REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E405 OF 2025

-between-

SUSAN WANGECHI HINGA.....APPELLANT

-versus-

MWENDWA KIOKO.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. M.W. Murage (PM) delivered on 17th March 2023 in Milimani CMCC No. 9416 of 2019)

JUDGMENT

Background:

1. By a Plaint dated 16th December 2019, *Mwendwa Kioko,* the Respondent herein, sued *Susan Wangechi Hinga,* the Appellant herein, in Milimani Chief Magistrates Civil Case No. 9416 of 2019 [hereinafter referred to as ***'the suit'***]. It was his case that he was lawfully riding a motorcycle along Aerodrome Road in Nairobi when the Appellant, while driving motor vehicle registration number KBC 555Z [hereinafter referred to as '***the motor vehicle'***], negligently knocked him down.

2. The Respondent particularized the Appellant's negligence to include, *inter alia*, driving at excessive speed, failing to keep a proper lookout and hitting the Plaintiff from the rear. As a result of the accident, the Respondent pleaded that he sustained serious injuries, including compound fractures of the right tibia and right fibula. He sought general damages, special damages, and future medical expenses.

3. The Appellant entered an appearance in the suit and filed a Statement of Defence dated 24th September 2020. She denied the occurrence of the accident as pleaded and, in the alternative, alleged contributory negligence on the part of the Respondent. Specifically, she averred that the Respondent was riding on the wrong side of the road and caused the motorcycle to hit her vehicle.

4. In its judgment, the trial Court not only found the Appellant largely liable for the accident, but also that the Respondent had contributed to it. It apportioned liability at 80% : 20% in favour of the Respondent. On quantum, the Court awarded the Respondent Kshs. 1,500,000/= in general damages, Kshs. 100,000/= for future medical expenses and Kshs. 2,500/= in special damages.

5. Aggrieved with the rendition, the Appellant preferred this appeal which was disposed of by way of written submissions.

The Appeal:

6. Through the Memorandum of Appeal dated 24th May 2023, the Appellant challenged the entire judgment and preferred the following grounds of appeal: -

    1. *That the Learned Magistrate erred in law and in fact in failing to find that, the Appellant had not proved his case on a balance of probabilities.*

    2. *That the Learned Magistrate erred in law and in fact in finding that, the Appellant was to blame for the cause of the accident subject matter of the primary suit.*

    3. *That the learned trial Magistrate erred in law and in fact in failing to find the Respondent liable for the accident.*

    4. *That the Learned Magistrate erred in law and in fact in failing to fairly and/or properly analyse the evidence.*

    5. *That the Learned Magistrate erred in law and in awarding excessive general damages to the Respondent in the sum of Kshs. 1,500,000.00 and future medical expenses in the sum of Kshs. 100,000.00.*

    6. *That the Learned Magistrate erred in law and fact in awarding excessive Special damages to the Respondent.*

7. *That the Learned Magistrate erred in law and in fact in evaluating the circumstances of the accident and evidence adduced, and apportioning liability in the ratio of 80:20 percent in favour of the Respondents.*

8. *That the Learned Magistrate erred in law and in fact in condemning the Appellant to bear the costs of the suit.*

The Submissions:

7. The Appellant filed written submissions and supplementary submissions dated 8th July 2025 and 15th January 2026 respectively to canvass the appeal. On the issue of liability, the Appellant submitted that the Respondent ought to be fully blamed for the accident. She argued that the police abstract indicated the rider of the motorcycle was blamed for the accident. She maintained that she was driving on a one-way road when the Respondent emerged from the opposite direction, riding against traffic and as such, the trial Court erred in apportioning liability at 80%: 20% in favour of the Respondent. The Appellant contended that liability should either be attached 100% to the Respondent or be apportioned at 80%: 20% in her favour.

8. On quantum, the Appellant submitted that the awards of Kshs. 1,500,000/= for general damages and Kshs. 100,000/= for future medical expenses were excessive. She relied on the case of *Third Engineering Bureau China Construction Group Limited -vs- Edwin Kinanga Atuya [*2021] eKLR, where an award of Kshs. 800,000/= was reduced to Kshs. 500,000/= for comparable injuries. Further support was drawn from the case of *China Henan International Cooperation Group Co. Limited -vs- Mureithi [2024] KEHC 1590*, where an award of Kshs. 1,200,000/= was substituted with Kshs. 700,000/= for displaced fractures of the tibia and fibula. The Appellant proposed that general damages be reduced to Kshs. 500,000/= and future medical expenses be reduced to Kshs. 75,000/=, noting that Dr. Wambugu assessed the cost at Kshs. 75,000/=.

The Respondent's case:

9. *Mwendwa Kioko* opposed the appeal through written submissions and Supplementary Submissions dated 7th and 27th October 2025 respectively. As regards the new evidence, the Respondent raised a preliminary objection regarding the Police Abstract dated 11th May 2017, included in the Record of Appeal. It was his case that the document was not produced during the trial and was not part of the list of documents for either party. He submitted that the only Abstract listed before the trial Court was dated 25th July 2019, which indicated the result of the investigation as referred to insurance. He urged the Court to expunge the strange abstract.

10. As regards liability, the Respondent maintained that the evidence in the trial Court proved the Appellant was the author of the accident. He argued that he was hit from the rear by the Appellant who failed to keep a safe distance. He pointed out that his motorcycle was damaged at the rear, lending credence to his version of events.

11. The Respondent submitted that the injuries were grievous, resulting in permanent disability assessed at 8%. He argued that the award was not excessive. To that end, he referred to the case of *John Kuria Mbure -vs- Magari Hire Purchase Ltd [*2019] eKLR, where an award of Kshs. 2,000,000/= was upheld for fractures of the tibia and fibula with 30% disability. He submitted that the award of Kshs. 1,500,000/= (less contribution) was reasonable given the debilitating injuries.

Analysis:

12. Having perused the record, the rival submissions and the decisions referred to therein, the following issues emerge for determination:

    i. *Admissibility of the Police Abstract dated 11th May 2017.*

    ii. *Whether the Learned Trial Magistrate erred in the assessment and apportionment of liability.*

    iii. *Whether the award of damages was manifestly excessive to warrant interference by this Court.*

13. Before dealing with the above issues, this Court will address its role as the first appellate Court. This being a first appeal, this Court is tasked with the duty to re-evaluate the evidence tendered before the trial court and arrive at its own independent conclusion. In ***Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates*** [2013] eKLR the Court set out the role of the first appellate Court in the following terms: -

> *... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.*

14. The Court will now interrogate the issues sequentially.

[a] Admissibility of the Police Abstract dated 11th May 2017:

15. The Appellant relied heavily on a Police Abstract dated 11th May 2017, appearing at page 12 of the Record of Appeal, which allegedly blames the Respondent. The Respondent contended that the document was never produced at trial. Having examined the trial record, this Court notes that the Plaintiff's List of Documents dated 16th Dec 2019 lists a "Police Abstract dated 25th July 2019 and the Defendant's List of Documents dated 12th April 2022 lists only a "Medical Report from Dr. Wambugu P.M. Further, the Police Abstract at page 12 of the record is dated 11th May 2017 whereas the Police Abstract at page 15 of the record is dated 25th July 2019.

16. An appellate Court acts strictly on the record from the trial Court. Documents not tendered in evidence during the trial cannot be introduced through the backdoor into the Record of Appeal unless the necessary leave to adduce additional evidence is sought and granted. The Court of Appeal in **Otieno, *Ragot & Company Advocates -vs- National Bank of Kenya Limited*** [2020] KECA 894 (KLR) rendered

itself on the prejudice occasioned to a party when new evidence is sneaked to an appellate Court's record. It was observed: -

> *….. In the case of* ***Wanga & Co. Advocates*** *(supra), the court stated that allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but also against public policy and the law. The two courts below were not given an opportunity through the proper channels to strike a fair balance. By allowing the new evidence on account of inadvertent mistake, the learned Judge opened a door to litigants to introduce all sorts of material which should have been properly placed and considered by the taxing officer and not before the first appellate court. Having discussed elsewhere in this judgment and concluded that the application for review was not merited, I find that the learned Judge erred in allowing the said evidence.*

17. There is no evidence that the Police Abstract dated 2017 was produced as an exhibit at trial. Consequently, this Court will disregard the said Police Abstract and rely only on the evidence properly adduced at trial.

[b] Whether the Learned Trial Magistrate erred in the assessment and apportionment of liability:

18. The trial Court was presented with two divergent accounts on the manner in which the accident occurred. The Respondent, who testified as (PW1) stated that he was at a roundabout in Madaraka behind a vehicle that braked. He also braked, but the Appellant's vehicle behind him hit him from the rear. The Appellant, who testified as DW1 gave evidence that the accident occurred on Aerodrome Road, which was a one-way road. She claimed the Respondent was riding in the opposite direction, that is on the wrong side and hit her side mirror.

19. The Trial Magistrate found that both parties contributed to the accident and apportioned liability at 80%: 20% in favour of the Respondent. The Appellant's defence of the Respondent riding against traffic on a one-way street is a weighty allegation. However, the Appellant bore the burden of proving this contributory negligence. DW1 admitted in cross-

examination that she hit the Respondent on the *"left side on the road"* and claimed that the Respondent *"hit the side mirror".*

20. On the basis of the two diametrically opposite versions on how the accident occurred, the trial Court had to tread quite carefully in examining the credibility of the witnesses. The Court, having heard the witnesses, concluded that the Appellant was largely to blame. However, the Court also found the Respondent contributed to the accident. Given the fact that the Respondent's motor cycle was hit from the rear, then the finding that the Appellant failed to keep a safe distance from the Respondent's motor cycle was sound as well as the finding on the contributory negligence. This Court, therefore, finds no compelling reason to disturb the ratio of 80%: 20%, which acknowledges the Appellant's primary duty of care to the vehicle or motorcycle in front, while recognizing potential negligence by the Respondent.

[c] Whether the award of damages was manifestly <u>excessive to warrant interference by this Court:</u>

21. The principles for interfering with an award of damages are well settled. In ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini -vs- A M Lubia and Olive Lubia*** *[*1982-88] 1 KAR 727 it was observed that an appellate Court should not interfere with a trial Court's discretion in making awards unless it is satisfied that the trial Court took into account an irrelevant factor, failed to take into account a relevant one or that the amount awarded is so inordinately low or high that it must represent a wholly erroneous estimate of the damage.

22. The Respondent sustained compound fractures of the right *tibia* and *fibula*. He underwent surgery fix a metal plate. *Dr. Wokabi* initially assessed permanent disability at 8% whereas later, *Dr. Wambugu* assessed it at 2%. The fractures were, however, united. The Court of Appeal, in ***Simon Taveta -vs- Mercy Mutitu Njeru*** [2014] eKLR as follows: -

…. The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

23. *In* ***China Henan International Cooperation Group Co. Limited -vs- Mureithi*** [2024] KEHC 1590, the High Court reduced an award of Kshs. 1,200,000/= to Kshs. 700,000/= for a plaintiff who suffered displaced fractures of the tibia/fibula, head injury, and soft tissue injuries. The injuries in the above case were arguably more severe (head injury included) yet attracted a lower award than the trial Court's award herein. In ***Aloise Mwangi Kahari -vs- Martin Muitya*** [2020] eKLR an award of Kshs. 500,000/= for compound fracture of right tibia and fibula were made. In ***John Kuria Mbure -vs- Magari Hire Purchase*** [2019] eKLR the Court made an award of Kshs. 2,000,000/=. However, this case involved 30% disability and dislocation of the ankle joint, which is significantly more severe than the 2% - 8% disability in the present case.

24. Therefore, the award of Kshs. 1,500,000/= for healed fractures with between 2% and 8% disability is manifestly excessive when compared to recent decisions like the *China Henan International Cooperation Group Co. Limited -vs- Mureithi* herein. With utmost respect to the trial Court, the award is manifestly high and results to an erroneous estimation of the damages. Taking into account inflation and the nature of injuries, a figure of Kshs. 800,000/= results to be reasonable and sufficient compensation for general damages.

25. As regards future medical expenses, the trial Court awarded Kshs. 100,000/=. Dr. Wokabi estimated the cost of implant removal at Kshs. 100,000/= whereas Dr. Wambugu estimated it at Kshs. 75,000/=. Given the difference, this Court will not disturb the award of Kshs. 100,000/=. Similarly, special damages of Kshs. 2,500/= was pleaded and properly proved.

Disposition:

26. Accordingly, the appeal partly succeeds on the issue of quantum. The judgment of the trial Court is hereby reviewed as follows: -

[a] The apportionment of liability at 80%: 20% in favour of the Respondent (Plaintiff) is upheld.

[b] General Damages for pain, suffering and loss of amenities are hereby reduced from Kshs. 1,500,000/= to Kshs. 800,000/=.

[c] The award of Kshs. 100,000/- for Future Medical expenses is hereby upheld.

[d] Special Damages of Kshs. 2,500/= is hereby upheld.

[e] The awards in [b], [c] and [d] above shall be subject to the contribution in [a].

[f] The rest of the awards and orders in the suit are hereby affirmed.

[e] As the appeal has partly succeeded, parties shall bear their respective costs of the appeal.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **27th** day of **February, 2026.**

A. C. MRIMA
JUDGE

Judgment virtually delivered in the presence of:

Mr. Ojuok for Mr. Modi, Learned Counsel for the Appellant.

Mr. Ongeri, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.