

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL APPEAL NO. E016 OF 2025

PERIS WANGECI WACHIURU.....1ST
APPELLANT
BONIFACE NGUGI MUIRURI..... 2ND
APPELLANT

VS

PURITY MUTHEU MATITI(a minor suing thro'
Her parents MATITI MATI & JACKLINE MAWIA MATITI.....
.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. J.
Omwange (P.M.) delivered on 04.06.2025 in CMCC No. E008 of
2023 at Garissa).

JUDGMENT

1. Through a plaint dated 12.04.2023, the respondent moved the trial court averring that on the material day, she was crossing the road within Mikono junction area of Iftin Location, Garissa Town in the company of her mother, one Jackline Mawia Matiti, when the 2nd appellant being the driver of motor vehicle Regn.No.KAX015M registered in the name of the 1st appellant so recklessly, dangerously or carelessly drove the said motor vehicle that he drove and ran over her left foot thereby inflicting her grievous bodily injuries which necessitated below knee amputation of the left leg.

2. Particulars of the injuries suffered by the respondent were listed as follows: the respondent's left lower leg and foot was completely crushed leading to amputation leaving a stump of 20cm below the knee;
3. That as a consequence, she shall be forced to use elbow crutches at a cost; she will be forced to regularly change the elbow crutches at a cost; she will need to be fitted with a below knee prosthesis at a cost; she will not run nor play net-ball, will not dance or engage in other social activities; will not be a first choice in relationships and will always suffer imbalance in footing in most commercial activities.
4. Reasons wherefore, she sought judgment against the appellants for general damages for pain and suffering and loss of amenities with interest thereon at court rates from the date of judgment until payment in full; general damages for diminution of earning capacity; special damages of Kes. 35,670.00/-, future medical expenses of Kes. 2,200,000.00/- and cost of the suit.
5. The appellants entered appearance and consequently filed a statement of amended defence wherein they denied the content of the plaint. They averred that the accident was occasioned by negligence on the part of the respondent's mother's failure to take reasonable care of the minor while crossing the road. They also denied the particulars of negligence as pleaded by the respondent and further averred that the 2nd appellant was driving carefully at a speed of 60km/h. That in the alternative to the foregoing, the occurrence of the accident was caused solely

and/or substantially contributed to by the respondent's mother's own negligence.

6. The respondent filed a reply to defence wherein he joined issues with the appellants' defence and reiterated the content of the plaint. Further, the particulars of negligence attributed to the respondent were denied. In the same breadth, the respondent stated that at the opportune time, they were to produce a certified record of proceedings in traffic Case No. E212 of 2022 where the 2nd appellant pleaded guilty of driving without due care and accepted the facts of the accident as narrated to the court by the prosecutor. That the 2nd appellant was fined Kes. 50,000.00/- which he paid. The trial court was urged to allow the prayers sought in the plaint.
7. The trial court found the appellants 100% jointly and severally liable and awarded the respondent general damages of Kshs. 3,000,000.00/-, diminution of earning capacity of Kes. 900,000.00/-, future medical expenses of Kes. 2,200,000.00/- and special damages of Kshs. 35,670.00/-, plus costs and interest to run from the date of judgment until payment in full.
8. The appellants being dissatisfied with the judgment filed a memorandum of appeal dated 26.09.2025 citing the following grounds:
 - i. **The learned trial magistrate erred in law and fact by misapprehending the facts, applying the wrong legal principles and arriving at the wrong decision to the prejudice of the appellant.**

- ii. The learned trial magistrate erred in law and fact in finding the appellants wholly liable for the occurrence of the accident in the absence of sufficient credible and independent evidence establishing negligence on their part.**
- iii. The learned trial magistrate erred in law and fact in awarding Kes. 3,000,000/- as general damages for pain and suffering, which sum is grossly excessive, not supported by precedent of comparable injuries, and disproportionate to similar awards by courts of concurrent or superior jurisdiction.**
- iv. The learned trial magistrate erred in law and fact in awarding Kes. 900,000.00/- as damages for diminution of earning capacity in favour of a minor aged under 2 years, without a proven basis for lost potential income or any concrete projection of future loss.**
- v. The learned trial magistrate erred in law and fact in awarding Kes. 2,200,000.00/- in respect of future medical expenses which was speculative, inadequately interrogated and based entirely on a single doctor's projection without challenge or independent costing contrary to the strict proof required for special damages.**
- vi. The learned trial magistrate erred in law and fact in failing to apportion liability notwithstanding the conflicting testimonies, and wrongly concluded that both appellants were jointly and severally liable**

without weighing the degree of control, involvement or supervision.

vii. The learned trial magistrate erred in law and fact by basing its judgment on irrelevant considerations.

9. It was prayed thus that:

i. The whole judgment by the trial court be set aside.

ii. The appeal be allowed.

iii. Any other orders this Honourable Court may deem just.

10. PW1, Jackline Mawia Matiti testified that she is the mother of Purity Mutheu Matiti, the minor involved in the accident herein. That on 05.05.2022, at around 5:00 pm, she was walking with her child to buy vegetables when the accident occurred. She stated that she was holding the child's hand while crossing the road. Jackline confirmed that she did not sustain injuries herself, but the child suffered severe leg injuries that led to amputation. She described the road as busy and noted the presence of potholes, which she believed should have prevented high-speed driving. She insisted that the motor vehicle veered off the road and hit them. In re-examination, she reiterated that the accident was caused by the motor vehicle moving at high speed and prayed that the child's rights be upheld until she grows up.

11. PW2, Dr. Fred Shuma Sitati, a consultant orthopedic surgeon, testified that on 17.07.2024 he examined the minor on 24.06.2022 and prepared a detailed medical report dated 21.03.2023. The report indicated that the child, aged two years

at the time, had undergone a below-knee amputation on the left leg. Dr. Sitati explained that his report included calculations for the total cost of a prosthesis and crutches required throughout the child's life. He noted that a prosthesis for younger patients needs frequent replacement until skeletal maturity at 18 years. He assessed the child's permanent disability at 30%.

12. DW1, Elsie Mukami testified that she was a passenger in the motor vehicle involved in the accident and adopted her written statement dated 20.07.2023 as her evidence in chief. She confirmed that the driver, Boniface Murimi, was charged in connection with the accident. She however stated that she did not know what transpired in court.
13. DW2, Peris Wangeci Wachiuru, the proprietor of Perihill School, adopted her statement dated 20.07.2023 as her evidence in chief and referred to a medical report marked as a defense exhibit. She confirmed that DW1 was her employee and that Boniface Murimi, the driver involved in the accident, had previously worked for her but absconded duty and switched off his phone after the incident. She acknowledged that Murimi was charged with a traffic offense related to the accident and was sentenced.
14. The appeal was canvassed by way of written submissions.
15. The appellants in their submissions dated 26.09.2025 challenged both liability and quantum as found by the trial court by raising the following issues:

- i. Whether the trial court erred in holding them 100% liable.
 - ii. Whether the awards for general damages, loss of earning capacity, and future medical expenses were excessive or based on wrong principles.
16. The appellants contended that the learned trial magistrate erred in holding them wholly liable for the accident. They argued that the court failed to properly evaluate the evidence on record and disregarded material inconsistencies in the respondent's testimony. In their view, liability ought to have been apportioned between the parties rather than imposed entirely upon them. To buttress this position, they cited the case of **Khambi & Another v Mahithi & Another (1968) EA 70** and **Hussein Omar Farah vs Lento Agencies [2006] eKLR**, where the respective courts emphasized the principle of apportionment in circumstances where fault was not clearly established.
17. On the issue of general damages, the appellants submitted that the award of Kes. 3,000,000.00/- was manifestly excessive when compared to awards in similar cases. They maintained that the trial court had acted on wrong principles, thereby inviting interference by the appellate court. They relied on **Butt v Khan [1977] eKLR** and **KEMFRO Africa Ltd vs Lubia [1982-88] KAR 777**, which affirmed the jurisdiction of an appellate court to interfere with an award that is inordinately high or founded on improper considerations.
18. With respect to diminution of earning capacity, the appellants pointed out that the respondent was a minor aged less

than two years at the time of the accident and therefore had no proven earning capacity. They contended that the award of Kes. 900,000.00/- was speculative and contrary to established principles of law. They invoked the case of **S J v Francesco Di Nello and Mumias Sugar Co. Ltd vs Francis Wanalo [2007] eKLR**, which require proof of risk or disability affecting future employment prospects before such damages can be awarded.

19. On future medical expenses, the appellants challenged the award of Kes. 2,200,000.00/-, arguing that it was based solely on a doctor's estimate without corroborating evidence. They relied on the case of **Tracom Ltd vs Hassan Mohamed Adan [2009] eKLR**, which underscores the requirement that future medical expenses must be specifically pleaded and proved by credible evidence.
20. In conclusion, the appellants submitted that the total award was grossly excessive and unsupported by precedent or proof. They urged this court to allow the appeal, set aside the finding of 100% liability, substantially reduce the damages, and award them the costs of the appeal together with those in the lower court.
21. The respondent on the other hand filed submissions dated 06.11.2025 submitting that the appeal lacked merit and urged the court to dismiss it. On liability, it was emphasized that the 2nd appellant had pleaded guilty in Garissa Traffic Case No. E212 of 2022 to the offence of driving without due care and attention, after running over the minor thereby causing grievous harm. The respondent argued that the plea and mitigation statements

confirmed negligence, making any contestation of liability baseless. It was further submitted that liability could not reasonably be apportioned to a child of less than two years, and that the trial court had correctly found the appellants wholly liable.

22. On general damages, the respondent contended that the award of Kes. 3,000,000.00/- was reasonable and supported by precedent. Reliance was placed on **CM (a minor suing through the mother and next friend MN) vs JM Maina Civil Appeal No. 97 of 2016** and **Kenfro Africa Ltd vs Lubia [1987] KLR**, with the submission that the minor's very young age and permanent disability justified a higher award than that given to older claimants. The respondent added that the trial court had considered inflation and recent trends in comparable cases. It was noted that although the respondent had prayed for Kes. 3,500,000.00/-, the court awarded Kes. 3,000,000.00/-, which fell within the acceptable range.
23. With respect to diminution of earning capacity, the respondent argued that the award of Kes. 900,000.00/- was proper and consistent with established principles. To that end, reliance was placed on the case of **Mumias Sugar Co. Ltd vs Francis Wanalo [2007] eKLR Civil Appeal 91 of 2003** and **Butler vs Butler [1984] KLR 226** to support the position that the award was intended to compensate for the risk that the minor might not secure suitable employment in the future due to her disability.

24. On future medical expenses, the respondent defended the award of Kes. 2,200,000.00/-, submitting that it was based on a detailed and credible report prepared by Dr. F.C. Sitati, an experienced orthopaedic surgeon. The report, it was said, outlined the anticipated costs for prosthesis, crutches, and related services, and was supported by pro forma invoices from reputable providers. The respondent pointed out that the appellants had not challenged the report during trial, nor had they produced alternative costing through their own expert. It was therefore argued that the trial court had relied on uncontroverted expert evidence and applied the correct principles.
25. In conclusion, the respondent asserted that the awards made by the trial court were reasonable, well-supported by evidence and precedent, and fell within the general range for comparable injuries. It was submitted that the principles governing appellate interference, as discussed in *Kenfro Africa Ltd(supra)* case and other authorities, did not apply to the present case. The respondent accordingly urged the court to dismiss the appeal in its entirety with costs.
26. This being a first appeal, this court must evaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of *Mbogo and Another vs Shah* [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

27. Upon careful consideration of the record of appeal, the judgment of the trial court, the grounds set out in the memorandum of appeal, and the written submissions by both parties, this Court identifies the issues that fall for determination as follows:

- i. Whether the trial court’s award was inordinately high and should be set aside.
- ii. Who should bear the costs of the appeal.

28. In finding the appellants 100% liable, the trial magistrate in his judgment took notice of the fact that the evidence of PW1 was that the place where the accident occurred had potholes and that the driver was driving at a high speed. That based on that evidence together with the conviction of the 2nd appellant, it was clear that the appellants were 100% liable for the causation of the accident.

29. My perusal of the evidence herein shows that only PW1 testified on evidence in relation to the liability of the appellants. She stated that on the material day at around 5:00 pm, she was walking with her child to buy vegetables when the accident

occurred. She stated that she was holding the child's hand while crossing the road and denied leaving the child behind. She confirmed that she did not sustain injuries herself, but the child suffered severe leg injuries that led to an amputation.

30. In the same breadth, in the abstract filed, no officer testified on the same. This is so, since parties by consent produced the document as evidence before court. Having perused the same, it was not indicated who was responsible for the accident.
31. The foregoing notwithstanding, it is trite that a police abstract is not conclusive evidence of liability and that the contents therein must be proved. In the persuasive case of **Dikir & another vs Kimary (Civil Appeal 316 of 2013) [2022] KEHC 12733 (KLR) (Civ) (30 August 2022) (Judgment)**, the court (Majanja J) stated;

“Since the Investigating Officer was not called to testify as to the circumstances of the accident, the reports produced amount to hearsay evidence and cannot be proof of how the accident took place. At the very least, the report is only proof that the accident involving several motor vehicles took place on the material date (see *Peter Kanithi Kimunya v Aden Guyo Haro* NRB HCCA No. 307 of 2008 [2014] eKLR). As to which party was to blame for the accident is a question of evidence and the remarks in the OB about blameworthiness is hearsay as the investigating officer was not called as a witness. The

conclusion therein are matters of opinion which are inadmissible to prove facts.”

32. As already noted, PW1 stated that she was holding the child’s hand while crossing the road and denied leaving the child behind. She confirmed that she did not sustain injuries herself, but the child suffered severe leg injuries that led to an amputation. The appellants shifted blame to the mother of the minor for not taking care of the baby when crossing the road. It is possible for an accident to occur and affect one person and leave the other even if the two were crossing together. The duty of the driver when driving on the road does not change because two people are crossing the road together. In the circumstances, the person who owed the minor a duty of care was the driver. The driver had the obligation not to cause the accident

33. The court in the case **of Mombasa Maize Millers & another vs Elius Kinyua Gicovi [2021] eKLR** Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, held as follows: “

“In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:“

...When contributory negligence is set up as a defence, its existence does not depend on any duty

owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

34. The balance of probabilities is also about what is likely to have happened than the other. **Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586** held that;

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability..."

35. Further, in the case of **Simba vs Langat (Civil Appeal 84 of 2021) [2024] KEHC 2110 (KLR)** the High Court at Nakuru observed that:

“The basic principle underlying the defense of contributory negligence is that people should take reasonable care for their own safety as well as for that of others.”

36. In the case of **Bashir Ahmed Butt V Uwais Ahmed Khan by M. Akmal Khan (1982-88) I KAR I** two minors were crossing the road. One was struck down by a vehicle whilst the other crossed safely to the other side. The Hon. Judge held there was no contributory negligence by the minor. The court of appeal upheld this finding and stated as per Madan JA:-

“The practice of the civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence and thereafter in so far as a young person is concerned only upon clear proof that the . . . making the omission he had capacity to know that he ought not to do the act or make the omission.” The advocate for the defendant came up with the authority of:-**Rahima Tayab and another v Anna Mary Kinanu (an infant suing by her next of friend)**

37. It is trite that the negligence of the adult accompanying the minor cannot be apportioned to the minor. The driver owed a duty of care to the minor who cannot be held to have been negligent. To that extent, I am persuaded by the above decision hence hold that the driver of the motor vehicle was 100/% liable.

38. On quantum, the same is at the discretion of the court guided by case law on comparable cases bearing similar injuries. An appellate court would then interfere with the trial court's finding if circumstances espoused in the case of **Peters vs Sunday Post Limited [1958] EA 424**, are established as follows;

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

39. In the case of **Nyambati Nyaswabu Erick vs Toyota Kenya Ltd & 2 Others (2019) eKLR**, Justice D.S. Majanja held as follows:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

40. From the record, the respondent according to Dr. Sitati suffered a severe crush injury to her left foot.

41. In the case of **Umoja Rubber Products Limited v Bobson Rimba Lewa [2015] eKLR** the court, **Chitembwe J** awarded general damages of Ksh.2,200,000/= . The Plaintiff sustained amputation of the left arm below the elbow. In **Roba Doti Guyo v Jiang Zhongemei Engineering Company [2015] eKLR** the **Plaintiff suffered a crushed hand** which was amputated. He was awarded Kshs. 2,500,000/= as general damages for his pain, suffering and loss of amenities in 2015.
42. Equally, in the case of **Crown Bus services Ltd and 2 others v BM(Minor) suing through his mother and next friend) (2020)KEHC1817(KLR)** the court awarded 2,500,000/= for pain and suffering and loss of amenities for a child aged 4 years who suffered amputation above the knee.
43. Similarly, in the case of **CM (a minor suing through mother and next friend MN) v Joseph Mwangangi Maina(2018)** the court awarded 2million for pain and pain and suffering and loss of amenities for a child aged 7 years for amputation of the right leg. Taking into consideration the rate of inflation and the seriousness of the injuries sustained, I find the sum of kshs.3,000,000, appropriate. I do not find any good reason to interfere with the trial court's finding.
44. On diminished earning capacity, the court is bound to take into account the reduced opportunities in earning income. Although not clearly elaborated, it is apparent that the opportunity to advance his education was not severely affected. However, education is not the only means of earning income. With the amputation, earning opportunities like business or artistic

activities like drama or dancing are diminished. It will be erroneous to say that the minor's futures earning capacity was not compromised.

45. In **Shabani v City council of Nairobi (1985) KLR** the court of appeal held that it is right for a court to make a modest award of future earning capacity in the case of a child provided that there is some evidence provided for it. The court went ahead and provided for Ksh 350,000/=. In the circumstances, and taking into account the rate of inflation, a global sum of 900,000/= would suffice.
46. On the issue of future medical expenses, the court awarded kshs 2,200,000/=. The trial court extensively captured the supporting medical reports of Dr. Sitati, a consultant Orthopaedic, trauma surgeon and Arthroscopist whose report dated 21-03-2023 gave an elaborate medical background explaining the type of prosthesis that the minor required taking into account the quality, age of the user and tolerance in use.
47. The doctor explained that as an expert in that field, he was conversant with the prices. The price of a prosthesis for a minor below 18 years according to him costs around 50,000/= making a total of 1,200.000 and above 18 years making a total of 800,000/=. That the same were supported by quotations from service providers. He gave an estimate of 28 changes till the child reached approx..64 years the WHO estimated age of Kenyan life expectancy at a cost of 5000/= making a total of

140,000/=. Equally, he estimated 16 changes of crutches at 5000/= each making a total of 80,000/=.

48. According to the appellant, the doctor was not the right person to give estimates of the costs. However, the Doctor's evidence was not challenged on cross examination. There was no other medical opinion tendered challenging Dr. Sitati's evidence as an expert in that field. In my view, Dr. Sitati, being an expert in Orthopaedic surgery, has the expertise on the cost involved in securing and fixing a prosthesis. His evidence is not therefore hearsay. In the absence of any other contrary expert opinion, the evidence of Dr. Sitati prevails.

49. In view of the above holding, it is my finding that the appeal herein lacks merit and the same is dismissed with costs to the respondent. The trial court's judgment is upheld in its entirety.

Dated, signed and delivered this 3rd day of February 2026

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J. N. ONYIEGO
JUDGE