REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E080 OF 2024

PAUL ARIYO OLOO ..... APPELLANT

VERSUS

PETERLIS ONYANGO ARIKA ..... 1ST RESPONDENT

WAHAB TRADING LTD ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of Hon. S. Mutava (RM) delivered on 30.10.2024 in Rongo CMCC No. E010 of 2023. The appellant was the plaintiff in the lower court. The court dismissed the appellant's suit with costs. She assessed general damages at Ksh. 30,000/=.

2. The appellant was aggrieved by the said decision and filed a memorandum of appeal dated 18.11.2024 and raised the following grounds of appeal:

    a. The learned trial magistrate erred in law and in fact when she held that the Respondents were not liable for occurrence of the accident in total disregard to the

factual basis and evidence on record thereby leading to a wrong conclusion on liability.

b. The learned trial magistrate erred in law and in fact by disregarding the Appellant's testimony when the same was not rebutted by failure on the part of the Respondents to call a defence witness.

c. The learned trial magistrate erred in law and in fact when she failed to take into account all the relevant facts and erroneously assessed the quantum payable as general damages to the Appellant at inordinately low amount of Kshs. 30,000.00/=.

d. The learned trial magistrate erred in law and in fact by failing to exercise her discretion on award of costs in a judicious manner.

3. The appellant thereby prayed for the following orders in the appeal:

(i) Setting aside and/or substituting the judgment of the trial court with suitable orders on liability and an award of general damages payable to the Appellant together with costs of the suit.

(ii) Costs of this appeal be awarded to the Appellant.

<u>Pleadings</u>

4. The appellant pleaded that at all the material times relevant to this case, the Respondents were the owners of motor vehicle Registration Number KCV 085D. On or about 1.06.2022, the appellant was a lawful passenger in the said motor vehicle Registration Number KCV 085D Toyota HIACE matatu along Rongo-Homa Bay Road at Nyarach area when the 1st defendant negligently and recklessly drove the said motor vehicle registration Number KCV 085D, thereby causing the said vehicle to lose control, hit an unregistered Tuk Tuk, thereby severely injuring the appellant.

5. The appellant set out the following injuries:
    a. Head injury
    b. Left and right leg injury
    c. Superficial bruises to both knees, face and scalp
    d. Chest injury
    e. Soft tissue injuries on the fingers
    f. Bruises and laceration on the various parts of the body
6. The appellant prayed for the following special damages:
    a. Treatment - Ksh. 5,000/=
    b. Medical Report - Ksh. 5,000/=

    Total - Ksh. 10,000/=

7. The 1st Respondent filed their defence dated 20.04.2023, denying liability and blaming the plaintiff for negligence.

Evidence

8. The appellant testified that the Respondents were the owners of motor vehicle Registration Number KCV 085D. On or about 1.06.2022, he was a lawful passenger in the said motor vehicle Registration Number KCV 085D Toyota HIACE matatu along Rongo-Homa Bay road at Nyarach area when the 1st defendant negligently and recklessly drove the said motor vehicle registration Number KCV 085D, thereby causing the said vehicle to lose control, hit an unregistered Tuk Tuk, thereby severely injuring him. He blamed the respondents. He produced exhibits in support of his case.

9. On cross-examination, the witness stated that the accident occurred on the right side, from Homa Bay toward Rongo. He did not know how the accident occurred, between the tuk-tuk and motor vehicle Registration Number KCV 085D. On re-examination, the appellant maintained that the accident occurred on the right side.

10. PW2 PC Dickson Agumba testified that he was attached to Awendo Police Station. He recalled that an accident involving motor vehicle Registration Number KCV 085D and the unnamed tuk-tuk occurred. The said tuk-tuk hit motor vehicle with registration number KCV 085D. He stated that there was a fatality and two people were injured. The accident occurred on the matatu's side. He said the motor vehicle with registration number KCV 085D.

11. On cross-examination, he stated that he was the investigating officer. The appellant and one Benard Okomo Owili were involved in the accident.

12. PW3 was Pope Ochieng, a Clinical Officer who produced exhibits 1-3, that is, the medical report, P3 form, and treatment notes.

13. There was no defence evidence tendered despite several adjournments.

Submissions

14. The Appellant filed submissions dated 16.12.2025. It was submitted that the determination of liability was not a scientific affair. Reliance was placed in the dictum of the court in **Michael Hubert Koss & Another v David Seroney & 5 Others (2009) eKLR.**

15. The Appellant submitted that he proved liability on the part of the Respondents as he was a passenger and the accident occurred in the lane of motor vehicle Registration No. KCV 085D. The Appellant relied *inter alia* on **Chao v Dhanjal Brothers Ltd & 4 Others** (1990) KLR 90.

16. On quantum, it was submitted that the projected Ksh. 30,000/= for general damages was inordinately low, erroneous and should be interfered with. Reliance was placed on the case of **Butt v Khan** (1981) KLR 349.

17. The Respondent also filed submissions dated 17.12.2025. It was submitted that the Appellant failed to prove liability against the Respondent under section 107 of the Evidence Act. Reliance was placed on the case of **Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 KLR**, based on which it was submitted that there cannot be liability without fault.

18. The Respondent also submitted that though they did not call a witness, the onus still remained with the Appellant to prove the case on liability. Reliance was placed inter alia on **Robert Muriithi Weru v Diocese of Embu Salesians of Don Bosco** (2015) eKLR.

19. No submissions related to the quantum of damages.

Analysis

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind 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 is*

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."

21. The duty of the first appellate court was discussed by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the Judges in their usual gusto, held as follows:

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

22. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself 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…"

23. The appeal on liability is a fairly straight one. It turns not just on evidence but on pleadings. The 1st respondent did not blame the tuk-tuk. They blamed the appellant for contributory negligence.

24. Parties are bound to plead their cases fully. In the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, Justice A C Mrima stated as doth: -

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
> *…..it is now trite principle in law that parties are bound by their pleadings and that any evidence*

led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

25. In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled *The Present Importance of Pleadings* published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are

themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

26. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition: -

> In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…

27. It was thus not open to consider the negligence of the tuk-tuk in the absence of pleadings.

28. The next issue is whether the court was directed to say that the independent witness shows the appellant was not to blame. There were two witnesses on liability. The first witness, the appellant, stated that the accident occurred on the right side of the road. The police officer, on the other hand, said the tuk-tuk hit the motor vehicle, and the motor vehicle was not to blame. No sketch plan was produced to show that the motor vehicle was blameless.

29. The police officer did not show the basis upon which he held that the motor vehicle was not to blame. A police abstract is not evidence of blame. An entry in a police abstract is not

proof of the cause of an accident. It is evidence of the accident. In the case of **Kasaam Hauliers Limited & another v Shreeji Enterprises [2025] KEHC 12039 (KLR),** Matheka J held as follows:

> **Production of a police abstract by any police officer in the relevant police station is not in issue. A police abstract shows that an accident was reported in a certain police station and its contents must be substantiated. In this case there was no eye witness. The IO did not testify. The circumstances of the accident as recorded in the abstract unless conceded required the evidence of the plaintiff/or the plaintiff's witness in the absence of which, they were not proved.**

30. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

> **"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."**

31. The burden of proof is on whoever asserts. This is set out succinctly in sections 107-109 of the Evidence Act as follows:

> 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.
>
> (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.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. 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."

32. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

> **"In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

33. In this case, the appellant asserted that the respondents were to blame. The evidence was led against the first respondent, as the owner of motor vehicle registration number KCV 085 D matatu. The first respondent filed a defence, while the second respondent did not. There was no interlocutory judgment against the second respondent. The appeal was also not served against the second respondent. The appeal against the second respondent is thus dismissed on the basis of *audi alterum paterm*.

34. The Court of Appeal, sitting in Malindi [Makhandia, Ouko & M'Inoti, JJ.A] in the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR),** posited as follows:

> The former Court of Appeal for Eastern Africa, in Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. concurred, stated thus:
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> "On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and

that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR."

35. Without the involvement of the second respondent, the court cannot legitimately hold them liable. The police abstract indicated that the said vehicle was owned by the first respondent. In the case of **Kundu v Mbugua & 3 others [2025] KEHC 5404 (KLR),** AC Mrima held as follows:

> 24. One of the issues in the suit was definitely the ownership of the subject vehicle. On one hand, the 1st Respondent's name was entered into the Police Abstract issued by the police as the owner of the vehicle. On the other hand, the 1st Respondent relied on a motor vehicle search from the National Transport and Safety Authority to exclude himself from the suit. The trial Court agreed with the 1st Respondent.
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> 25.Courts have interpreted the concept of ownership to include various facets thereof. It can, therefore, be easily gleaned and respectfully so, that the Learned Magistrate did not take into account the fact that the issue of ownership is such a broad legal terminology and instead it ended up taking a rather narrow view thereto. The Court also failed to appreciate that since there was conflicting evidence on whether the 1st Respondent was the owner of the vehicle, such could only be safely settled in a hearing.

36. The question was addressed in the case of **Moses Muriithi Njagi v Joseph Njuguna Macharia & 2 others**

[2016] KEHC 3763 (KLR), where the court posited as follows:

> *The upshot is that this ground of appeal is misplaced. A police abstract proves ownership of a motor vehicle unless the contrary is proved. The appellant did not adduce any evidence and it was established that he owned the accident vehicle.*

37. The court of appeal settled the question as follows in the case of **Lake Flowers vs Cila Franklyn Onyango Ngonga** (suing as the personal legal representative of the estate of Florence Agwingi Ogam (deceased) and Josephine Mumbi Ngugi (2008) eKLR which was also on the same issue. It was held:-

> "Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and/or (sic) attempt to partly or wholly blame the 2nd respondent for the accident on this appeal. Neither can it deny the ownership of the Mitsubishi Canter without any evidence to counter the Police Abstract produced by the 1st respondent, which shows it to be the owner of that motor vehicle."
>
> In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the

vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.

38. The ownership of the said vehicle was proved. The liability was proved as against the first respondent. The question is whether contributory negligence was proved.

39. The respondent failed to offer a plausible explanation to prove contributory negligence. There was no defence tendered, hence the allegations of contributory negligence remain allegations. to make matters worse, they are against the appellant and not another tortfeasor. The respondent had a duty to show that the accident occurred as a result of the appellant's negligence as pleaded. As was held in **Kenya Bus Services Ltd v Dina Kawira Humphrey Civil Appeal No. 295 of 2000** where the Court of Appeal [Tunoi, Omollo and Githinji JJA] observed quite correctly that:

> *"Buses, when properly maintained, properly serviced and properly driven do not just run over*

bridges and plunge into rivers without any explanation."

40. In a courtroom situation, we deal with empirical evidence on what is more probable than the other. In the case of ***Embu Road Services v Riimi*** *(1968) EA 22,* the courts held *inter alia* as doth:

> "Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". *See also* Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

41. The appellant proved the duty of care on the part of the motor vehicle. He showed that the accident occurred on the right side of the road. There is no explanation on what a vehicle was doing on the right side of the road. In the absence of any explanation, the first respondent was negligent in driving on the wrong side of the road. In the case of *Caparo Industries PLC v Dickman* {1990} 1 ALL ER 568 and *Chun Pui v Lee Chuen Tal* {1988} RTR 298 the determinants of negligence were stated as follows:

"The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."

In Caparo case (supra) the Court stated:

"What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

42. The accident occurred on the wrong side of the road. The driver ought to know that these vehicles are to be on the left side, some explanation was needed, but did not turn up. The evidence of a police officer, in the absence of sketch plans,

does not hold any water. Lord Hope of Craighead in **Transfield Shipping Inc v Mercator Shipping Inc** [2009] 1 AC 61 posited as follows in respect of a proper defence of contributory negligence:

> Without proper defence of contributory negligence, the court could not determine whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly. The Appellant failed in this duty. The lower court was correct in its finding on liability and the same is upheld. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:
>
> > "Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

43. Whereas the appellant proved their case to the required standard, it was the duty of the Respondent to prove contributory negligence. This was not pleaded as against the Tuk tuk. As against the appellant, it is untenable as a passenger. Therefore, it is vain to determine contributory negligence. In the case of ***Mac Drugall App V Central Railroad Co***. *Rbr (supra)* the court held that; -

> **"In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".**

44. In the circumstances, I find that the court below was plainly wrong. She ignored the parties' pleadings and went off on a tangent, away from the doctrines and principles governing pleadings. The court should be guided by the reasoning of the Court in the case of **Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] KEHC 1105 (KLR),** where Nyakundi J referred to *Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan*, and 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."

45. Vehicles properly driven do not run into each other. It is not lost on the court that in this country, vehicles are driven on the left side. An accident occurring on the right side, ex facie, is evidence of negligence. The appellant was a passenger and could not contribute to the accident. The first respondent did not blame the tuk-tuk or even join them in the suit. In the circumstances, the court cannot attribute the occurrence of the accident to a non-party. In the case of **Orioki v Kevian Kenya Limited [2025] KECA 780 (KLR**), the court of appeal [DK Musinga, M Ngugi & FA Ochieng, JJA] posited as follows:

> The appellant relied on the Donoghue case to argue that negligence must be the proximate cause of the damage. However, the principle established in the Donoghue case is generally

applied in product liability cases and does not directly affect the issue of negligence in road traffic accidents. In road traffic cases, the duty of care requires that drivers maintain a safe distance, and the failure to do so can lead to a finding of negligence if it results in a collision.

51.The appellant, as a driver, owed a duty of care to the respondent and all other road users. His failure to maintain a safe distance from the respondent's vehicle was a breach of this duty. The case of Stapley v Gypsum Mines Limited, (supra), as cited by the respondent, emphasized that legal causation must be determined by common sense and an analysis of the facts at hand. In the circumstances, we find that the breach of duty by the appellant directly resulted in the accident.

46. The courts cannot apportion liability with non-parties. In **Stapley –v- Gypsum Mines Limited** (2) (1953) A.C 663 at P. 681 Lord Reid reasoned that:

> To determine what cause 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 fact of each particular case. One may find that 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 cause the accident. I doubt whether any test can apply generally."

47. The question that arises is how to apportion liability between the respondents and the owners of the tuk-tuk, having found that the appellant was a mere passenger? The first respondent blamed the appellant in the defence. I have found that the appellant is not to blame. This follows that had the respondents wished to blame some other party, they should have taken out third-party proceedings. None have been taken. In the circumstances, it is not open to determine who between the tuk-tuk and the motor vehicle is liable. In **Abbay Abubakar Haji Patuma Ali Abdulla Vs Freight Agencies Ltd [1984] KECA 14 (KLR),** the court of appeal [A A Kneller JA] held as follows:

> The trial judge rightly applied to the facts before him the relevant law enunciated by Spry, V P in Lakhamshi v Attorney General, (1971) E A 118, 120 for such cases which -
>
> "It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it.

> In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.

48. In relation to non-parties, the court, in the case of **Mbiti v Maingi & another** (Civil Appeal E77 of 2022) [2023] KEHC 20833 (KLR) (10 July 2023) (Judgment), held as follows:

> The attribution of negligence to a non party, like the rider was completely unhelpful in the case EN v Hussein Dairy Limited & 3 others [2020] eKLR, the Court stated as doth: “I agree with the Appellant’s submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly

adopted in the case of Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows. The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances, therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability."

49. The court therefore sets aside the finding on liability and enters judgment for the appellant against the first respondent at 100% liability.

50. I now turn to general and special damages. When it comes to general damages, the same are at large. In the case of **Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR** , Justice D.S Majanja held as doth:

> *"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."*

51. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally, and the welfare of the insured and injury public must be at the back of

the mind of the trial Court. The foregoing was settled in the cases of **William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)**, where the court of appeal [Kneller JA, Chesoni & Nyarangi Ag JJA] stated as follows:

> This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. *Kimothia v Bhamra Tyre Retreaders* [1971] EA (CA-K); *Tayab and Ahmed Yakub & Sons v Anna May Kinanu* Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA) March 30, 1983. The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.
>
> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. *Bhogal v Burbridge* [1975] EA 285 (CA-K). None, alas, has been cited to us.
>
> The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.
>
> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment,

> it is not necessarily wrong. *H West & Sons Ltd v Shephard* [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in *Tayab (supra)*

52. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being an exercise of discretion, the exercise should be done judiciously, considering the circumstances, to ensure that the award is not too high or too low as to be an erroneous estimate of damages. The Court of Appeal [Kneller, Nyarangi JJA & Chesoni AG JA] pronounced itself succinctly on these principles in **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] KECA 137 (KLR)**, as follows:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.

53. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. So my duty as the appellate court is threefold regarding quantum of damages:

a. *To ascertain whether the Court applied irrelevant factors or left out relevant factors.*
b. *To ascertain whether the award is too high as to amount to an erroneous assessment of damages.*
c. *To ascertain whether the award is simply not justified by evidence.*

54. To be able to do this, I need to consider similar injuries, take into consideration inflation, and other comparable awards.

55. The appellant suffered head injury, left and right leg injury, superficial bruises to both knees, face, and scalp, chest injury, soft tissue injuries on the fingers and bruises and lacerations on various parts of the body. The court noted that the appellant submitted a sum of Ksh. 300,000/= while the first respondent had submitted for Ksh 70,000/=. The court used authorities where awards were made between 100,000/=-125,000/=. However, the court proceeded to disregard the authorities of both sides and went on frolics of her own. She awarded a sum of Ksh 30,000/=. She did not explain why she departed from the binding decisions of the superior court and even the ones by the 1st respondent. I agree with the

appellant that the award was arbitrary and capricious. Award of damages is not a reward, where the court, out of its benevolence, grants favours. The court must take into consideration relevant factors, including authorities.

56. The P3 form classified the injuries as harm. True, the injuries were superficial in some areas and soft tissue in other areas. The court will adopt the authorities of the court.

57. In **Surian Enterprises Ltd v Mary Bahati Peter** (Civil Appeal No. E199 of 2021) [2023] KEHC 20426 (KLR) (5 July 2023) (Judgment) an award of Kshs. 300,000/= for soft tissue injuries, including a deep cut on the forehead and a blunt injury to the right knee, was considered inordinately high. However the award was reduced to Kshs. 150,000/=. The injuries herein are minor with no permanent disability. On the basis of the Surian case, I consider an award of Kshs. 150,000/= to be fair and reasonable in the circumstances.

58. In the circumstances, an award of Ksh 150,000/= will suffice. There is no appeal on special damages. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what**

extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

59. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR**) had this to say:

> "It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

60. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), as follows:

> **18.It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by**

instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

61. The appellant is entitled to costs. A sum of Ksh 65,000/= will suffice.

Determination

62. In the upshot, I make the following orders:

a) The appeal on liability is merited and allowed. The finding on liability is set aside. In lieu thereof, judgment is entered for the appellant against the first respondent at 100% liability.

b) The suit and appeal against the second Respondent is dismissed with no order as to costs.

c) The appeal on quantum is allowed. The sum of Ksh. 30,000/= is set aside. In lieu thereof, I award a sum of Kshs. 150,000/=.

d) Judgment on special damages of Ksh.10,000/=.

e) The appellant is entitled to costs in the lower court as against the first Respondent.

f) Costs of the appeal of Ksh. 65,000/= to the Appellant.

g) 30 days stay of execution.

h) Right of appeal 14 days.

i) File is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **3rd** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael