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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. E137 OF 2024

(Being an appeal from the Judgment of Hon. F. Makoyo at Kilungu Law Courts in CMCC E059 of 2021 delivered on 15th November, 2024.)

JOHN MWAURA NJAMBI .... APPELLANT

(Suing as the legal representative of the late GEOFREY MBUGUA MWAURA)

VERSUS

JOHNSTONE GITONGA .... 1ST RESPONDENT

JOHN NDERITU GICHUKI .... 2ND RESPONDENT

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JUDGMENT

1. The Deceased, **Geofrey Mbugua Mwaura**, was involved in a road on 5th August, 2020 as a result of which he sustained multiple injuries. He blamed the Respondents for the accident and brought a suit against them vide a Plaint dated 19th March, 2021, seeking general and special damages. He later died on 23rd October, 2021. Subsequently, the Appellant obtained Letters of Administration *ad litem* and took over the suit on behalf of the Deceased. He amended the Plaint on 6th May, 2024 to capture the new developments. The matter proceeded for hearing and the Court delivered a judgment on 15th November, 2024 wherein it dismissed the Appellant's case with costs.
2. The Court found that the Appellant had failed to prove his claim against the Respondents. It found that, although the Appellant had established that he sustained injuries on the material date, he did not lead evidence to connect his injuries or accident to an act or omission on the part of the Respondents. It also found that, had the Appellant

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succeeded in his claim, he would have awarded general damages of Kshs.500,000/=, Kshs.111,675/= in special damages, and Kshs. 75,000/= for future medical expenses.

3. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 29th November, 2024. He listed the following Grounds of Appeal;

    1) ***That the trial magistrate erred in law and fact in finding that the Appellant contributed to the accident when no such evidence was tendered to proof the said assertion.***

    2) ***That the trial court erred in law and fact in not comprehending the evidence on liability.***

    3) ***That the trial court erred in law and fact by refusing to attribute blame to the Defendants for causing the accident notwithstanding the fact that did not adduce any evidence in court to attribute any negligence on the part of the plaintiff.***

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4) ***That the trial magistrate erred in law in failing to note that the key respondents witness, Johnstone Gitonga who was at the scene of the accident never testified on behalf of the Respondent to rebut the Appellant's version of events leading to the cause of the accident.***
5) ***That the trial court failed to note that a traffic charge per se does not absolve one from civil liability in a claim for damages despite no evidence of conviction of the Appellant being adduced before court.***
6) ***That trial magistrate erred in law in holding that the Appellant did not lead evidence to connect his injuries or accident to an act or omission on the part of the Respondent when the Respondent never adduced any evidence to the contrary.***
7) ***That the trial court failed to properly evaluate and analyze the Appellant's case.***

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8) ***That the trial court erred in lad and fact by relying on the Respondent's submissions as evidence and failing to note that submissions cannot take the place of evidence.***

9) ***That the trial court failed to note that the Appellant had proved his case on a standard of probability.***

10) ***That the judgment is unreasonable, untenable, and contrary to law, principles of negligence, and the facts of the case.***

4. He asked the Court to allow the appeal and set aside the judgment of Hon. F. Makoyo dated 15th November, 2024. He also asked the Court to enter judgment against the Respondents as was prayed in the Plaint.
5. The Appeal was canvassed by way of written submissions.

Appellant's written Submissions

6. The Appellant submitted that the lower Court was wrong in dismissing his claim. He submitted that his evidence and that of his witnesses was unchallenged, arguing that the

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Respondent never adduced any evidence or called a witness to rebut his claims. He argued that the driver of the fateful motor vehicle No. KCW 391H, which the Deceased was allegedly dangerously hanging from, never testified to corroborate the allegations of **PW2.** He submitted that the Respondents ought to have called the said driver as a witness to shed light as to allegations that were leveled against the Deceased in the abstract.

7. On the quantum of damages, the Appellant submitted that the award made by the lower court was way below what Courts have awarded in similar injuries. He argued that an award of Kshs.500,000/= was too law and inadequate and suggested that the court should have awarded Kshs.2,000,000/=. He argued that this award would be commensurate with the injuries sustained by the Deceased, which were grievous harm, severe soft tissue injuries, and fractured bones.

Respondents' written Submissions

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8. The Respondents submitted that the lower Court was right in dismissing the Appellant's suit against them, arguing that the Appellant failed to discharge the burden of proof as required in law. They argued that the Appellant did not tender any evidence nor call any eye witness to show negligence on their part. They submitted that there was no evidence to show that they invited, encouraged, and or were aware of the Deceased's attempt to board the accident M/V while the same was in motion. The submitted that the police investigations clearly laid blame on the Deceased.
9. They submitted that the fact that they did not call any witness to rebut the Appellant's allegations at the trial did not lessen his burden, arguing that he still bore the burden to prove negligence on a balance of probabilities. On quantum of damages, the Respondents submitted that the lower Court's proposed assessment of general damages should not be interfered with. They argued that the damages sought by the Appellant are extremely high given the injuries. They submitted that the Deceased cannot

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lawfully benefit from an award of general damages because, in law, a party cannot benefit from his own wrong doing.

Issues for Determination

10. Having considered the Grounds of Appeal and the submission by the parties, I find that there are two issues for determination;

    a) **Whether the Appellant proved his case on a balance of probabilities.**

    b) **Whether the Lower Court's assessment of proposed damages was reasonable.**

11. The role of this Court as the first appellate court is well-settled. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses.

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12. This principle was set out in **<u>Okeno vs. Republic (1972) EA 32,</u>** where the East Africa Court of Appeal stated as follows;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of***

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hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

13. Based on this authority, this Court is being required to undertake a wholesome review of the Appellant suit at the lower Court and come up with its conclusion.

Appellant's Claim and evidence at the lower Court

14. The Appellant claimed that the Deceased was involved in a road accident on 5th August, 2020, involving M/V No. KCW 391H, in which he sustained serious injuries. He claimed that the accident was caused by the Respondents' negligence, and particularly, the 1st Respondent, who he claimed was the driver of the accident M/V. He thus claimed that the Respondents should be held responsible for the accident and they should be held liable for the injuries sustained by the Deceased. I shall relook at the evidence on record to see whether the Appellant adduced sufficient evidence to prove his case.

Whether the Appellant proved his case on a balance of probabilities

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15. The Appellant adopted the Deceased's statement dated 21/5/2024. **PW2,** a police officer, produced an abstract dated 20/11/2020 indicating that the Deceased had been involved in an accident on 5th August, 2020. **PW1**, who was a medical doctor, testified on the nature of injuries sustained by the Deceased. He classified the injuries as grievous harm and gave an estimate of the future medical expenses. Based on these three testimonies, I find that the Appellant proved that the Deceased was involved in a road accident on 5th August, 2020 and that he sustained grievous harm including broken bones and soft tissue injuries.

16. I shall also relook at the evidence to determine whether the Appellant proved that the accident involved M/V No. KCW 391H and that the same was being driven by the 1st Respondent. The police abstract indicates that the accident M/V was No. KCW 391H and that its driver at the time of the accident was the 1st Respondent. In the submissions, the Respondents submitted that the Deceased attempted to board M/V No. KCW 391H while the same was in motion. Based on this evidence, I find that the Appellant

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proved that the accident involved M/V No. KCW 391H and the same was being driven by the 1st Respondent.

17. There was also evidence on record indicating that the 2nd Respondent was the registered owner of the accident M/V. I have seen a M/V copy of records which indicate that as at 25th February, 2021, the 2nd Respondent was the registered owner of the accident M/V. Same was produced as exhibit.

18. We now turn to the last and the most important issue, which is to determine whether the 1st Respondent (the driver) was negligent, and whether it was his negligent actions/omissions that caused the accident.

19. It is trite law that he who alleges must prove. **<u>Section 107 of the Evidence Act Cap 80 Laws of Kenya</u>** provides that

> ***"107 (1) 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.***

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(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

20. Therefore, the burden lay on the Appellant to prove firstly that the 1st Respondent (the driver) was negligent, and that it was his negligent actions/omissions that cause the accident.

21. The Appellant relied on his statement dated 6th May, 2024, in which he adopted the Deceased's statement dated 19th March, 2021. He stated that the Deceased was a pedestrian at Kabini when the 1st Respondent knocked him as he tried to avoid a pothole along the road. He claimed that the 1st Respondent drove the accident M/V negligently, as a result of which he caused the accident. The Appellant admitted that he did not witness the accident and that he got the details of the accident from the Deceased.

22. **PW2** stated that that Deceased was riding in a dangerous position on the accident M/V. He testified that the Deceased ran after the accident M/V to board it while it was in motion, when he fell down and was run over by the

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M/V. On cross examination, he told the Court that he did not visit the scene and that he was not the investigating officer. He also stated that the Deceased was charged with riding in a dangerous position but the charges were withdrawn before he died.

23. In my view, **PW2's** testimony does not give a verifiable account of what actually happened in the accident. The police officer was not an eye witness to the accident because he was not present when the accident happened. He was probably told what had happened by third parties. I find that his testimony was hearsay and not admissible.

24. I find reliance on **Tabitha Songa (Suing as mother and on behalf of other dependants of the late Paul Mulondolo Songa) v Bernard Kiganda [2018] eKLR**, where the Court found such testimony to be hearsay. It observed as follows;

> *16**. The police officer who testified in the case PW2 is not the one who investigated the case. He took over the file one year later. He was only relying on what was recorded in the police file….***

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The evidence of the police officer, PW2, as to how the accident took place was therefore heresy evidence.

25. There was no other independent witness who could attest to the fact that the Deceased tried to board the accident M/V while it was on motion. For these reasons, I find that PW2's testimony that the Deceased tried to board the M/V while in motion is not verifiable and the same should be discarded.

26. The question now, is whether, the Appellant's testimony was sufficient to discharge the burden of proof imposed on him by the law. In other words, did the Appellant's sole testimony establish, on a balance of probabilities, that the 1st Respondent was negligent?

27. The Court notes the unique circumstances of this case. It notes that the Deceased is not here to shed light on what actually happened at the time of the accident. It also notes that, the 1st Respondent, was the driver of the accident M/V and he must have information on what actually happened. The Appellant did the most that he could do to prove his

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claims and he placed the blame at the 1st Respondent's doorstep.

28. In these circumstances, the Court invokes **Section 112 of the Evidence Act Cap 80 of the Laws of Kenya** which provides thus:

> ***"In Civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

29. Courts have held that the above section is applicable in cases where a Defendant deliberately withholds evidence as to the cause of an accident. The binding authority on this issue is the Court of Appeal's decision in **Rahab Micere Murage (Suing as a Representative of the Estate of Esther Wakiini Murage) v Attorney General 2 others [2012] eKLR**, where the Court held as follows;

> ***"The conduct of the respondents appears to us to suggest that they deliberately withheld evidence as to the cause of the accident to frustrate the***

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appellant's suit. Section 112 of the Evidence Act Cap 80 of the Laws of Kenya, we think was meant to deal with situations as those in the present case … The appellant alleged negligence against all the respondents as the cause of the accident in which her daughter died. She was not there at the scene and could not have known how the accident happened…

..Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter. All of them having failed to adduce evidence in that regard, the rebuttable presumption of fact is that all of them were in one way or another negligent and through such negligence caused the accident in which the deceased died. It is not a presumption arising out

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of the doctrine of res Ipsa Loquitor, but from the evidential burden as imposed under Section 112 of the Evidence Act.

The burden was on the respondents to disprove on their part as the cause of the accident was a matter especially within their knowledge but each of them failed to offer evidence in that regard as required by law. It follows that each of the three respondents is liable to the appellant in damages in equal shares ………"

30. The above Court of Appeal decision has been relied on by the High Court in several instances. Once of them is in the case of **Janet Njoki Kigo (suing as the personal representative of the estate of the late Benson Irungu Wanjohi) vs Daniel Karani Gchuki (2016) eKLR**. In that case, the plaintiff had not witnessed the accident and did not call evidence as to how the accident took place. The defendant similarly did not call evidence to show how the accident took place. The Court invoked the provisions of

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Section 112 of the **Evidence Act Cap 80** to find that the defendant was liable for the accident.

31. The Court held as follows;

"Where it is trite clear like in the instant case that the plaintiff was not present when the fatal accident occurred and the defendant who was the driver of the material motor vehicle involved in the accident is possessed of the evidence of how the accident occurred but deliberately fails to adduce that evidence with the sole intention of frustrating the plaintiff's suit, Section 112 of the Evidence Act would be invoked by the court to deal with such a situation. The defendant in this case having pleaded particulars of negligence or contributory negligence against the deceased, it was incumbent upon him to adduce evidence to prove those facts of the deceased's negligence that contributed to or caused the fatal accident. The rebuttable presumption of fact therefore, is

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that the defendant was negligent, which negligence caused the accident in which the deceased died, and it is not a presumption which arises out of the doctrine of Res Ipsa Loquitur, but from the evidential burden as imposed under Section 112 of the Evidence Act. The cause of the accident being a matter especially within the defendant's knowledge but he failed to tender any evidence in that regard as required by law, it follows that the defendant was to blame and therefore liable in damages to the plaintiff".

32. The Court went on to state as follows;

59. This is a case of a motor vehicle knocking down a pedestrian only described in the police abstract as an intending passenger. There are indeed no facts that have been proved by the plaintiff to presume negligence on the part of the defendant as against any other cause. In addition, the defendant would only be enjoined to rebut the

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presumption of Res Ipsa Loquitur after the plaintiff had established aprima facie case by relying on the facts of the accident, which facts as I have stated earlier, were not available as the plaintiff was not an eye witness and neither did the defendant testify to state those facts. <u>I would therefore without hesitation hold, like in the decision of Esther Wakiini Murage (supra) case that Section 112 of the Evidence Act was meant to deal with situations where the plaintiff is deprived of evidence as to the occurrence of the accident and the defendant deliberately withholds evidence as to what the cause of accident was in order to frustrate the plaintiff's suit</u>.

33. The Court of Appeal decision was also relied upon in the case of **<u>Tabitha Songa (Suing as mother and on behalf of other dependants of the late Paul Mulondolo Songa) v Bernard Kiganda [2018] eKLR.</u>** In that case, the appellant did not witness the occurrence of the accident

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and she did not call any evidence of an eyewitness to the accident. The police officer who testified in the case exonerated the Respondent from blame and blamed the Appellant for the accident. However, the police officer was not the one who investigated the case and was only relying on what was recorded in the police file. The Respondent, on the other hand, did not tender evidence as to how the accident occurred.

34. In finding the respondent 100% liable for the accident, the Court held as follows;

> ***"The respondent cannot rely on the heresy evidence of the police officer PW2 to hold that he was not to blame for the accident. If the respondent wanted to exonerate himself from blame he should have testified as to how the accident had occurred and not to rely on the heresy evidence of the policeman.***
>
> ***……The respondent or his driver had knowledge of how the accident took place but deliberately failed to testify so as to frustrate the appellant's***

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case….. I accordingly hold that section 112 of the Evidence Act is applicable in the circumstances of the case before *me.* ***The respondent had knowledge of how the accident occurred. The burden of proof was on him to disapprove the contention by the appellant/plaintiff that he was to blame for occasioning the accident. He did not. The court finds that he caused the accident that resulted to the death of the deceased. The respondent is found 100% liable for the accident".***

35. The above authorities are very relevant to the instant case, in that the facts are very similar. I also note that the facts herein are virtually similar to the facts in **Tabitha Songa (Supra),** in that the Respondents herein seek to rely on the hearsay evidence of a police officer to exonerate themselves from the blame.

36. In my view, I hold that the 1st Respondent cannot rely on the heresy evidence of the police officer **PW2** to hold that he was not to blame for the accident. If the Respondent

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wanted to exonerate himself from blame he should have testified as to how the accident had occurred and not to rely on the heresy evidence of the policeman.

37. The 1st Respondent, being the driver of the accident M/V, had had knowledge of how the accident took place but deliberately failed to testify so as to frustrate the Appellant's case. Accordingly, I find that **Section 112** of the **Evidence Act** is applicable in the circumstances of this case. The burden of proof was on him to disapprove the contention by the Appellant that he was to blame for occasioning the accident. He did not. The court finds that the 1st Respondent caused the accident in which the Deceased sustained injuries. I find that the Respondents 100% liable for the accident.

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<u>Whether the Lower Court's assessment of proposed damages was reasonable</u>

38. The Appellant claimed, in the amended plaint, that the Deceased suffered fractured right tibia/Fibular bones, open wound on the right lower limb, and Blunt injuries to the

right-hand fingers. The injuries are captured in various medical reports including a report by Dr. T.N. Nzina dated 2nd March, 2021, the outpatient card issued by Kiambu Level 5 Hospital, and the discharge summary issued by Shalom Community Hospital. These injuries were corroborated by the testimony of PW1, who is a medical doctor.

39. In light of the above documentary evidence, and **PW1's** oral testimony, I find that the Appellant proved that the Deceased suffered the injuries outlined in the amended plaint, namely; fractured right tibia/Fibular bones, open wound on the right lower limb, and Blunt injuries to the right-hand fingers.

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General damages for pain, suffering, and loss of amenities.

40. With regards to damages, the Appellant sought general damages for pain, suffering, and loss of amenities. The

Court in **Mwaura Muiruri v Suera Flowers Limited & another [2014] eKLR** discussed the nature and the rationale behind an award for damages for pain, suffering, and loss of amenities. It held as follows:

> ***"The philosophy and reasons for award of damages for pain and suffering is explained in paragraph 883 in HALSBURY'S LAWS OF ENGLAND 4th Ed, vol. 12(1) page 348-***
>
> ***883. Pain and suffering. Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate.***
>
> ***884. Loss of amenities -***

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In addition to damages for the subjective pain and suffering sustained by a plaintiff by reason of his injuries, damages are awarded for the objective losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial employment, the loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function. Damages under this head are awarded whether the plaintiff is aware of it or not: damages are awarded for the fact of deprivation, rather than the awareness of it".

41. The lower Court held that it would have awarded the Appellant Kshs.500,000/= under the claim for general damages for pain, suffering, and loss of amenities. The Appellant has argued that this award is too low and has asked this Court to review the same.

42. In arriving at my decision on whether I should review or interfere with the quantum of damages, I am guided by

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Court of Appeal's decision in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete [2004] eKLR**, where the Court held that an Appellate Court should exercise caution and restraint where it has been called upon to review the trial court's award of damages. It stated:

> ***"It is trite law that the assessment of general damages is at the discretion of the trial court and 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 at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a***

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figure so inordinately high or low as to represent an entirely erroneous estimate."

43. Similarly, this Court appreciates the observations of the Court of Appeal in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, where the Court outlined the exceptional circumstances on which an appellate court can interfere with the award of damages. The Court said:

> ***"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."***

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44. Based on the above authorities, it appears to this court that an Appellate court can interfere with an award of damages if the same is a wholly erroneous estimate of the damage suffered by being so inordinately high or low.

45. The courts have gone ahead and established parameters that should help a court determine whether a particular award of damages is an erroneous estimate of the damage suffered. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR,** the Court held:

> ***1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.***
>
> ***2) The award should be commensurable with the injuries sustained.***
>
> ***3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.***

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4) ***<u>Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.</u>***

5) Similarly, in the case of **<u>Penina Waithira Kaburu v LP [2019] eKLR</u>**, the Court should guide a court in arriving at the correct estimate of quantum of damages. It held:

"While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."

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46. Based on the above authorities, one principle runs across: The principle that generally, the Courts should make similar awards for persons who have suffered similar injuries. The principle calls upon the Court to conduct a comparative analysis of injuries sustained and the extent of the awards made for similar injuries in previous decisions. Accordingly, I have analyzed previous authorities that are relevant and where the injuries sustained are comparable to those that the Deceased herein sustained.

47. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR**, on appeal, the court allowed a sum of Kshs.700,000/= general damages for pain, suffering and loss of amenities where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screws.

48. In the case of **James Okongo v Elmat Sagwe Ogega [2021] eKLR**, the High Court made an award in general damages of Ksh.900,000/= in a case where the party sustained a fracture of the right tibia and fibula, fracture of

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the right femur, bruises on the face and a blunt trauma to the chest.

49. In the case of **Erick Mwiriki & another v Peter Kariuki Wanjiru [2020] eKLR**, the Court varied the lower Court's award to Kshs.800,000/= for a party who had sustained a fracture of the femur, fracture of the distal end of the right tibia and severe soft tissue injuries of the left thigh and right ankle joint.

50. Similarly, in **Albanos v Captain Motor Cycle Manufacturing Limited & another [2023] eKLR**, the Court awarded the Plaintiff Kshs. 1,000,000/= as general damages for pain, suffering, and loss of amenities. The Plaintiff had suffered displaced fracture of the right radius, displaced fractures of the left radius and ulna, Soft tissue injuries of the face, and soft tissue injuries of the left hip joint.

51. With regards to pain and suffering, I have considered the nature of injuries suffered by the Deceased. He was hospitalized at Shalom Community Hospital for five days from 6th August, 2020 to 11th August, 2020. He was also

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underwent open reduction and fixation of the fractures with implants during which he must have undergone a great deal of pain. In fact, at the time of examination by the doctor, which was 7 months after the accident, he was still complaining of pain on the injured sites.

52. With regard to loss of amenities, the court in **Mwaura Muiruri v Suera Flowers Limited & another [2014] eKLR** held that damages for loss of amenities are awarded when the ability of the Plaintiff to enjoy certain aspects of his life as a result of the accident are diminished.

53. In this case, the Doctor who examined the Deceased stated that the injuries had interfered with his routine duties and for a period of one year from the time of the accident he would not be able to attend to his duties as before the accident. She also found that, at the time of the examination, the Deceased could not walk without support. Essentially the quality of life of the Deceased was reduced due to the inability to do the things he would otherwise have done had it not been for the injuries.

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54. Taking these considerations into account as well as the awards in similar cases, I find that the sum of Kshs. 1,600,000/= to be reasonable under the head of pain, suffering, and loss of amenities. I thus set aside the award of the lower Court under this head.

Special Damages and Future Medical Expenses

55. On the issue of special damages, I have relooked at the evidence on record, and I am satisfied that the Appellant proved his claim of Kshs. 111,675/= in special damages and Kshs. 75,000/= for future medical expenses. I thus find no reasons to disturb the lower Court's assessment for awards for special damages and future medical expenses. The same is hereby upheld.

Disposition

56. The Appeal succeeds.

57. The Respondents are 100% liable for the accident.

58. It is hereby directed that judgment be and is hereby entered in favour of the Appellant against the Respondents

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herein, jointly and severally, for the sum of **<u>Kshs. 1,786,675/=</u>** made up as follows:-

General damages Kshs.1,600,000/=

Special damages Kshs. 111,675/=

Future Medical expenses <u>Kshs. 75,000/=</u>

Kshs. 1,786,675/=

Plus interest thereon on general damages at Court rates from date of judgment of the trial Magistrate and interest on special damages from the date of filing suit at the lower court until payment in full.

59. The Appellant shall have the costs of this appeal and the costs of the suit in the lower Court. The costs for this Appeal assessed at Kshs. 30,000/=.

60. It is so ordered.

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DATED, DELIVERED and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **17TH** day of **FEBRUARY, 2026.**

....

C. KENDAGOR

JUDGE

In the presence of:

Mr. Amutallah Advocate for Appellant

No attendance for Respondent

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