncan Mwangi Wambugu [1984] eKLR where the Court of Appeal held that it will not interfere with a finding of fact by a trial court unless such findings are based on no evidence or a misapprehension of evidence or that the judge acted on wrong principles in reaching its findings.

44. On quantum, the 1st respondent submitted that the award was sufficient considering the

extent and nature of injuries he sustained. That the injuries are life threatening and rendered him disabled and unable to earn a living as the appellant laid him off due inability to perform his duties.

45. He relied on the case of James Maina Muriithi vs My Beauty Transporters Limited, Timothy Kinuthia & Peter Njihia [2018] KEHC 4023 (KLR) where the plaintiff sustained frictional burns over the lower abdomen, frictional burns on both thighs, crush injury of the right lower limb with eventual below knee amputation, crush injury left upper limb with eventual disarticulation and pains, blood loss and soft tissue injuries and the High Court awarded general damages of Kshs. 4,200,000.

46. That in the case of Abdi Werdi Abdulahi vs James Royo Mungatia & Joseph Mwongela Mungana [2019] KEHC 2791 (KLR) the plaintiff

suffered multiple fractures on the right lower and upper limb, amputation of the right lower limb, multiple fracture and bruises on the upper right limb leading to affixation of two metal plates, injury to the right eye leading to impaired vision, compressed burst level 4 vertebra with retro-pulsed fracture fragments, deep bruising on the chest due to dragging on tarmac, and head trauma injuries leading to concussion with the High Court awarding general damages of Kshs. 3,500,000.

47. On loss amenities, the 1st respondent referred the court to the case of *Mwaura Muiruri vs Suera Flowers Limited & another [2014] eKLR* where the court cited Halsbury's Laws of England on a claim of loss of amenities and stated that in addition to damages for pain and suffering damages are awarded for objective loss including loss of a limb and its use, loss of congenial employment, pride

and pleasure of work and that the damages are awarded whether the plaintiff is aware of it or not.

48. That the court went on to hold that damages for loss of amenities are awarded where the quality of the life of the plaintiff is reduced due to the inability to do things he would otherwise have done if not for the injuries.

49. On loss of earnings and earning capacity, the 1st respondent argued that before the accident he worked as driver earning Kshs. 35,000 per month and produced a letter dated 16th May 2018 in support of the same which was not disputed by the appellant. Further, at the time he was 41 years old and would have worked for another 19 years before retiring. As such he calculated his loss of earnings as follows: Kshs. 35,000 x 19years x1 2months = Kshs. 7,980,000.

50. He contended that the trial court was well guided in the award made and urged the court not to disturb the award.
51. On special damages, the 1st respondent submitted that he produced receipts as P.exhibit 7 in the trial court totalling Kshs, 745,241 which was never challenged.
- 52.The 1st respondent argued that the doctor informed the trial court that his urinary system was extremely damaged and requires several surgeries to remedy it as supported by the medical report of Dr Mutunga. That he sought for Kshs. 400,000 as future medical expense to cater for corrective surgery.
- 53.He further argued that he required an artificial leg replaced after every ten (10) years and estimated the cost of fixing the artificial leg at Kshs. 200,000 and assuming it will be replaced for the next thirty

(30) years, he will require Kshs. 600,000 calculated as; Kshs 200,000 x 3.

54. On loss of consortium, the 1st respondent submitted that he was married but since the accident he was unable to enjoy consortium with his wife and urged the court to retain the award by the trial court.

55. In consideration of the appeal this court notes that the role of the 1st appellate court as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion.

56. After considering the appeal based on the grounds thereof and the other materials before court, the court finds that the first issue to determine is whether the trial court had jurisdiction to hear and determine the matter before it.

57. The trial court considered this issue of jurisdiction and stated as follows.

“It is common ground that the plaintiff was an employee of the 2nd defendant. He had been hired as a driver for a company owned by the 2nd defendant, the 2nd defendant in his evidence admitted as much.

The plaintiff by the very nature of his job description as a driver meant that he would be inside a vehicle to discharge his duties. He was therefore on duty when the accident occurred, however, he was not working, that is to say that he was not driving. By the very fact that he was inside the vehicle, this did not preclude him from filing for damages for a total negligence.

This court therefore finds that it had jurisdiction to entertain this matter”.

58. The argument by the parties on this issue is already summarised herein and in a nutshell the

appellant argues that, in reaching the afore conclusion, the court erred in its interpretation of the Work Injury Benefit Act (WIBA).

59. That the 1st respondent stated in his witness statement that he was an employee of Ngiluni Stores & Transporters Company Limited as a driver earning Kshs 35,000 per months and that on 19th August 2016, while in the course of employment, he was involved in a road traffic accident.

60. The appellant argues that the appellant had taken out an insurance cover for his employees pursuant to section 7(1) of WIBA.

61. However, in response the 1st respondent submitted that the issue of jurisdiction of the trial court was determined vide a ruling dated 7th September 2021 and the same has never been set aside, varied or appealed against by the appellant, as the appellant has never prosecuted

the appeal filed in the Employment and Labour Court in Nakuru.

62. To revert back to the matter herein, section 16 of WIBA states that:

“No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death”.

63. The above provision requires an understanding of what “occupational accident” mean. Section 2 of the Act states “accident” means an accident arising out of and in the course and scope of an employee’s employment and resulting in personal injury. The word occupational

though not defined relates to a person's job or profession.

64. Consequently, an occupational accident is a sudden, unexpected, and unplanned incident occurring during the course of work, on or off company premises, that causes physical or mental harm, injury, disease, or death to an employee. It arises from work-related tasks, such as handling equipment, or during business trips, but generally excludes commuting to/from work.

65. Therefore, occupational accidents are incidents which meet the definition of an accident, take place under conditions specified by law, and result in an effect that is causally linked to the incident.

66. It suffices to note that this court has in the past dealt with the issue at hand in the case of *Andukan v Bilashaka Flowers Limited & another* [2025] KEHC 9344 (KLR) where the court held that

the guiding factor in determining whether the court has jurisdiction or not, is the pleading.

67. Pursuant to the aforesaid, the evidence adduced herein as whether the 1st respondent was injured while in the ordinary course of his employment or not, can only be gathered from the pleadings.

68. In that regard, the 1st respondent at paragraph 4 of the plaint states that, he was travelling on Motor vehicle registration number KBY 434V as “co-driver”. In his statement in support of the averments in the plaint he states that, “he had been assigned to transport maize using motor vehicle registration number KBY 434 Isuzu FRR. That they were two drivers who were transporting the said maize since the distance from Busia to Mwingi was long. As such we were driving the lorry in turns”.

69. In his oral evidence he adopted his statement as evidence in chief. In cross examination he stated that, “he was an employee and that he had been given a lift in the vehicle by the driver”. He went on to state that he was an employee of Nguluni earning Khs 35, 000.”
70. The question that arises is whether based on the afore the 1st respondent was a passenger in the subject vehicle or a co-driver. And if he was a co-driver, whether he was therein in the ordinary course of his employment.
71. From the averments in the pleadings, the 1st respondent’s witness statement, and his oral evidence, it is not in dispute that the 1st respondent was an employee of the appellant, at the time of the accident he had been assigned the duty of ferrying maize from Busia to Mwingi and was injured while on that trip.

72. Consequently, the finding of the trial court that he was not on duty simply because that he was not at the steering wheel at the time of the accident, is erroneous and not based on evidence as the 1st respondent that they were driving in turns.

73. Pursuant to the aforesaid, it is the finding of this court that, the claim fell squarely within the provision of section 16 of WIBA and the trial court had no jurisdiction to entertain the case between the 1st respondent and the appellant.

74. The argument by the 1st respondent that there was no employer/employee relationship between the respondent herein, is not tenable as the law is clear and that argument could not clothe the court with jurisdiction.

75. However, be that as it may, the 1st respondent has raised the issue relating to the ruling delivered on 7th September 2021. It is argued that

it resolved the issue of jurisdiction herein. Further an appeal was filed against and abandoned and so this court cannot deal with the issue again. The appellant did not respond to this issue.

76. The court has perused the subject ruling and notes that indeed the issue of jurisdiction of the court was dealt with. The question is should this court deal with the issue or not?

77. In answering that question, this court notes that it has not been supplied with any pleading or documents to prove that indeed the appeal was filed. Further, there is no evidence that if the appeal was filed, it was heard and determined so that this issue herein become Res judicata and/or this court become functus officio.

78. Furthermore, this court is dealing with the matter before, it cannot down its tool in the absence of a stay order from a court of higher jurisdiction and/or on being moved through a

formal application or otherwise, to determine the issue. In the given circumstance, it is the finding of this that the argument by the 1st respondent is not tenable.

79. Pursuant to the finding herein that the trial court had no jurisdiction, the appeal cannot be considered on liability and quantum as the proceedings of the trial court are rendered null and void.

80. However, before concluding this judgment, the court notes that this is a very sad case, and it is a classic example where the victim becomes a “victim of law and practice”.

81. The 1st respondent was involved in an accident, in the year 2016, the case was not filed until the year 2019. The case was heard and determined through a judgment delivered on 22nd June 2021, but was subsequently set aside. The case commenced afresh resulting in another

judgment rendered on 10th December 2024. It is out of that judgment that this appeal arises and all through the victim of the accident has fractured and/or missing body parts.

82. It is not therefore surprising when he emotionally pleads with the court not to take him back to the queue but this court's hands are tied by the chains of law. The key question is; who is to blame. To the court, this question is a wake-up call to all stakeholder to re-examine themselves as to the manner in which each party to litigation executes their responsibility.

83. In conclusion, the appeal is allowed and the judgment herein is set aside with all the consequential orders. However, the appellant is not awarded any costs on the simple reason that they had an opportunity to appeal the ruling of the trial court on jurisdiction but did not and as result the case was heard and determined. In any

case, the judgment is set aside due to the finding of the court and not any act on the part of the 1st respondent.

84. It is so ordered.

Dated, delivered and signed on this 17th day of February, 2026

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Muthubi HB for Mr. Mutua ESC for the appellant

Ms Nzili HB for Mr. Mutava for the 1st respondent

Ms Mwangangi for the 2nd -respondent

Hannah: Court Assistant