

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CIVIL APPEAL NO. E013 OF 2025**

**BENVAR ESTATES LIMITED** .....  
APPELLANT

**VERSUS**

**RODGERS WAMALWA WASIKE** .....  
RESPONDENT

***(Being an appeal from the judgment of Hon. N. Shiundu,  
(CM) delivered on 29th January 2025 in Naivasha CMCC  
No. 223 of 2020)***

**JUDGMENT**

**Introduction**

1. The Respondent sued the Appellant seeking general damages, special damages, loss of earnings, loss of earning capacity, and related reliefs following a road traffic accident that occurred on 11th June 2020 along the Kongoni - Naivasha Road.
2. The trial court found the Appellant 100% liable for the accident and awarded the Respondent general damages of Kshs. 1,500,000, loss of earning & earning capacity at Kshs. 13,319,568, special damages as proved, costs and interest.

3. Aggrieved by the said decision, the Appellant filed a Memorandum of Appeal dated 5th February 2025, raising seven (7) grounds challenging both liability and quantum.

### **The Appeal**

4. The Appellant's Memorandum of Appeal raises the following key grounds: -
  - a) ***The trial magistrate erred in awarding Kshs. 1,500,000 as general damages, the amount being excessive.***
  - b) ***The magistrate erred in finding the Appellant 100% liable.***
  - c) ***The award under loss of earnings/earning capacity amounting to Kshs. 13,319,568 was erroneous, not pleaded, and unsupported by the evidence.***
  - d) ***The court disregarded the Appellant's overwhelming evidence.***
  - e) ***The quantum awarded was excessive and inconsistent with precedents.***
  - f) ***The trial magistrate misdirected herself by failing to consider the Appellant's evidence and submissions.***
5. The Appellant seeks the setting aside of the entire judgment on liability, general damages, and loss of earnings/earning capacity, with costs to follow the event.
6. The appeal was canvassed by way of written submissions which I have considered.

7. The duty of the first appellate court is to reconsider and reanalyse the evidence presented before the trial court with a view to arriving at its own independent findings while bearing in mind the fact that it neither saw nor heard the witnesses testify and to make an allowance for that. (See ***Selle & Another vs. Associated Motor Boat Co. Ltd*** [1968] EA 123).
8. I have considered the Record of Appeal, written submissions of both parties, cited authorities, and the law. I find that the appeal raises two broad issues, namely: -
- a) ***Whether the trial court erred in finding the Appellant 100% liable.***
  - b) ***Whether the awards under general damages and loss of earnings/earning capacity were excessive, unproved, or based on wrong principles.***

## **Analysis and Determination**

### **Liability**

9. The Appellant submitted that the Respondent did not prove negligence on a balance of probabilities as no eyewitness was called to testify save for the Respondent himself. The Appellant noted that the Respondent admitted seeing the Appellant's tractor before the accident but did not demonstrate any measures that he took to avoid the collision. It was therefore the Appellant's case that the Respondent substantially contributed to the accident. The Appellant cited the decision in ***Harrison Geita vs. Twiga Chemicals Ltd*** [2014] KECA 650 (KLR) for comparative

circumstances where liability was apportioned at 70:30 and urged this Court to either dismiss the claim or apportion liability in its favour.

10. The Respondent, on the other hand, submitted that he gave an account of how he was hit from behind while lawfully riding motorcycle KMEH 904N. He added that PW2, a police officer, corroborated his testimony and confirmed that investigations blamed the Appellant's vehicle for the accident while the Appellant did not call any witness to rebut this evidence. He cited the decisions in ***Trust Bank Ltd vs. Paramount Universal Bank Ltd Nairobi Milimani HCCS No. 1243 of 2001*** and ***DT Dobie vs. Wanyonyi Chebukati [2014] eKLR*** for the proposition that uncontroverted evidence must be accepted.
11. He maintained that the trial court made the correct decision when it found the Appellant 100% liable.
12. It is trite that the burden of proof lies with the Plaintiff. Sections 107-109 of the Evidence Act stipulates as follows:

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**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.**

**107(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 - Incidence of burden

**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 - Proof of particular fact**

**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.**

13. In *Kirugi & Another vs. Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal held that the burden of proof lies on the plaintiff, and that he must discharge that burden by proving his case on a balance of probabilities. The court added that the burden is not lessened even if the case is heard by way of formal proof.
14. In the instant case, I note that the Respondent's testimony that he was hit from behind was not controverted by the Appellant who did not tender any rebuttal evidence, the police abstract and the testimony of PW2 placed fault on the Appellant's tractor.
15. My finding is that the Appellant's allegation that the Respondent contributed to the accident is unsupported by evidence. I therefore find that the trial court's finding of

100% liability was justified and supported by evidence. I find no basis for interfering with the said decision.

## **Quantum of Damages**

### **General Damages**

16. The Appellant argued that the award of **Kshs. 1,500,000** was excessive and proposed that an award of **Kshs. 1,000,000** would suffice. The Appellant cited the decision in ***Butt vs. Khan (Civil Appeal 40 of 1977) [1978] KECA 24 (KLR)*** where it was held that: -

***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”***

17. The Respondent, on the other hand, submitted that he suffered serious spinal and orthopaedic injuries including brain concussion, fractures C6-T1, compression fracture T8, soft tissue injuries to back, wrist, knees, and limbs. The Respondent maintained that medical evidence confirmed ongoing pain and deformity. He cited comparable case of ***David Chege vs. Robert Macharia (2015) eKLR*** where the court awarded Kshs. 4,000,000 for similar injuries. It

was the Respondent's case that the award of Kshs. 1,500,000 was modest rather than excessive.

18. It is trite that an appellate court will not ordinarily interfere with an award made by the trial court unless the same is inordinately high or low, or based on wrong principles. (See **Butt vs. Khan** (supra))

19. I have considered the nature of injuries that the Respondent suffered in the accident in question as shown in the pleadings and the medical documents which indicate that there is continuing pain. The record shows that the Respondent sustained the following injuries: -

- i) **Head injuries - had brain concussion and lost consciousness**
- ii) **Displaced fractures of vertebral C6 to T1 with muscle spasm and spondylosis**
- iii) **Compression fracture thoracic vertebral T8**
- iv) **Fracture of the right radius**
- v) **Severe soft tissue injuries of the lumbar region of the back resulting into lumbar hypo lordosis due to muscle spasm and lower spondylosis**
- vi) **Soft tissue injuries of the right wrist joint and forearm**
- vii) **Soft tissue injuries of the left wrist joint**
- viii) **Soft tissue injuries of the right knee joint**

20. Medical evidence shows that the Respondent suffered long-term pain, spinal deformity, difficulty in bending and lifting, and permanent disability (8%-35%) depending on the doctor's assessment. The injuries are therefore classified as

severe orthopaedic and neurological injuries with long-term effects.

21. I have considered the following comparable Kenyan Court Awards: -

**a)** In ***David Chege vs. Robert Macharia (2015) eKLR*** the court awarded Kshs. 4,000,000 for fractures C6–T7, spinal instability and permanent deformity.

**b)** In ***Stephen Karanja vs. Nairobi Women's Hospital (2017) eKLR*** an award of Kshs. 2,000,000 was made for cervical and thoracic compression fractures with neurological symptoms.

**22.** In the present case, the Respondent's injuries are not minor and can be placed in the severe injury category. Given the comparative awards, I find that the amount of Kshs. 1,500,000 does not appear excessive. If anything, it is conservative given the severity of injuries. I therefore uphold the said award.

### **Loss of Earnings & Loss of Earning Capacity**

23. The Appellant argued that the Respondent did not specifically plead loss of earnings and that there was no proof of job loss as payslips showed that he remained employed after the accident. The Appellant noted that disability was assessed inconsistently at 8% and 35%. It was therefore the Appellant's case that the award of Kshs. 13,319,568 for loss of earning capacity was speculative and excessive. Reliance was placed on ***SJ vs. Francesco Di Nello & Another (2015) KECA 606 (KLR)*** where the distinction between future earnings (special damages) and

loss of earning capacity (general damages) was emphasized.

24. The Appellant argued that the Respondent suffered no real loss capable of mathematical assessment, and that the award under this heading must therefore fail in its entirety.
25. The Respondent, on his part, submitted that he earned gross salary of Kshs. 113,000 per month as a supply chain manager as confirmed through his payslips. He stated that he did not resume work and cannot engage in gainful employment after the accident. He confirmed the disability assessment of 8% as supported by the medical evidence and submitted that the multiplier approach used by the trial court being (17 years × Kshs. 65,292 net income × 12) was proper.
26. Courts in Kenya have had occasion to deal with the subject of damages for loss of earning capacity in numerous cases such as:-

**a) *Mumias Sugar Company Limited vs. Francis Wanalo* (2007) eKLR where it was held that: -**

***“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or, in the case he loses the job, his diminution***

***of chances of getting an alternative job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future.”***

**b) In *SJ vs. Francesco Di Nello & Another* [2015] eKLR it was held that: -**

***“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earnings capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages once proved.”***

**c) *Wambua vs. Patel & Another* [1986] KLR where it was held that: -**

***“Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token, moderate or substantial depending on the***

***circumstances of each case.***” loss of earning capacity is **general damages**;

27. The principle that emerges from the above cited cases is that the assessment of damages for loss of earning capacity does not require that actual earnings be proved as it is compensation for reduced employability and may thus be awarded whether or not the claimant was working. The said damages may also be assessed by multiplier or through the global sum method and appellate courts interfere only where award is inordinately high/low or based on wrong principles.
28. In this case, I note that the Respondent proved that he was in a stable job with payslips even though the medical evidence supported reduced or eliminated working capacity. The trial court applied a multiplier method based on evidence. I however note that disability was assessed at 8%, not 35%. I find that the multiplier approach used by the trial court appears to treat loss of earnings as strictly quantifiable, yet the Respondent did not strictly plead special damages for loss of earnings.
29. I further find that the trial court’s award of Kshs. 13,319,568 is manifestly excessive for the following reasons: -
- i) Comparable awards for 8% spinal disability range from Kshs. 350,000 to 600,000.
  - a) In ***S J vs. Francesco Di Nello & Another*** (supra) an award of Kshs. 500,000 was awarded for loss of earning capacity where permanent disability was

assessed at 10%. The court noted that the plaintiff was still employed. The court held that the injuries affected his competitiveness in the job market and awarded a moderate global sum for diminished earning ability.

- b) In ***Philip Musyoka Mutua vs. Peter Kavita Mwangangi [2019] eKLR*** permanent disability was assessed at 8% for lumbar spine soft tissue injury and the court awarded Kshs. 400,000 for loss of earning capacity. This case is directly similar to the instant case where disability is exactly 8%.
- c) In ***John Kipkemoi Bett vs. Kenya Power & Lighting Co. Ltd [2018] eKLR*** the court awarded Kshs. 600,000 for loss of earning capacity where permanent disability was assessed at 12% for spinal compression fracture.
- d) In ***Joseph Gikonyo vs. Evergreen Agencies Ltd [2017] eKLR***, permanent disability was assessed at 8% for thoracolumbar soft tissue injury and the court awarded Kshs. 350,000 while emphasizing that diminished physical capacity is compensable even at low disability.

30. Guided by the range of awards in the above cited cases, I find that the trial court's award under the heading of loss of earning capacity is inordinately high, thus falling within the purview of ***Butt vs. Khan*** (supra) threshold for appellate interference.

31. Given the 8% disability rating and the jurisprudential trend in comparable spinal injury cases where awards range between Kshs. 350,000 and 600,000, the trial court's award of Kshs. 13,319,568 was so inordinately high as to represent an erroneous estimate and was based on wrong principles. The award is therefore set aside and substituted with an award of Kshs. 700,000 taking into account the inflationary trends that may have diminished the value of the Kenyan Shilling since the delivery of the decisions in the above cited cases. I am persuaded that the said award is more reasonable and aligns with comparable awards for spinal injuries and partial disability.

### **Disposition**

i) Having considered the entire appeal, I find that it partially succeeds and make the following final orders:

a) ***Liability:***

***The finding of the trial court that the Appellant was 100% liable is upheld.***

b) ***General Damages:***

***The award of Kshs. 1,500,000 is upheld.***

c) ***Loss of Earnings / Earning Capacity:***

***The award of Kshs. 13,319,568 is set aside and substituted with:***

***Kshs. 700,000.***

d) ***Special Damages:***

***As proved is upheld.***

e) ***Costs:***

***Each party shall bear its own costs of the appeal,***

***but the Respondent retains the costs awarded  
before the trial court.***

***Orders accordingly.***

**DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 5<sup>TH</sup>  
DAY OF FEBRUARY, 2026.**

**HON. W. A. OKWANY**

**JUDGE**

**05/02/2026**

**FOR APPELLANT Mr. Mwangi  
FOR RESPONDENT Kiberenge  
COURT ASSISTANT Karani**