

2. Being aggrieved by the said decision, on 30th October 2023, the Appellants herein filed a Memorandum of Appeal of even date. They relied on seven (7) grounds of appeal.
3. Their Written Submissions were dated 5th June 2025 and filed on 10th July 2025 while those of the Respondent were dated and filed on 24th June 2025. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that all the grounds of appeal were related and the issues that had been placed before it for determination were as follows:-

- a. **Whether or not the Learned Trial Magistrate erred in finding the Appellant to have been wholly liable for the accident;**
- b. **Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.**

7. The court deemed it prudent to address the issues under the following distinct heads.

I. LIABILITY

8. Grounds of Appeal Nos (1), (2) and (3) were dealt with under this head as they were all related.
9. The Appellants invoked Section 78 of the Civil Procedure Act, Cap 21 (Laws of Kenya) and submitted that this court was duty bound to re-evaluate, re-assess and re-consider the evidence adduced and come up with its own conclusions bearing in mind that it did not have the opportunity to hear the witness testify in the first instance as was held in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others** (Supra).
10. They contended that No 52015 PC Kipkemoi (hereinafter referred to as "PW 3"), a Police Officer attached to Mudete Police Station testified that Motor Vehicle Registration Number KCR 863 L (hereinafter referred to as the "subject Motor Vehicle") and Motorcycle Registration Number KMCF 019 X (hereinafter referred to as "the subject Motorcycle") were moving in opposite directions and having stated that he reached the scene

twenty-five (25) minutes, this meant that he did not witness the accident. They added that he also said that he had not completed investigations.

11. They pointed out that there was a test suit, **CMCC No 168 of 2020** which had been selected for purposes of determining liability and that the testimonies of the defence in the said suit were to apply in this suit. They relied on Section 107(1) of the Evidence Act Cap 80 (Laws of Kenya) and argued that this being a civil suit, the Respondent was under a duty to prove her allegations that their driver caused the accident through negligent driving, on a balance of probabilities. They argued that this being an adversarial system, it was not enough to throw everything at the court and tell it to scrap through and arrive at a favourable decision as the court must be persuaded.
12. They were categorical that the Respondent did not offer much to persuade the court that they were negligent hence the Trial Court's decision ought to be set aside and her suit dismissed. Even so, they pointed out that the evidence adduced before court by the Respondent and their evidence was conflicting hence the liability ought to have been shared equally. They were, therefore, emphatic that the Trial Court erred when it held them hundred (100%) per cent liable for the accident and that there was no negligence attributed on their part. They were emphatic that they were entirely blameless.
13. In this regard, they placed reliance on the case of **Equator Distributors vs Joel Muiru & 3 Others[2018]eKLR** where it was held that a police sketch map for a road traffic accident that was prepared after the event carried some probative value.

14. On her part, the Respondent submitted that the accident was reported to the police and she had produced a Police Abstract. She relied on the case of **Ibrahim Wandera vs P. N. Mashru Ltd Civil Appeal No 333 of 2003** (eKLR citation not given) where it was held that in absence of any rebuttal evidence, the police abstract form was sufficient to establish ownership of the accident bus. She argued that that was the case in the instant case.
15. She contended that during trial, her testimony was clear that the Appellants' subject Motor Vehicle was overtaking other vehicles and as such encroached on the subject Motorcycle's lane. She added that the subject Motorcycle was violently hit on its side and on impact together with its rider, she was thrown off on the left side of the road when facing the direction they were heading to.
16. She asserted that the 1st Appellant's statement in which he alleged that the subject Motorcycle on which the Respondent was a pillion passenger was overtaking a motor vehicle was discredited by PW 3 who was the Investigating Officer assigned to the case noting that the Appellants' subject Motor Vehicle was the one overtaking a pick-up vehicle on the wrong lane. She added that DW 3's **(sic)** direct evidence confirmed that the subject Motorcycle fell on the left side thus confirming her version of events.
17. She was categorical that the Appellants were vicariously liable for the tortuous acts of their agent, driver, servant and/or employee since they were deriving a monetary benefit from the services of the said

subject Motor Vehicle's driver. She urged the court to uphold the finding of the Trial Court on liability.

18. According to the Plaint dated 10th September 2020 and filed on 16th September 2020, on 25th October 2019, the Respondent was a lawful pillion passenger aboard the subject Motorcycle when the subject Motor Vehicle was driven so negligently, carelessly, recklessly and/or controlled and/or managed that it collided with the said Motorcycle as a result of which the Respondent sustained injuries.
19. The Appellants entered appearance and in their Statement of Defence, denied that the accident occurred in the manner disclosed in the Plaint . They attributed the cause of the accident to the negligence of the rider of the subject Motorcycle.
20. In her evidence, the Respondent blamed the driver of the subject Motor Vehicle for overtaking without ensuring it was safe to overtake and driving at a high speed. She was emphatic that they were hit while on their rightful left lane. She added that her rider of the subject Motorcycle was not to blame as he was qualified and that she had warned him about speed.
21. PW 3 testified that on 25th October 2019 at 1000 hours, he was at the Police standby when a driver came and reported an accident. He booked the same as OB No 25/19/2019. He said that the said driver informed him that he had taken two (2) victims to Sabatia Hospital. He explained that the driver of the subject Motor Vehicle was driving from Kakamega to Kapsabet and on reaching Mudete Junction, he met the subject Motorcycle in which the Respondent was a pillion rider heading to

Wangulu Secondary School. He stated that the driver of the said subject Motor Vehicle wanted to overtake a pickup but he hit the said Motorcycle which fell on the left side of the road. He produced the Police Abstract Report as an exhibit in this case.

22. A reading of the court proceedings indicated that the evidence of one DW 2 PC Damaris Mutunga (**sic**) was to apply in this case on defence. This court noted that although the Appellants claimed that there was a test suit being **CMCC No 168 of 2020**, they failed to point out the details of the said case and the liability that was decided therein as alleged to enable this court make a proper determination on the same.
23. Be that as it may, the victim in the test suit must have been the rider of the subject Motorcycle. As the Respondent herein was a pillion passenger, her contribution and that of the said rider could not be the same. However, if he was found to have been liable, he would have to shoulder that part of liability in the Respondent's claim.
24. Notably, in the case of **Khambi and Another vs Mahithi & Another [1968] EA 70**, it was held that an appellate court would not interfere with the apportionment of liability save where such apportionment was manifestly erroneous. A perusal of the Trial Court's Judgment showed that the Learned Trial Magistrate had noted that as the Respondent was a pillion passenger, it had not been proved of how she contributed to the accident, thus, proceeded to find the Appellants hundred (100%) per cent liable for the accident.
25. As the Respondent was a fare-paying passenger in the Motorcycle, she was not in control of the said vehicle. She had no power to control the

same so as to exercise caution to avoid the accident. Besides, the Appellants did not call any eye witness to tender evidence as to what may have happened and whether or not the Respondent was involved in the causation of the accident so as to enable the court determine the issue of contribution on liability on his part.

26. The Police Abstract Report dated 25th October 2019 that was produced as an exhibit indicated that the accident involved subject Motor Vehicle which belonged to the Appellants herein. Thus, the Trial Court could not have been faulted for having held the Appellants hundred (100%) per cent liable for the accident herein.

27. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (3) were not merited and the same be and are hereby dismissed.

II. QUANTUM

28. Grounds of Appeal Nos (4), (5), (6) and (7) were dealt with under this head as they were all related.

29. The Appellants did not submit on the issue of quantum. It was not clear to this court of whether they had abandoned their grounds of appeal on quantum, however, for completeness of record, this court found it prudent to determine the same.

30. The Respondent placed reliance on the cases of **Butt vs Khan (1977) 1 KAR** and **Kenya Breweries Ltd [1991]eKLR** where the common thread was that an appellate court would not disturb an award for damages unless it was inordinately high or low as to represent an entirely erroneous estimate.

31. She asserted that from the record, she sustained severe multiple hard and soft tissue injuries which were potentially life threatening. She argued that the award of Kshs 1,000,000/= by the Trial Court was reasonable in the circumstances and not excessive as alleged by the Appellants. To buttress her point, she relied on the case of **Stanley Maore vs Geoffrey Mwenda [2004]eKLR** where it was held that the award of damages should be considered in light of the injuries sustained and that the approach should be comparable injuries should be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
32. She further relied on the cases of **Barnabas vs Ombati Civil Appeal E043 of 2021**(eKLR citation not given) where the award of Kshs 800,000/= was upheld for lesser injuries compare to what she sustained in the instant case and **David Kimathi Kaburu vs Dionisius Mburungu Itiari[2017]eKLR** where the court awarded the respondent a sum of Kshs 750,000/= for lesser injuries.
33. She urged the court to uphold the award of special damages as they had not been challenged. She prayed that she be awarded the costs of the appeal herein.
34. It is well settled in law that an appellate court will not disturb an award of general damages unless the same was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of **Margaret T. Nyaga vs Victoria Wambua Kioko [2004] eKLR.**

35. It must be understood that money can never really compensate a person who had sustained any injuries. No amount of money could remove the pain that a person went through no matter how small an injury appeared to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person had sustained. It was merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who had suffered an injury.
36. However, this assessment was not without limits. A court had to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court therefore had to be guided by precedents.
37. Indeed, in the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated that damages had to be within the limits set out by decided cases and also within the limits the Kenyan economy could afford. This was because high awards would lead to higher insurance premiums which would in turn affect the members of the public.
38. This court also had due regard to the case of **Lim vs Camden HA [1980] AC 174** where it was held that even in assessing compensatory damages, the law sought to indemnify the victim for the loss suffered and not to punish the tortfeasor for the injury that he had caused.
39. Similar injuries ought to attract comparable awards. However, in the quest for consistency, courts also had to recognize that no case was exactly the same as the other. It must be noted that cases cannot contain exact injuries and they are merely for comparison purposes. Each case

therefore had to be decided according to its own peculiar circumstances but keeping in mind that any monies awarded had to be sustainable.

40. Towards this end, an appellate court ought not to interfere with the discretion of a trial court merely because it could have awarded a lower or higher sum than that which was awarded by the trial court. It could only interfere where the award of general damages was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended as was held in the case of **Margaret T. Nyaga vs Victoria Wambua Kioko** (Supra).

41. In her Complaint 10th September 2020 and filed on 16th September 2020, the Respondent pleaded that as a result of the accident she suffered a blunt injury to a gravid abdomen (gestation 29 weeks) and chest, bruises on the face/forehead, fracture of the right humerus, fracture on the right femur, right radial nerve injury and developed decubitus ulcer on the sacral area. She produced a P3 form and a Medical Report as exhibits in court.

42. The Medical Report of Dr Joseph Sokobe dated 2nd September 2020 showed that the Respondent suffered similar injuries as pleaded on the Complaint. At the time of the medical examination, the Respondent was unable to use her right limbs. The doctor indicated that she still needed further treatment. He termed her injuries as severe bony and soft tissue injuries.

43. Remaining faithful to the doctrine of *stare decisis* and taking the inflationary trends into consideration, it was the considered view of this

court that general damages in the sum of Kshs 1,000,000/= that was awarded by the Trial Court was not unreasonable.

44. In arriving at the said conclusion, this court had due regard to the following cases:-

1. Peter Namu Njeru vs Philemone Mwangoti

[2016] eKLR

The court held that Kshs 700,000/= was sufficient as general damages where the plaintiff sustained a fracture of the humerus and soft tissue injuries.

2. Barnabas vs Ombati [2022] KEHC 12136

(KLR)

The court upheld the trial court's award of Kshs 800,000/= for general damages where the plaintiff therein had sustained soft tissue injuries together with fracture of the right femur, right humerus and fracture of the pelvic.

3. Ouma vs Jumba alias Chumba Ndeda (Civil Appeal E028 of 2023)

[2024] KEHC 13525 (KLR)

This very court awarded Kshs 1,000,000/= to the respondent therein who sustained left elbow fracture, tibia and right femur fracture and left ear injury

45. As the issue of special damages was not in contention between parties, this court found it prudent not to belabor as there was no reason to disturb the same.

46. In the premises foregoing, Grounds of Appeal Nos (5), (6) and (7) were not merited and the same be and are hereby dismissed.

DISPOSITION

47. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal that was dated and filed on 30th October 2023 was not merited and be is and hereby dismissed.

48. The Appellants will bear the Respondent's costs of the Appeal herein.

49. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **26th** day of **February** 2026

J. KAMAU
JUDGE