REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. E002 OF 2023 & No. E003 of 2023 (CONSOLIDATED)

JOHN CHEGE MBURU……1ST APPELLANT

DUNCAN KIMONDO……2ND APPELLANT

VERSUS

GRACE NASHILUNI ENE JOHANA NKOIBONI…..1ST RESPONDENT

DAVID KUNG'U……2ND RESPONDENT

(Being an appeal from the judgment of Gicheha, CM delivered on 3rd November 2022 in Kajiado CMCC No. E264 of 2021 and CMCC E350 of 2021 (consolidated))

JUDGMENT

1. The two consolidated appeals herein emanate from the judgements delivered on 3rd November 2022 in Kajiado **CMCC No. E264 of 2021** and **No. E350 of 2021,** both arising from a road traffic accident that occurred on 23rd May 2020. By her

amended plaint dated 4/11/2021, **Grace Nashiluni Ene Johana Nkoiboni** (hereafter the 1st Respondent) sued **John Chege Mburu** (hereafter the 1st Appellant) in his capacity as the driver or owner of motor vehicle registration no. **KCR 692J,** seeking damages in respect of injuries suffered as a result of the road traffic accident that occurred on 3rd May, 2020.

2. She averred that on the material date, she was in the process of boarding motorcycle registration number **KMDH 680L** (hereafter the motorcycle) along **Isinya -Kiserian** road when the motor vehicle registration number **KCR 692J** (hereafter the accident motor vehicle) while being negligently driven lost control and hit her, occasioning her severe injuries, loss and damage. The injuries are particularized as constituting amputation of the right leg below the knee, dislocation of the left knee joint, fractures to right clavicle, 6th and 7th right anterior ribs, to distal right radius bone, and resultant 65% permanent incapacity. In addition to general damages, she sought future medical expenses, lost earnings from the date of the accident to the date of judgement, and loss of future earning capacity.

3. The 1st Appellant filed his statement of defence dated 17th August, 2021. Therein the said Appellant while admitting ownership of the accident motor vehicle denied the key averments in the amended plaint, negligence and liability, while pleading contributory negligence against the 1st Respondent, as particularized at paragraph 10 of the defence statement.
4. On his part, **David Kung'u** (hereafter the 2nd Respondent) by his amended plaint dated 4th October, 2021 sued both the 1st Appellant and **Duncan Kimondo** (hereafter the 2nd Appellant) in their capacity as the registered or beneficial owner, and as driver, actual, registered or beneficial owner of the accident motor vehicle, respectively. The 2nd Respondent averred that while he was seated on the motorcycle outside of the **Isinya-Kiserian** road, the accident motor vehicle was so carelessly driven that it lost control and hit him. Thereby occasioning him injuries including open fractures to the left tibia and fibula bones resulting in 15% incapacity. He sought general damages for pain, suffering and loss of amenities, special damages, future medical expenses, loss of earnings from the date of the

accident to the date of judgement, and loss of future earning capacity.

5. The Appellants filed a statement of defence dated 22nd October, 2021 denying the capacities in which they were sued, the occurrence of the accident, negligence, the alleged injuries and liability. And in the alternative, pleading that if the accident indeed occurred, it was solely or substantially caused by the negligence of the 2nd Respondent, the motorcycle rider, as particularized at paragraph 10 of the defence.
6. On 21st June, 2022 a consent was recorded before the trial court, effectively consolidating **CMCC E264 of 2021** and **CMCC E350 of 2021** for purposes of trying liability. At the trial, both Respondents testified, while the 1st Appellant testified on behalf of the Appellants.
7. In the judgment delivered on 3rd November 2022, the trial court found the two Appellants wholly liable for the accident and proceeded to award damages with costs, as follows:

    1st Respondent:

    a. General damages: Kes. 3,500,000/-

b. Damages for loss of future earning capacity: Kes. 1,477,320/-

c. Future medical expenses: Kes.300,000/-

d. Special damages: Kes. 1,250/-

Total - Kes. 5,294, 570/-

2nd Respondent:

a. General damages: Kes. 1,200,000/-

b. Special damages: Kes. 7,050/-

Total: Kes. 1,207,050 -

8. Aggrieved by the outcome, the Appellants lodged the two appeals herein via separate but identical memoranda of appeal, dated 25th November 2022. Raising four grounds of appeal, in challenging the findings on liability and quantum, as follows:

1. That the trial magistrate erred in law and in fact as she did, when she failed to properly evaluate the evidence on record thus reaching an erroneous decision on the issue of liability.

2. That the trial magistrate erred in law and in fact as she did, on evaluation of liability.

3. That the trial magistrate erred in law and in fact as she did by basing her decision on irrelevant matters and failing to base her decision on the facts and evidence on record thereby arriving at an excessive award on the issue of quantum of damages.

4. That the trial magistrate erred in failing to follow and uphold legal parameters and binding precedents on assessment of quantum of damages under similar circumstances.

Appellants' submissions

9. Pursuant to directions given that the appeals be canvassed by way of written submissions, counsel for the Appellants filed two sets of submissions in **HCCA No. E002** and **HCCA No. E003 of 2023** (hereafter the 1st and 2nd appeal, respectively).

10. In the former, the 1st Appellant's submissions dated 8th April, 2025 address the issues of liability and quantum. Asserting that

the Respondent acted negligently by boarding the motorcycle at a non-designated area, thereby exposing herself to danger, the 1st Appellant takes issue with the trial court's finding of 100% liability. Further pointing out that the police abstract produced did not assign blame, but only indicated that the accident was under investigation.

11. Counsel for the 1st Appellant submitting further that if liability is apportioned in the 2nd appeal, such apportionment should apply in both appeals. Counsel urged the court to either absolve the Respondents of liability or apportion liability equally at the ratio of 50:50 between the parties. Citing decisions in **Karanja vs. Malele (1983) KLR 142** and **Berkeley Steward Ltd, David Coltel & Jean Susan Colten vs. Lewis Kimani Waiyaki [1982-88] 1 KAR 101-108**, for the proposition that *"Where there is no crucial evidence on who was to blame between the two parties, both should be held equally to blame."*

12. Concerning general damages, counsel submitted that the trial court's award of Kshs. 3,500,000/= in general damages, was excessive in light of the 1st Respondent's medical report

confirming total healing of her injuries. He relied on **Kim Pho Choo vs. Camden & Islington Area Health Authority (1979) 1 ALL ER 332**, where Lord Denning stated that, *''the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.... the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably''* while taking care not to punish the defendant.

13. Counsel further cited the case of **Osman Mohammed & Another vs. Saluro Bundit Mohammed Civil Appeal No. 30 of 1997**, as referenced in **John Kaindo Ngugi & Another vs. Alice Wanjiku Njoroge [2020] KEHC 8050 (KLR)** among others. And hence proposed a reduction of general damages down to Kshs. 1,500,000/=, citing comparable awards in **Akwaba Olubuliera Nichodemus vs. Dickson Shikuku [2020] eKLR** (general damages of Kshs. 2,000,000/= for amputation and fractures) and **Edwina Adhiambo Ogol vs. James Kariuki [2020] eKLR** (general damages of Kshs. 2,200,000/= for leg amputation and multiple fractures).

14. While conceding that the future medical expenses claim was properly granted, counsel for the Appellants attacked the award on loss of future earning capacity by asserting that the trial court erred in applying a multiplier of 20 years. Pointing out that the Respondent was 42 years old at the time of the accident, he stated that a multiplier of 10 years was more appropriate. Here citing **Butler vs. Butler (1984) KLR 226** and **Alpharama Limited vs. Joseph Kariuki Cebron (2017) eKLR**. Hence proposing an award of Kshs. 1,136,400/=, calculated as follows: Kshs. 9,470 x 12 months x 10 years).

15. Describing the total award of Kshs. 5,277,320/= as excessive, counsel proposed a substituted award of Kshs. 2,953,650/=, made up as follows:

- General damages: Kshs. 1,500,000/=
- Future medical expenses: Kshs. 300,000/=
- Loss of future earning capacity: Kshs. 1,136,400/=
- Special damages: Kshs. 17,250/=

16. Regarding the 2nd appeal, the 2nd Appellants' submissions dated 8th April, 2025 equally address liability and quantum. In assailing the trial court's finding of 100% liability against the

Appellants for the accident, counsel contended that the Respondent negligently stopped his motorcycle at a non-designated area to pick up a passenger, thereby exposing himself and others to danger. Hence, the accident was unavoidable, resulting from the accident motor vehicle driver's swerving to avoid an overtaking vehicle. Pointing to the police abstract which he contended did not assign blame and the absence of independent investigations or corroborating evidence, counsel posited that a police abstract is merely proof that an accident was reported. As held in **Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR**.

17. As to the burden of proof, they relied on the case of **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR**, for the general proposition that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, as provided by Sections 107, 109 and 112 of the Evidence Act. Also cited was the case of **Nandwa vs. Kenya Kazi Ltd (1988) eKLR**, where the Court of Appeal held that in an action for negligence, the burden is always on the plaintiffs to prove that the accident

was caused by the negligence of the defendant. Contending that no such prima facie evidence was established in this case, counsel urged the court to either find the 2nd Respondent wholly liable or, in the alternative, apportion liability equally at 50:50, following dicta in **Karanja vs. Malele (1983) KLR 142** and **Berkeley Steward Ltd & Others vs. Lewis Kimani Waiyaki [1982-88] 1 KAR 101-108.**

18. Regarding quantum of damages, the award of Kshs. 1,200,000/= in general damages was described as excessive for the injuries sustained by the 2nd Respondent. Counsel contending that the fractures healed well without deformity, as confirmed by the medical report of **Dr. Nathan Wafula Khamala**. In disputing the assessment of 15% permanent incapacity, counsel highlighted the report finding that a proper evaluation could only be done after removal of implants. Once more citing Lord Denning's words in **Kim Pho Choo vs. Camden & Islington Area Health Authority (1979)** (supra)**.** And **Boniface Nzioka Malundu v Jeremiah Kariuki Mwaniki [2020] eKLR**, for emphasis.

19. Hence, counsel urged the court to set aside the trial court's finding of 100% liability against the Appellants and substitute it with either full liability against the 2nd Respondent or a 50:50 apportionment. Proposing in addition that the award of Kshs. 1,200,000/= in general damages be reduced to Kshs. 300,000/=, in keeping with comparable cases.

Respondents' Submissions

20. With regard to the 1st appeal, the 1st Respondent's submissions dated 23rd July, 2025 only addressed the quantum of damages. Reiterating the award heads by the trial court for injuries proved, including amputation of the right leg below the knee, dislocation of the left knee joint, fractures of the clavicle, ribs, distal radius, and pelvic bone, with permanent incapacity assessed at 65%, counsel for the 1st Respondent emphasized that the Appellant failed to procure a second medical report despite arranging for medical re-examination. Referencing the medical report by **Dr. Ndeti Nzina** dated 17th September 2021 confirming the 1st Respondent's injuries, counsel asserted that the trial court, having equally observed the 1st Respondent, was persuaded that she had sustained all the injuries pleaded.

21. Counsel dismissed the Appellant's submission that the award of general damages should be reduced on account of the recovery of his client as "insensitive, callous and casual," stating that it was impossible to recover from a leg amputation and 65% permanent disability. The Respondent relied on **Yobesh Makori v Elmerick Mobisa Bota [2021] eKLR**, where victim had sustained amputation of the left leg below the knee, a left clavicle fracture, mild head injury, dislocation of the right tarsal bone, multiple soft tissue injuries with permanent incapacity at 50%, for which the High Court upheld as a fair and reasonable, an award of Kshs. 5,000,000/= as general damages for pain and suffering.

22. On the Appellant's authorities, counsel submitted that in **Akwaba Olubuliera Nichodemus v Dickson Shikuku** (supra), the plaintiff's injuries were less severe and did not involve pelvic bones fractures or 65% disability. While in **Edwina Adhiambo Ogol v James Kariuki** [supra], the injuries and resultant disability were less severe in comparison to the 1st Respondent's case, and hence the trial court did not

err in awarding Kshs. 3,500,000/= as general damages in the latter.

23. Defending the award for diminished earning capacity, counsel conceded that the Appellant's computation of her age as 42 years is correct and did not object to reduction of the award to Kshs. 1,136,400/=.

24. The submissions relating to the 2nd Respondent (2nd appeal) are dated 23rd July, 2025. Asserting that the trial magistrate's finding that the Appellants were wholly liable was correctly arrived at, counsel reiterated evidence that the Respondents were stationary outside the road when the accident motor vehicle driver swerved off the road and collided into them. A fact admitted by the 1st Appellant during cross-examination, when he stated that he swerved off the road to avoid a head-on collision with another vehicle.

25. Counsel contended that the said driver was negligent, having failed to brake, slow down, or control the accident motor vehicle and relying on the statement made in **Boniface Waiti & Another vs. Michael Kariuki Kamau [2007] eKLR**, that a driver was under an obligation to drive prudently, be on

the lookout, be vigilant ‘’*and most importantly be able to control the vehicle and bring it to a safe stop in the event of an emergency*.’’ Counsel further dismissed the Appellants’ reliance on the police abstract, noting that investigations were incomplete and that police findings are not conclusive proof of civil liability, as held in **Techard Steam & Power Limited v Mutio Muli & Mutua Ngao [2019] eKLR**. And reiterating that a trial court must determine a dispute based on evidence by witnesses testifying before it. According to counsel therefore, the trial court did not err in holding the Appellants wholly liable.

26. In defence of the award of Kshs. 1,200,000/= as general damages and Kshs. 7,050/= as special damages for the 2nd Respondent’s injuries comprising open fractures of the tibia and fibula, deformity of the left leg, and 15% permanent incapacity, counsel argued that the Appellants’ medical report was biased and controverted by overwhelming medical evidence from Kajiado, Kenyatta, and St. Peters Orthopaedic hospitals.

27. And that guided by the comparable authority in **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Anor [2015] eKLR**, where the plaintiff sustained a compound comminuted fracture of the tibia and fibula with 20% permanent incapacity and was awarded Kshs. 1,500,000/= as general damages, the trial court made its award. And correctly disregarded the Appellants' authorities as incomparable to the Respondent's injuries. Namely, **Naomi Momanyi v G4S Security Services Kenya Limited Meru HCCA No. 145 of 2014 [2018] eKLR** (award of Kshs. 300,000/= for tibia fracture and bruises) and **Gogni Construction Company Limited v Francis Ojuok Olewe HB HCCA No. 1 of 2014 [2015] eKLR** (award of Kshs. 350,000/= for fractures to the radius and ulna). Thus, counsel submitted that at Kshs. 1,200,000/= the award was fair and reasonable compensation, consistent with precedent and inflationary trends.

28. In conclusion, counsel asserted that entire the appeal was without merit, the trial court having properly assessed liability and quantum, applied the correct principles, and awarded damages consistent with comparable cases. The court was

urged to dismiss the appeal with costs to the Respondents, including costs in the lower court with interest from the date of the lower court judgment.

Analysis and Determination

29. The court has considered the record of appeal, as well as the parties' respective submissions. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in **Selle v Associated Motor Boat Co. [1968] EA 123** in the following **terms: -**

> **"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**
>
> **An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly**

put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

30. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278**. As earlier noted, the

appeal before this court turns on the twin issues of liability and damages.

31. Concerning the question of liability, the Appellants challenge the trial court's finding that they were 100% liable, asserting that the Respondents wholly caused or substantially contributed to the accident by stopping or boarding a motorcycle at a non-designated area as pleaded in their respective defences. Conversely, the Respondents' case was that they were stationary outside the road when the accident motor vehicle lost control, veered off the road and collided into them as pleaded in the respective amended plaints .

32. During the trial, the 1st Respondent testified that she was a pedestrian and was about to mount the motorcycle as a pillion passenger along Kiserian-Isinya road when the accident motor vehicle lost control and hit her, as a result of which she sustained injuries. On his part, the 2nd Respondent, the motor cycle rider, herein testified that he was seated outside the Kiserian-Isinya road on the motorcycle and about to pick up a passenger when the accident motor vehicle which was dangerously driven, lost control and hit him and the passenger

and as a result he sustained injuries. The 1st Appellant, the admitted driver of the accident motor vehicle testified that the collision between the motorcycle and the accident motor vehicle was unavoidable, and occurred when he swerved off the road onto the path outside the road where, the rider was standing. That he took the action in a bid to avoid a head- on collision with another oncoming overtaking vehicle, and as a result he hit both the rider and the passenger. He blamed the rider for picking up the passenger at a non-designated place.

33. In its judgment, the trial court observed that despite the emergency, the accident motor vehicle driver owed a duty of care to the Respondents whose motorcycle was stationary outside the road, to ensure their safety. Hence found the Appellants wholly liable for the accident. The Appellants assert on this appeal that the Respondents contributed to the accident, and hence liability ought to have been apportioned between the parties in these circumstances.

34. As regards the burden of proof in civil cases, this is spelt out in Sections 107, 108 and 109 of the Evidence Act. The import of the said provisions and the standard of proof in civil liability

claims in our jurisdiction, that is, on a balance of probabilities, was discussed by the Court of Appeal in **Mumbi M'Nabea v David M. Wachira [2016] eKLR** as follows**:**

> **“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:**
>
> > **“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 exists.” The above provision provides for the legal burden of proof.**

<u>However, Section 109 of the same Act provides for the evidentiary burden of proof</u> and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M’mairanyi & Others v. Blue Shield Insurance Company Limited - Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under Section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially

asserts the affirmative of the issue, Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

35. Further, the same court in **Karugi & Another v Kabiya & 3 others [1987] KLR 347** noted that:

> **"[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof….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."**

See also **Embu Public Road Services Ltd v Riimi [1968] EA 22.**

36. In **Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR**, the Court of Appeal stated that *"determination of liability in a road traffic case is not a scientific affair"* and proceeded to quote Lord Reid in **Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681** as follows:

> **"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it …**
>
> **The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident**

would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

37. In this case, the Respondents were outside the road when the accident motor vehicle veered outside the road, before proceeding to collide into and occasion them injuries. This uncontroverted fact alone points to negligence on the part of the 1st Appellant, who during his testimony was hard pressed to identify the alleged oncoming motor vehicle that forced him off the road, or to substantiate the said claim or his assertion that the motorcycle was picking a passenger at a non-designated place at the material time. It was not enough to plead

contributory negligence against the Respondents, the evidentiary burden was upon the Appellants to tender evidence in support of the particulars of negligence pleaded against the Respondents and circumstances in which the vehicle veered off the road.

38. In the absence of such evidence, it is difficult to justify apportionment of negligence as proposed by the Appellants. Besides, as the trial court observed, even in an emergency, the 1st Appellant was under a duty to maintain control of his vehicle to ensure the safety of other road users, not only on the road itself but also outside the road. In the court's view the trial court arrived at a proper conclusion that on the evidence led by the Respondents the Appellants were negligent and wholly liable for the accident. The findings of the trial court cannot be faulted, and nothing therefore turns on the issue of liability.

39. Turning now to the question of quantum of damages, the court will be guided by the principles enunciated by the Court of Appeal in several cases including **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30.** It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages.”

40. The same court stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5** 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".

See also **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR.**

41. In the latter case, the Court of Appeal reiterated the discretionary nature of general damage awards and exhorted that:

"An appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance".

42. As a result of the accident, the 1st Respondent sustained severe injuries including fractures to the pelvic bone, the right clavicle, right 6th and 7th ribs right distal radius bone and amputation of the right lower limb, below the knee. Resulting in a 65% permanent incapacity. The injuries and attendant sequela were confirmed by the medical report by **Dr. Ndeti**

Nzina dated 17th September, 2021 whose contents were not controverted by way of a second medical report. **Dr. Nzina's** report stated that she would require artificial prothesis with flexible knee joint at Kshs. 300,000/.

43. The trial court, guided by the principles enunciated in **Cecilia Mwangi & Anor -vs- Ruth Mwangi(1997) eKLR,** proceeded to consider authorities cited by the parties involving comparable injuries and having adjusted for inflation, awarded a sum of kshs. 3,500,000/- as general damages.

44. The Appellants in challenging this award relied on the cases cited before the trial court**.** Namely**, Akwaba Olubuliera Nichodemus v Dickson Shikuku [2020]eKLR** where the plaintiff had sustained a fracture of the right clavicle, a crush injury to the right leg leading to a below-the-knee amputation, and a sprained elbow joint. The High Court upheld general damages in the sum of Kshs. 2,000,000/-. And **Edwina Adhiambo Ogol v James Kariuki [2020] eKLR** where the plaintiff sustained a fracture of the left humerus, compound fractures of the left tibia and fibula, amputation of the left leg above the knee, and intrauterine fetal death at 32 weeks. The

trial court awarded Kshs. 1,500,000/=, which was later enhanced on appeal to Kshs. 2,200,000/=. While the decisions appear comparable to the present case, it is useful to bear in mind that the instant appeals relate to awards made in 2022 while the above authorities were in respect of awards made by lower courts from around 2018, hence inflationary trends ought to be borne in mind.

45. For her part, the 1st Respondent, relying on authorities such as **Yobesh Makori v Elmerick Mobisa Bota [2021] eKLR**, defended the trial court's award as fair given the severity of injuries, including amputation and permanent incapacity. The injuries sustained by the plaintiff in **Yobesh Makori** compare well with those of the 1st Respondent. It is pertinent that the initial award in that case was in 2019 though subsequently confirmed on appeal in 2021. Thus, an upward adjustment of awards based on inflationary factors would be justified.

46. As observed by the English Court in **Lim Poh Choo v Health Authority (1978)1 ALL ER 332** and echoed by **Potter JA** in **Tayab v Kinany (1983) KLR 14,** quoting dicta

by **Lord Morris Borth-y-Gest in West (H) v Shepard (1964) AC 326,** at page 345:

> **"But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. <u>Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional</u>."**

See also **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR**; **Kigaraari v Aya (1982-**

88) 1 KAR 768 and **Simon Taveta vs Mercy Mutitu Njeru (2014) eKLR.**

47. A necessary caveat here is that as important as consistency in awards for similar injuries might be, the court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. In this instance, there is no demonstration that the trial court 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**.**

48. On the contrary, it appears that the trial court, while seemingly alive to relevant principles, analyzed the evidence and submissions placed before it and arrived at an award of general damages in respect of the 1st Respondent that were patently justified and cannot be said to be excessive and hence erroneous. The challenge to the award of general damages in respect of the 1st appeal must fail.

49. On the issue of diminished earning capacity, the Appellants argue that the 20 years multiplier used by the trial court in respect of the 1st Respondent was excessive and that the trial court should have used a multiplier of 10 years. The 1st Respondent testified that she was a casual labourer earning kshs.9,470/- pm as demonstrated from her pay slip. From her identity card and medical records, she was aged 42 years at the time of the accident. Her counsel having conceded that this award should be adjusted to Kshs. 1,136,400/=, calculated as follows: Kshs. 9,470 x 12 months x 10 years, the award is accordingly reduced.

50. Moving on, the same general principles considered above apply in respect of the Appellants' challenge to general damages awarded to the 2nd Respondent, which counsel for the 2nd Respondent has strongly countered. The Appellants argue that the award of Kshs. 1,200,000/= was excessive, proposing reductions to Kshs. 300,000/= consistent with the cases of **Naomi Momanyi v G4S Security Services Kenya Limited Meru HCCA No. 145 of 2014 [2018] eKLR** (award of Kshs. 300,000/= for tibia fracture and bruises) and **Gogni**

Construction Company Limited v Francis Ojuok Olewe HB HCCA No. 1 of 2014 [2015] eKLR (award of Kshs. 350,000/= for radius and ulna fractures). The medical report by **Dr. Ndeti Nzina** indicates that the 2nd Respondent suffered the following injuries: open fracture left tibia bone, open fracture left fibula bone, deformity on the left leg and 15% permanent incapacity. In awarding the sum of Kshs. 1,200,000/-, the trial court considered the medical reports by **Dr. Nzina** and **Dr. Khamala**. The former assessing 15% permanent incapacity and the latter, while asserting that the 2nd Respondent had recovered from his main injury without deformity , opined that permanent disability could only be assessed after the nail implanted in treating the 2nd Respondent's distal tibia fracture had been removed.

51. The trial court appears to have accepted the medical report by **Dr. Nzina**, and for good reason. The report by **Dr. Khamala** appears inherently contradictory. For instance, while noting the subtle limp in the 2nd Respondent's gait, acknowledging the 2nd Respondent's difficulty and left ankle pain in walking, it asserted that he had healed from the distal

fracture. Attributing the pain to a breach to the ankle by the nail used for the fracture fixation. He proposed further that assessment of permanent disability was only possible after the nail was removed while simultaneously asserting that the fracture had healed without deformity.

52. The 2nd Respondent's medical exhibits 3-7 and **Dr. Khamala's** report taken together indicate inter alia that the affected limb was "mangled" in the accident and despite treatment and follow-up, the said Respondent was still walking with a limp and in pain in November 2021 when Dr. Khamala saw him. These reports demonstrate not just the severity of the fracture to the left tibia/fibula bones, but also the lengthy period of morbidity endured by the 2nd Respondent.

53. This court, therefore, agrees with the findings of the trial court that the authorities cited by the Appellant involved less severe injuries and especially, sequela. And in any event, the authorities were fairly dated. The case of **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited [2015] eKLR** who was awarded Kshs. 1,500,000/- appears relevant, albeit involving several skeletal injuries. In the court's view, the

Appellants have not shown that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect hence arrived at a figure which was either inordinately high or low. The Appellant's proposal for the reduction of the general damages awarded to the 2nd Respondent based on the cases of **Naomi Momanyi** and **Gogni Construction Ltd.** therefore appears unjustifiable in the circumstances of this case.

54. In the result, the court finds that, save with regard to the conceded reduction of the award to the 1st Respondent in respect of diminished earning capacity to Kshs. 1,136,400/=, the appeals against liability and quantum are without merit. Accordingly, the appeals are hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 5TH DAY OF FEBRUARY 2026.

C.MEOLI

JUDGE

In the presence of:

For the Appellants: Ms. Migele h/b for Mr Ataka

For the Respondents: Ms. Nekesa h/b for Mr Ngigi

C/A: Lepatei