

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO E143 OF 2022

JOHN KIRAGU
NJUGUNA.....APPELLANT

VERSUS

NICKSON GLATO SHIKALAI.....
.....RESPONDENT

*(Being an Appeal against the Judgment delivered on 30/9/2022 by
Hon E. Kigen (SRM) in Eldoret CMCC No. 399 of 2019)*

Coram: Before Justice R. Nyakundi
M/s Onyinkwa & Co Advocates
M/s G.K Okara & Co Advocates

JUDGMENT

1. The brief facts of this Appeal are that the Respondent herein who was the Plaintiff at the trial Court filed a Plaint dated 8th May 2019 seeking the following prayers against the Appellant who was the Respondent at the trial Court: special damages of kshs. 17,900/=; General damages; Future medical expenses kshs. 120,000/=; costs of this suit and interest and any other relief that the Honourable Court may deem fit to award.
2. The Plaintiff's case was that on or about 11.3.2019, the Plaintiff was lawfully riding motorcycle registration number KMEC 091Q TVS STAR along Eldoret-Kitale road at Matunda trading centre when the Defendant and or recklessly managed controlled and or drove the said motor vehicle registration number KCE 119A Tata Lorry causing it to lose control and hit the Plaintiff thereby occasioning him severe injuries loss and damage. It was the Plaintiff's pleadings that he sustained the following injuries: - cut wound on the upper lip, bruises on the left cheek, traumatic avulsion of four teeth due to blunt trauma, blunt injury to the chest, blunt injury to

the left shoulder, blunt injury to the right knee and blunt injury to the lower limbs.

3. The Defendant who is the Appellant herein entered appearance and filed an Amended Statement of Defence dated 22nd February 2021 and denied the claims by the Respondent. He averred that the said accident was wholly caused by and/or substantially contributed to by the Plaintiff, rider and/or owner of motorcycle registration number KMEC 091Q for negligent manner in which he rode, controlled and/or managed the said motorcycle thus causing the accident. He thus prayed that the Plaintiff's suit against him be dismissed with costs.
4. The matter proceeded for a full trial and judgment was entered and delivered on 30th September 2022 in favour of the Plaintiff as against the Defendant as follows: -

a. General damages.....	400,000/=
b. Special damages.....	14,000/=
c. Costs of future medical expense.....	120,00/=
GRAND TOTAL.....	534,000/=

5. The Appellant being dissatisfied by the aforesaid judgment appealed to this Honourable Court on both liability and quantum vide a Memorandum of Appeal dated 8th day of October 2022 on the following grounds: -
 - a. *That the Learned Trial Magistrate erred in law and fact in finding and/or holding the appellant 100% liable in view of the evidence on record.*
 - b. *That the Learned Trial Magistrate erred in law and fact in failing to analyze the facts and make a finding on the facts in making a determination on the issue of liability thereby arriving at an erroneous decision.*
 - c. *That the Learned Trial Magistrate erred in law and fact in failing to apportion liability upon the respondent despite the fact that the respondent did not prove his case on a balance of probabilities.*

- d. *That the Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's submissions on both liability and quantum thereby arriving at erroneous decision.*
 - e. *That the Learned Trial Magistrate erred in law and fact by failing to take into account the evidence on record hence arriving at erroneous decision.*
 - f. *That the Learned Trial Magistrate erred in law and fact in adopting the wrong principles in the assessment of damages awardable and/or payable to the Respondent.*
 - g. *That the Learned Trial Magistrate erred in law and fact in awarding general damages of kshs. 400,000/= which were manifestly excessive in the circumstances.*
 - h. *That the Learned Trial Magistrate erred in law and fact in awardable future medical expenses of kshs. 120,000/= despite the evidence adduced in Court.*
6. The Appellant sought for the following prayers from the aforesaid Memorandum of Appeal: -
- a. *That this Appeal be allowed*
 - b. *That the Subordinate court's judgement on liability and quantum be set aside and substituted with an order dismissing the respondent's case.*
 - c. *That without prejudice to (b) and (c) the trial court's judgement on quantum be revised and the same be reduced.*
 - d. *That the Honourable Court be pleased to dismiss the award for future medical expenses.*
 - e. *Costs of this appeal be awarded to the Appellant.*
7. The Appeal was canvassed by way of written submissions.

Appellant's Submissions Summary

8. The Appellant filed his written submissions dated 3rd July 2023 through the Learned Counsel. The learned counsel for the Appellant submitted that

the appeal arises from the judgment of the trial court delivered on 30th September 2022 in Eldoret CMCC No. 399 of 2019, where the trial magistrate found the Appellant 100% liable for a road traffic accident and awarded the Respondent damages totaling Kshs. 534,000 together with costs and interest.

9. Counsel began by submitting that this being a first appeal, the Court is obligated to reconsider and re-evaluate the evidence on record and draw its own independent conclusions, even though it did not have the benefit of seeing or hearing the witnesses testify. In support of this principle, counsel relied on ***Gitobu Imanyara & 2 Others Vs Attorney General (2016) eKLR.***
10. Counsel then addressed the **issue of liability**. It was submitted that the learned trial magistrate erred both in law and fact by holding the Appellant 100% liable for the accident. According to counsel, the evidence presented before the trial court did not justify such a finding. The Respondent testified that he was riding his motorcycle behind the Appellant's motor vehicle and that both were travelling in the same direction. The investigating officer also confirmed that the motorcycle struck the Appellant's motor vehicle from behind. Similarly, the Appellant's witness testified that while driving in his lawful lane he heard a loud bang at the rear of the vehicle and discovered that the Respondent's motorcycle had collided with it. Counsel further pointed out that the Respondent admitted during cross-examination that he was not a licensed rider.
11. It was therefore argued that the evidence on record suggested that the accident was caused by the Respondent who rammed into the Appellant's vehicle from behind. Counsel contended that despite the existence of conflicting testimonies regarding how the accident occurred, the trial magistrate failed to properly analyze the evidence or explain why the Appellant was found wholly liable. Instead, the magistrate merely outlined

the parties' testimonies and concluded that the Respondent had proved his case on a balance of probabilities without giving reasons. According to counsel, this failure to analyze the evidence rendered the finding on liability erroneous. Reliance was placed on the decision in ***Mkube Vs Nyamuro (1983) KLR***, where it was held that an appellate court may interfere with a trial court's findings of fact where they are based on no evidence, a misapprehension of the evidence, or where the trial court applied the wrong principles.

12. Without prejudice to the foregoing arguments **on liability**, counsel further submitted that the award of Kshs. 400,000 as general damages were excessive in light of the injuries sustained by the Respondent. Counsel noted that the injuries pleaded and proved consisted mainly of soft tissue injuries and the loss of one tooth, with the medical report assessing permanent disability at only 2%. In counsel's view, the award made by the trial court was not commensurate with the nature and severity of the injuries.
13. Counsel emphasized the principle that comparable injuries should attract comparable awards, as recognized in ***Arrow Car Ltd Vs Elijah Shamalla Bimomo & 2 Others (2004) eKLR***. To illustrate this point, counsel relied on comparable authorities including ***Moses Maina Mutaru Vs Stephen Kamau Gitau (2019) eKLR***, where an award of Kshs. 300,000 was reduced to Kshs. 200,000 for soft tissue injuries and loss of teeth, and ***Justine Nyamweya Ochoki & Another Vs Prudence Annamwamba (2020) eKLR***, where an award of Kshs. 650,000 was reduced to Kshs. 300,000 for similar injuries. Counsel therefore submitted that a reasonable award in the present case would range between Kshs. 200,000 and Kshs. 300,000.
14. Lastly, counsel challenged the award of Kshs. 120,000 for future medical expenses. It was submitted that the Respondent did not plead future medical expenses in the plaint. Counsel argued that such a claim

constitutes special damages which must be specifically pleaded and proved before a court can grant it. In support of this proposition, reliance was placed on ***Tracom Limited & Another Vs Hassan Mohamed Adan (2009) eKLR, Kenya Bus Services Ltd Vs Gituma (2004) 1 EA 91*** and ***Jackson Wanyoike Vs Kenya Bus Services Ltd & Another, Nairobi HCCC No.297 of 2002***. Counsel therefore urged the Court to set aside the award for future medical expenses as it was made without a proper legal basis.

15. It was the Learned counsel's final submission and conclusion that the Respondent failed to prove his case on a balance of probabilities and the trial court erred in holding the Appellant 100% liable; that the award of Kshs. 400,000 as general damages were excessive in view of the injuries sustained; that an appropriate award would have ranged between Kshs. 200,000 and Kshs. 300,000; that the award of Kshs. 120,000 for future medical expenses was erroneous since the claim was not pleaded and that the appeal should therefore be allowed, the award for future medical expenses set aside and costs of the appeal awarded to the Appellant.

Respondent's Submissions Summary

16. The Respondent filed his written submissions dated 6th July 2023 through the Learned Counsel Mr. Okara. Learned counsel for the Respondent submitted that the Respondent had instituted a suit before the Chief Magistrate's Court at Eldoret being Eldoret CMCC No. 399 of 2019 following a road traffic accident that occurred on 11th March 2019. The trial court entered judgment in favour of the Respondent, which prompted the Appellant to lodge the present appeal through a Memorandum of Appeal dated 8 October 2022 containing eight grounds challenging both liability and quantum.

17. At the outset, counsel raised two preliminary concerns. First, counsel submitted that the Respondent was not served with a notice to attend the

pre-trial conference in the appeal and only became aware of the judgment date on 4th July 2023, following which counsel wrote to the Deputy Registrar on 5th July 2023. Second, counsel pointed out that the Appellant had failed to comply with the conditions for stay of execution imposed by the subordinate court, which had ordered that half of the decretal sum together with costs be paid to the Respondent and the remaining half be deposited in a joint interest earning account in the names of the parties' advocates.

18. Counsel further submitted that this being a first appeal, the Court is required to re-evaluate, re-analyze and reconsider the evidence on record and arrive at its own independent conclusions while bearing in mind that it did not see or hear the witnesses testify. In support of this principle, counsel relied on ***Jackson Kaio Kivuva Vs Penina Wanjiru Muchene (2019) eKLR, Gitobu Imanyara & 2 Others Vs Attorney General (2016) eKLR, Peters Vs Sunday Post Ltd (1958) EA 424*** and ***Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.***
19. **On the issue of liability**, counsel submitted that the trial court correctly found the Appellant 100% liable for the accident. Counsel argued that the Respondent called the investigating police officer as PW1, who testified that the motor vehicle registration number KCE 119A was to blame for the accident. According to the evidence, the driver of the said motor vehicle suddenly turned from the left side of the road to the right onto a feeder road leading to a hospital without indicating. At the same time, the Respondent, who was riding a motorcycle behind the motor vehicle, was also turning into the same road to pick a patient from the hospital. Due to the driver's failure to indicate the turn, the Respondent collided with the motor vehicle.
20. Counsel further pointed out that the Appellant's witness admitted that there was indeed a hospital on the right side of the road at the location of

the accident, thereby corroborating the Respondent's account. Counsel therefore maintained that the accident occurred because the driver of the motor vehicle moved into the path of the motorcycle without proper indication. Reliance was placed on ***Nester Shikuri Vs Ibrahim Okwiri Matanji (2020) eKLR***, where the High Court held that a driver who turns into the path of a motorcycle without due care is responsible for the resulting collision. Counsel also argued that the Appellant's driver failed to produce a valid driving licence before the trial court, which could reasonably imply that he was not duly licensed to drive. Counsel submitted that such failure is indicative of negligence and relied on ***AI Kamar Trading Company Limited Vs Harrison Otina (2015) eKLR***, where the court emphasized that a genuine driver must possess a valid driving licence.

21. Additionally, counsel submitted that the Appellant failed to produce an inspection report for the motor vehicle to demonstrate the alleged point of impact or to prove that the motor vehicle was roadworthy. In the absence of such evidence, counsel urged the Court to uphold the trial court's finding that the Appellant was wholly liable for the accident.
22. Turning to the **issue of quantum**, counsel submitted that the Respondent sustained several injuries including a cut wound on the upper lip, bruises on the left cheek, traumatic avulsion of teeth due to blunt trauma, blunt injuries to the chest, shoulder, knee and lower limbs. Counsel argued that the award of general damages made by the trial court was reasonable and not excessive considering the nature of the injuries sustained.
23. Counsel emphasized that the assessment of damages is a matter within the discretion of the trial court and that an appellate court should only interfere with such an award where it is shown that the court acted on wrong principles or that the award is manifestly excessive or too low. In support of this proposition, reliance was placed on *Jeremiah & Brothers*

Contractor & Another Vs Francis Egusangu Kaguli (2020) eKLR, Simon Taveta Vs Mercy Mutitu (2014) eKLR, Charles Oriwo Odeyo Vs Apollo Justus Andabwa & Another (2017) eKLR, Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR and Loise Wanjiku Kagunda Vs Julius Gachau Mwangi (CA 142/2003).

24. Counsel further submitted that comparable authorities support the award made by the trial court. In ***Catherine Wanjiru Kingori & 3 Others Vs Gibson Theuri Gichubi (2005) eKLR***, the court awarded Kshs. 350,000 for multiple soft tissue injuries, while in ***Vincent Cheruiyot Rono Vs Mombasa Maize Millers*** an award of Kshs. 400,000 was granted for soft tissue injuries. Counsel also relied on ***Easy Coach Limited Vs Emily Nyangasi (2017) eKLR***, where the High Court upheld an award of Kshs. 700,000 for comparable injuries. Counsel therefore argued that the award made by the trial court was neither excessive nor unreasonable.
25. With respect to the award of future medical expenses, counsel submitted that the Appellant did not effectively challenge the medical evidence produced by the Respondent. The medical report was produced by consent and the Appellant did not request a second medical examination nor call any medical expert to dispute the Respondent's claim. Counsel relied on ***Onesmus Kimathi Kibiti Vs Leneck Gitan Njoka (2017) eKLR***, where the court held that where medical evidence on future medical expenses is not controverted, the court is entitled to rely on it.
26. In conclusion, learned counsel for the Respondent urged the Court to find that the trial magistrate properly evaluated the evidence and correctly held the Appellant fully liable for the accident. Counsel further submitted that the award of damages was reasonable and within the discretion of the trial court. The Court was therefore urged to dismiss the appeal with costs to the Respondent.
27. **The historical litigation of the claim was based on a plaint dated 8.5.2019 in which it was alleged :**

ON or about 11 March 2019, the Plaintiff was lawfully riding Motor Cycle Registration Number KMEC 091Q Tvs Star along Kitale - Eldoret Road at Matunda Trading Centre when the Defendant himself, his driver, servant and or agent so carelessly, negligently and or recklessly managed, controlled and or drove the said Motor Vehicle Registration Number KCE 119A Tata Lorry causing it to lose control and hit the Plaintiff thereby occasioning him severe injuries, loss and damage.

PARTICULARS OF CARELESSNESS, NEGLIGENCE AND OR RECKLESSNESS ON THE PART OF THE DEFENDANT, HIS DRIVER, SERVANT AND OR AGENT.

(a) Driving /Permitting the said Motor Vehicle to be driven at a speed that was excessive in the circumstances.

(b) Failing to stop, swerve and or control the said Motor Vehicle so as to avoid the accident. Failing to warn other road users especially the Plaintiff of its presence on the road.

(c) Failing to obey traffic rules, signs and regulations.

(d) Failing to notice the presence of the Plaintiff on the said road.

(e) Failing to drive the said Motor Vehicle with due care and attention.

(f) Driving/Permitting the said Motor Vehicle to be driven without due care and attention for the safety of other road users especially the Plaintiff.

(g) Driving /Permitting the Motor Vehicle to be driven on the wrong side of the road.

(h) Being generally careless and negligent.

28. The defendant to that court in answer to the claim filed the statement of defense dated 21.11.2019 in which he averred as follows:-

The Defendant avers that the said accident was wholly caused by and/or substantially contributed to by the plaintiff , and /or owned of motorcycle registration number KMEC 091 Q for negligent manner in which he rode, controlled and/or managed the said motorcycle thus causing the accident
PARTICULARS OF NEGLIGENCE OF THE PLAINTIFF. RIDER AND/OR OWNER OF MOTOR CYCLE REGISTRATION NO. KMEC 091 Q

- (a) Allowing a defective motorcycle to be used on the road.*
- (b) Failing to notice the presence of motor vehicle registration number KCE 119 A.*
- (c) Failing to give way to motor vehicle registration number KCE 119 A.*
- (d) Riding an uninsured motorcycle.*
- (e) Riding a motor cycle without a license.*
- (f) Riding on the wrong side of the road. Riding at an excessive speed in the circumstances.*
- (h) Riding recklessly and without due regard for his own safety. Driving without due care and attention to other road users. Failing to heed to the hooting/warning signs from motor vehicle registration number KCE 119 A.*
- (k) Riding along the road while under the influence of alcohol.*
- (1) Intentionally causing the accident.*
- (m) Failing to swerve, brake, slowdown or act in any other way to avoid the accident.*
- (n) Failing to abide by the Highway Code and the Traffic Act.*

6. The Defendant avers that the said accident was not caused by any negligence on his part.

The Defendant has no knowledge and makes no admission to the particulars of injuries and special damages as set out in paragraph 5 of the plaint and invites the plaintiff to strict proof thereof.

The Defendant avers that demand and notice of intention to sue have not been given.

9. The jurisdiction of this Honourable Court is admitted.

29. These pleadings formed the basic structure of the trial before the Magistrate's court. A casual observation of the plaint and the statement of defense gives a very clear impression that both liability and quantum formed the legal battle ground between the Plaintiff then and the Defendant. In so far as this appeal is concerned, it has been filed by John

Kiragwa Njuguna who was the Defendant before the Lower Court whereas Nixion Shikali was the Plaintiff. This historical factual matrix of the claim provides the bedrock upon which an interrogation of this appeal can be subsumed as a appeal before this court is a kind of re-hearing save only that the advantage of observing the demeanor of the witnesses is not applicable.

Decision Dimensional Perspectives both factual and Legal Scope

30. I have taken the liberty to conceive and appreciate the memorandum of appeal as premised by the Appellant and respective submissions for and against the appeal. In entering this realm of jurisdiction, the four corners of it can be appreciated from the principles laid down in the case of **Mbogo and Another v Sha (1968)EA** *“that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”* 93 the court stated”

The court further in Kenya Horticultural Exporters Ltd v Julius **Munguti Maweu 2010 (CAK)** the court stated as follows: *“ On a first appeal the court has the duty of re-evaluating the evidence, assess it and make its own conclusion without overlooking the conclusions of the trial court and bearing in mind that unlike the trial court it neither saw nor heard the witnesses”*

31 This cause of action as pleaded by the Respondent then as against the Appellant and the trial court the Defendant involved traversing every statement on negligence as stated for the very purpose of holding the defendant now the Appellant guilty of negligence under the Civil Law. It is on record that the Respondent and earlier on the Plaintiff before

the earlier court placed reliance in his own testimony and that of the investigating officer. According to PW1 Police Constable Ian Livu of Matunda Police Station attached to Traffic Duties to the best of his recollection he told the court that on 11.3.2019 at about 12.30 hrs along Kitale Eldoret road, a lorry registration No. KCE 119A heading towards Eldoret direction and in the cause of it at the scene of the said accident he tried to park the vehicle on the right side of the road. Unfortunately, the motorcycle rider who was on the process of picking a patient hit the front side of the lorry occasioning personal injuries which became a subject of the trial. It happened that PW1 was the investigating officer who visited the scene and on gathering the evidence and circumstances of the accident he opined as he told the court that the driver of the vehicle was the one to blame as the vehicles are not parked on that side of the road and therefore the motorcycle rider could not have expected such a collision to occur.

31. On the other hand the plaintiff and claimant before that other court now Respondent told the court that on the material day he was heading to an hospital to pick a patient and suddenly a vehicle came driving to his lane abruptly. It so happened that there was a collision in which he suffered multiple injuries which were treated at Matunda Maternity Home and later referred to Moi Teaching and Referral Hospital. He was later to secure a medical legal report from Dr sokobe which was produced before the trial court as an exhibit in support of his claim.
32. This evidence was challenged by the Defendant witness by the name Paul Njoroge who on his part said he was heading the same direction with the motor cycle rider and apparently in the cause of driving there was a collision.
33. This case as a whole must be tested within the guidelines of the legislative scheme of the Evidence Act commonly known and referred to as Section 107, 108, & 109 of the Evidence Act. First and foremost

Section 107 of the Evidence Act. Section 107 (1) of the Evidence Act Provides that: *“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.*

Section 108: The burden of proof in a suit or proceeding lies on that person who would fail if o evidence at all were given on either side.

Section 109: The burden of proof as to any particulars 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 the fact shall lies on any particular person. Section 112 In Civil Proceedings, when any fact is especially with the knowledge of any party to those proceedings, the burden of proving or disapproving he fact in upon him

34. These provisions have been held in the case of **Nyakwama -vs Cleophas Bwana Ongaro (2015) eKLR** it was held that: *“ That as a general proposition the legal burden of proof lies upon the party who invokes the said of the law That is the purport of Section 107 of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side*

35. The first point of call in this appeal, is whether the learned trial magistrate was right in apportioning liability at 100%. From the onset both the Appellant and the Respondent took a diverse position as to the nature and proximate cause of the accident. The two drivers seem to blame each other however the evidence as presented by the Plaintiff now the Respondent in this appeal, was believed by the learned trial magistrate who had the advantage of examining the demeanor, convincingness, and

truthfulness of the evidence as demonstrated by the investigating officer and the plaintiff claimant himself. The person who has been sued vicariously is the driver of the offending motor vehicle. Would he have a reason to make attempt to convince the court that he was no on the wrong to me the answer is in the affirmative. In a road traffic accident the tort of negligence once proven on a balance of probabilities attracts monetary compensation to the victim.

36. There is every reason the wrong doer to give a different version of the accident. In this appeal the memorandum of appeal is classified into many grounds being an attempt to demonstrate to this appeals court that the learned arial magistrate did not analyze, evaluate and assess the evidential material in a manner which could have allowed him arrive at a different verdict. I must say from the onset that the evidence by the Plaintiff responded to this appeal is classified as direct evidence, He as at the scene of the accident. The accident happened in a broad day light when one could visualize the entire surrounding of the environment and scene of the accident. In the statement by the witness summoned by the Appellant who also happened to be the driver of the offending motor vehicle he alleged that they were on the same lane and he was ahead of a motorcycle rider who is the Respondent. The question which remained unanswered is what the investigating officer whom I refer as an independent witness which essentially corroborates the testimony of PW2.
37. The offending motor vehicle was under the control and management of the driver who testified as the star witness for the Appellant at the trial in the court below. The explanation he gave to the trial court is not capable of being aligned with investigation conducted by PW1 who also happened to be a Police Officer to be the first responder to the scene, securing it, recording witness statement from the members of the public around, and finally made an opinion and recommendations that the driver to the subject motor vehicle was the one to blame for the accident.

38. From my appreciation of the evidence from PW1 & PW2 on the part of the Plaintiff/Respondent to this appeal although the learned magistrate did not use this doctrine commonly referred to as *res ipsa loquitur* in my considered view besides those other findings made before the lower court, it is probable that the evidence available points to this aspect of negligence. This is what the court said in **Scott v London and St Katherine Docks Co (1861-73) ALL E R Rep 246** observed: *"There must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant, or his servant, and the accident is such, as in the ordinary course of things, does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."*
39. In **Barkway V South Wales Transport Co. Ltd (1950) 1 all er 390**. Lord Porter in referring to Earle C.J's statement of the principles said at page 394
- "The doctrine is dependent on the absence of explanation, and although it is the duty of the defendants, if they desire to protect themselves, to give adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."*
40. The natural inference which manifest itself as what happened on this material day on the accident which took place one has to read in and read out the evidence of the investigating Officer PW1 and the Plaintiff/Respondent to this appeal. The motor vehicle in question driven by the driver (DW1) is stated to have left the roadway on a good service in good lighting condition to have it packed on the side of the road against the traffic rules for all other road users including the Appellant/Defendant Agent, or Servant and or driver on the material day. In this case there is

no cogent and credible evidence as to why the driver of the offending motor vehicle drove on the other wrong side of the lane and in doing so without notice to the Plaintiff/Respondent a collision occurred. In my considered view the driver was therefore negligent. It is of this negligence that the res speaks. This inference was never displaced by the evidence accepted by the learned trial magistrate hearing the issue on liability in which he established that the driver was negligent one hundred percent with no contributory negligence on the part of the Plaintiff/Respondent to this appeal.

41. The question which came to my mind is that how else can a different finding be made when a motorist who drives a motor vehicle off the road and crushing into another vessel herein the motor cycle rider at the side of the road would that without more be guilty of a duty of care and accordingly negligent. To me the answer to this instant appeal I concur with the learned trial magistrate. The investigating officer brought in expert evidence to assist the court on matters within the area of his specific expertise and competence and in that context to tender for acceptance in evidence his opinion based on actual situations examined by him or based on facts from the evidence of others given in court. The Appellant/Defendant at the trial court failed before the court below and on appeal to convince me that the learned magistrate erred in the findings he made on liability.
42. I am guided by the dictum in the privy counsel decision **Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another PC Appeal No 1/1988** in which the court observed that "*The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must*

*have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred... the So in an appropriate case, the plaintiff establishes a prima facie case by relying upon fact of the accident. If the defendant adduces no evidence there is, nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case... it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proven and on the inference he is prepared to draw he is satisfied that negligence has been established. (See also the principles from our very own Superior courts: Christine Kalama vs **Jane Wanja Njeru & another (2021) eKLR PLC V Dickman (1990) 1 ALL ER 568 and Chun Pui v Lee Cheuen Tal (1988) RTR 298.***

43. In essence the allegations of negligence were clearly set out by the Plaintiff/Respondent in the Plaint in the following language as alluded to clause 27 of this Judgement. This accident can only be deemed and stated to have been caused by some form of recklessness such as blindly moving from the main lane along Kitale -Eldoret road and upon reaching the allocation of the accident the driver made an attempt to park on the other side of the road and in the process collided with the motor cycle rider the Plaintiff/Appellant in this matter. A driver on the main road is not entitled to assume that a driver on the minor road or off the road will comply with traffic signs . If the danger the possibility of the danger emerging from this breach of duty of care then the one to take extra-

precaution is the one driving off the main road like the suggestive evidence indicates in this appeal. Placed where it was in the condition that it was and the man of driving placed white wash that it was being driven the lorry constituted a really threat and the users of the road who included the Plaintiff/Respondent. The errors of fact and law being alluded to by the Appellant in the Memorandum of Appeal have no force of law.

44. Generally speaking therefore in the circumstance of this accident as reflective of the evidence it was foreseeable that if the Appellant's driver did not exercise due care the Plaintiff Respondent was going to be injured. It is never disputed that a driver of a vehicle on road is under duty to take proper care not to cause damage to other road users may it be other drivers, passengers, cyclist, pedestrians or to property of others. This accident was avoidable if the offending motor vehicle could have kept a proper look out, observe traffic rules and signals including driving out of the road to park a vehicle in a prohibited area. I therefore sustain the appeal on liability and dismiss the prayer by the Appellant to interfere with it.
45. The next battleground in this appeal was on damages awarded as compensation arising out of the assessment of injuries suffered by the Plaintiff/Respondent. Likewise on this limb the law is kind of settled. It is based on judicial discretion which is galvanized with evidential material which may be oral or documentary. The Court of Appeal has spoken profoundly in the case of **Arrow Car Ltd vs Elijah Shamala Bimomo & 20 others (2004) eKLR** where it was held thus *"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 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...." similarly the court in **Sophinaf Company Limited and another v Daniel Nganga Kanyi civil appeal number 315 of 2001** made the following observations “ *The assessment of damages is a difficult task and the court is required to give reasonable award which is neither extravagant nor oppressive and while the Judge is guided by such factors as the previous awards for similar injuries and an exercise of discretion by the trial Judge and will invariably depend on the principles developed by the Courts, ultimately, what is reasonable award is peculiar facts of each case.*

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 in disturbing the quantum of damages awarded by a trial Judge were an irrelevant factor, or left out of account a relevant one, or that; short of this, satisfied that either that the Judge, in assessing the damages, took into account the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage. **See Kemfro Africa Limited t/a Meru Express Service, Gathongo Kanini v AM Lubia and Olive Lubia [1987] KLR 27 [1982-88] 1 KAR 727**

46. The decisions from the Kenya Courts more so the High Court personal injury damages are assessed best on proof of negligence, the extent of the injury and specific evidence of financial loss. Courts also typically distinguish between special damages being the precise expenses incurred after the injury and also general damages being compensation for pain, suffering and permanent incapacity. In so far as strict proof of damage is concerned which include inter-alia, medical expenses, loss of income etc must be specifically pleaded and strictly proven. This is

contradistinguished with general damages which are assessed based on what is fair and reasonable compensation.

47. In the instant appeal it is alleged that the Plaintiff/Respondent suffered personal injuries which included the following:

(a) *Cut wound on the upper lip*

(b) *Bruises on the left cheek*

(c) *Traumatic avulsion of one tooth with loose three lower incisors due to blunt trauma*

(d) *Blunt injury to the chest*

(e) *Blunt injury to the left shoulder*

(f) *Blunt injury for the right knee*

(g) *Blunt injury to the right knee*

(h) *Blunt injury to the lower limb*

48. The Kenyan law principles in the award of damages has been to restore the injured person to the position in which he or she would have been no injury occurred during the accident. The jurisprudence of damages in our legal system has since now been domesticated from the one of common law in both personal injuries and under the fatal accident claims. The assessment is never an abstract justice in exercise of judicial discretion of the magistrate or the Judge tasked with the mandate of weighing various factors and with that balancing act arrive at a fair, equitable, and proportionate compensation for the injuries suffered or to the estate of the deceased. In arriving at what may be considered the justice of the case in assessment of general damages it is expected that Judges and Magistrate have to apply their knowledge and experience gained over time in practicing their profession in this branch of law. However in the work of Judging and as one of them who has been in this space for over three decades I am always ordained by the very key words of Lord Denning in the case of **Chandler v Grane, Christmas and Co(1951)2B 164** that Judges can be classified as *timorous souls and bold spirits*. It is

worthy noting that in exercising their respective judicial discretion notwithstanding guidance from past awards there would always be some form of disparity and inconsistency in assessment of damages in the same set of facts. In my view by and large the principles which guide courts in Kenya are not far apart from the guidelines set out in the persuasive case of **Samson Edigbonya v Dumez (1986) 3 NWLR PT 31** in which the court held: *“It seems to have been established by judicial authority that in personal injury cases, two main factors have to be taken into consideration, in assessing damages in cases of liability. These are; (a) the financial loss resulting from the injury; (b) the personal injury involving not only pain and suffering, but also the loss of the pleasure of life. Perhaps one of the most difficult exercises in assessing damages is the quantification of the loss whether financial or personal. The court proceeds with the underlying assumption that damages are compensation for injury sustained and are not meant to be punitive. They are meant to be full and adequate. It must be recognized and conceded that the fullness and the adequacy of damages awarded as compensation will in each case depend on proved solid facts of the case and a just and fair easement of the effect of the injury complained of. Damages are assessed as a lump sum and once for all not only in respect of loss accrued before the trial but also in respect of prospective loss”*

49. In the English case in **Wise V Kaye (2003) and Conway V George Wimpy & Co. (1950) 2 ALL ER 331** it was remarked on matters of assessment of damages for pain and suffering as they get adjudicated before the trial courts. *'It has always been accepted that physical injury and personal experience of pain, and also of suffering, including worry and anxiety for the future and apprehension of an operation, or of nursing or deprivation of activity owing to disablement or embarrassment or limitation felt by reason of disfigurement, cannot in any true sense be measured in money... Damages for such injuries, originally almost*

invariably assessed by juries were said to be at large, and had to be assessed on a reasonable and fair basis between party and party. There can be no restitution for loss of a limb or loss of a faculty but the law requires adequate compensation to be assessed”

50. What is the end game here? There is no compelling new evidence in which to shift the burden of proof to the Respondent and further in so far as assessment of damage is concerned, the measure of it is within the guiding principles as required in the heads of pain and suffering, loss of amenities and the general disabilities unexpectedly suffered by the victim of this accident. These are hard matters to subject them precisely to the dollar for a dollar, shillings for the coins, for to me it is difficult to measure with precision the pain the Appellant must have gone through during the period of hospitalization and subsequent recovery. Therefore, for the Appellant to say that 400,000 assessments of general damages by the learned trial magistrate is punitive and on the higher side is missing the point on the factors underlying compensation in this branch of law. I am not convinced that the Memorandum of Appeal has been supported with credible and cogent evidence to interfere with the decision of the trial Magistrates to vary and set aside the quantum in this appeal. As a consequence of this, this appeal is dismissed on both liability and quantum with costs to the Respondent. Orders accordingly

DATED, SIGNED AND DELIVERED VIA CTS AND EMAIL THIS 16TH MARCH, 2026

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R. NYAKUNDI
JUDGE