REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. E019 OF 2025

JOHN OKELLO OGUTU……………………………………**APPELLANT**

-VERSUS-

JOHN ONYANGO OMAMBO…………………………… **RESPONDENT**

(Being an appeal from the judgment/decree of the Honourable T K. Nambisia (R.M) delivered on the 10/9/2024 in Ukwala CMCC E080 of 2023)

BETWEEN

JOHN ONYANGO OMAMBO………………………… **PLAINTIFF**

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VERSUS

DAVID MOSETI KENYAKANGA...............1ST DEFENDANT

JOHN ONYANGO OMAMBO…………………2ND DEFENDANT

JUDGMENT

1. The appeal arises from the judgment of Honourable T.K. Nambisia (RM) dated 10/9/2024 in Ukwala PMCC No. E080/2023 wherein she attributed liability at 100% against the Appellant jointly and severally with the 1st Defendant as well as awarding general damages of Ksh700,000/=, special damages of Kshs4,300/= with interest at court rates\ as well as costs of the suit.

2. The Appellant was aggrieved and filed his Memorandum of Appeal dated 3rd March 2025, wherein he raised the following grounds of appeal:

   i. **THAT** the learned trial Magistrate erred in fact and in law by apportioning 100% liability to the Appellant (Defendant) despite the Respondent not proving negligence on the part of the

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Appellant.

ii. **THAT** the learned trial Magistrate erred in fact and in law in failing to consider the Appellant's submissions on liability by completely disregarding the submissions and authorities of the Appellant and as a result arrived at an unjustified decision on liability.

iii. **THAT** the learned trial Magistrate erred in fact and in Law by awarding Kshs. 700,000/= for general damages an award which was excessive and an erroneous estimate of the damages awardable compared to the injuries sustained by the Respondent (Plaintiff).

iv. **THAT** the learned trial Magistrate erred in fact and Law in failing to consider the Appellants' submissions on quantum by completely disregarding the submissions and authorities of the Appellant and as a result arrived in unjustified decision on quantum.

v. **THAT** the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

The Appellant therefore prays that the appeal be allowed and the decree be set aside, and this court re-assess the evidence

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on record on liability, quantum, and to arrive at its decision. That the costs of the appeal be awarded to the Appellant.

3. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own decision as to whether or not to uphold the decision of the trial court. The court will also take into account the fact that it neither saw nor heard the witnesses testifying and to give due allowance for that. See **Selle Vs Associated Motor Boat Co. Ltd [1968] EA 123** where it was held as follows:

> **''The court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.**
>
> **In particular the court is not bound necessarily to follow the trial judge's finding of fact if it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.''**

3. The lower court record indicates that the Respondent had

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sued the Appellant and another vide a plaint dated 14/7/2023 as a result of a traffic accident which occurred on the 23/12/2023 along Ukwala- Sega road when the driver or agent of the Defendants motor vehicle registration number KDE 398 D carelessly, recklessly and or negligently controlled the same and lost control thereof and which hit the Respondent who was then a pedal cyclist and who sustained injuries thereby.

4. The Appellant and the 1st Defendant entered appearance and filed a joint statement of defence dated 24/7/2013 in which they denied that an accident did occur as alleged in the manner disclosed in the plaint and attributed the cause of the accident to the Respondent's negligence.

5. The matter proceeded for hearing on 16/4/2024 as follows:

7**.** **John Onyango Omambo (PW1**) adopted his witness statement dated 14/7/2023 as his evidence in chief. That he produced certain documents as exhibits and which comprised; demand letter, copy of the Plaintiff's ID card while he identified the treatment notes from Sega Mission Hospital and Siaya County Referral Hospital , P3 form, police abstract. That he also produced a copy of motor vehicle search record together with the receipt.

On cross-examination, he stated inter alia; that the accident took place on 23/12/2022; that he was heading home from

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work when the accident took place; that the accident took place at 7.00 AM as he headed towards Mama Liz supermarket; that he did not see the vehicle which hit him; that he lost consciousness and only regained consciousness in hospital; that he was first treated at Sega before being taken to Siaya; that he broke his right leg; that he now walks with the help of crutches; that no plate was placed in his leg and that the last time he went to hospital was in December 2023.

On re-examination, he stated that the vehicle had hit him from behind.

8. Parties later agreed by consent to produce the discharge summary, P3 form, Medical report, police abstract as exhibits, and that the Respondent's case was closed. That an application was later made for striking off the name of the 1st Defendant from the proceedings, thereby leaving the Appellant alone on record. That the Appellant's case was later ordered closed for lack of witnesses.

9. The trial court later considered the case and arrived at the impugned judgment.

10. The appeal was canvassed by way of written submissions. Both parties duly complied.

11. Learned counsel for the Appellant vide submissions dated

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5/2/2026 raised two issues for determination namely, whether the trial magistrate erred in law and in fact in holding that the Respondent had discharged his burden of proof and found the Appellant 100% liable for the accident and whether the trial magistrate erred in law in awarding Kshs. 700,000/= as general damages for pain and suffering.

12. It was submitted that the apportionment of 100% liability against the Appellant was in error in view of the fact that the issue of liability was not properly determined. It was contended that the Respondent did not indicate how the accident happened and that the police abstract produced also indicated that the matter was referred to the insurance company. Hence, as regards the issue of liability, as confirmed by the police abstract, there was no indication as to who was blamed for the accident. That there was equally no evidence on the point of impact and therefore, the learned magistrate fell into error when she failed to appreciate that all the evidence before the court did not point to negligence on the part of the driver of motor vehicle registration number KDE 398D. It was therefore submitted that the learned magistrate erred in law and fact when he held the defendant 100% to blame when the evidence clearly stated otherwise and that the respondent was wholly to blame for the accident.

13. It was further submitted that the trial magistrate failed to consider that the Respondent (plaintiff) failed to advance any evidence as to the negligence acts/omission on the part of the

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Appellant. The mere fact that the accident occurred and the Respondent/Plaintiff was injured does not qualify as proof of negligence against the Appellants and that the same was duly pointed out in the Appellant's/ Defendant's submissions before the trial court.

14. It was thus submitted that the Appellant are entirely blameless. That the Respondent did not establish on a balance of probabilities any negligence upon the Appellant. Again, the witnesses called by the Respondent did not blame the Appellant for the accident. Having failed to prove their case on liability, there was no need for the Appellant to bring evidence contrary to that.

15. Sections 107-109 of the Evidence Act, Cap 80 Laws of Kenya provides that he who alleges must prove. It was contended that this is an adversarial system and it is not enough to throw everything at the court and tell it to scrape through and arrive at a favourable decision. It must be persuaded. The Respondent did not offer much to persuade the court that the Appellants were negligent and hence, the appeal be allowed and the lower court judgment be set aside.

16. As regards the second issue, it was submitted that the Respondent/Plaintiff having failed to prove his case on a balance of probabilities, it is unnecessary for the court to assess damages. However, if the court proceeds to do so, it

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was submitted on general damages as follows; that the assessment of damages in a suit is more of a judicial discretion. The court of Appeal in **Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR** set out the parameters under which an appellate court will interfere with an award in general damages when it held that:-

> ***"An Appellate court will not disturb an award for general damages unless it is 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 low or high…."***

17. It was submitted that when assessing damages, the court ought to determine the appropriate level of compensation bearing in mind that comparable injuries should as far as possible be compensated by comparable awards as the Court of Appeal observed in **Simon Taveta vs Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 (2014) Eklr.** The evaluation is determined by the nature and extent of injuries and comparable awards made in the past. The compensation ought to be reasonable and to a considerable extent conventional. The principles were further summarized by the same court as follows; –

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a. An award of damages is not meant to enrich but to compensate such victim for the injuries sustained.
b. The award should be commensurable with the injuries sustained.
c. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
d. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

The awards should not be inordinately low or high (see **Boniface Waiti & another vs Michael Kariuki Kamau (2007) Eklr**

18. As regards the particulars of injuries as enumerated in paragraph 8 of the Plaint, it is noted that the injuries are commuted fractures distal tibia fibula, deformed right leg distal tibia fibula with mild bruises, tenderness on right lateral chest wall, tender anterior chest wall and cut wound on the right upper limb. The treatment notes produced confirmed the said fracture and that it is clear that the Respondent_only suffered fracture of the distal tibia fibula and soft tissue injuries.

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That the said fracture had re-united and did not have any deformity. It was submitted that an award of Kshs. 350,000/= is reasonable in the circumstance and that this court be persuaded with the court's decision in the cases of **Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor(2020) eklr** where the court awarded Kshs. 400,000/= for similar injuries and **Kimani v Mwangi & 2 others (Civil Appeal E071 of 2023) [2024] KEHC 6744 (KLR) (6 June 2024) (Judgment)** where the court awarded Kshs. 550,000/= for similar injuries with 5% disability.

19. As there was no disability in the case herein, it was submitted that an award of Kshs. 350,000/= is reasonable thus the court should reduce the lower court's award from Kshs, 700,000/=.

20. It was submitted that from the foregoing, it can be seen that the trial court relied on the wrong principles in apportioning liability at 100% against the Appellant. Equally, the award on general damages are manifestly excessive to warrant this court exercising its discretion to interfere with the same. That the appeal herein is merited and that it be allowed with costs.

21. As regards the issue of costs, the Appellant submits that costs follow events. That as the appeal has been allowed, the Appellant be granted costs of the appeal and in the trial

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court.

22. The Respondent's submissions are dated 19/2/2026 wherein learned counsel raised two issues for determination namely; whether the learned magistrate erred in law in finding the Appellant 100% liable and whether the damages awarded by the trial magistrate were manifestly excessive.

23. On the issue of liability, counsel quoted the Halsbury's Laws of England as follows: **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established."**

It was submitted that there is no contest that the accident occurred and that the Respondent sustained injuries as enumerated under paragraph 8 of the Plaint. The evidence adduced in Court by the Respondent herein unequivocally established that he suffered severe injuries

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as a result of the accident that was caused by the Appellant or his agents. The Respondent's witness statement which was adopted by the trial Court as his evidence in Chief, gave a detailed account of how the accident occurred and the injuries sustained thereon. He was particular on which vehicle knocked him from behind as he was cycling, it is therefore not true that there was no indication as to who was to be blamed for the accident. The Respondent also produced documents that is P.Exh 1-7 as per the list of documents filed alongside the Plaint in support of the Appellant being liable for the accident. The Police Abstract P.Exh 5 confirmed that indeed the Appellant's Motor-vehicle was involved in an accident whereupon the Respondent was hit from behind and suffered serious injuries.

The Appellant on the other hand opted not to adduce evidence despite filing a defense denying liability thus, the Respondent's evidence on liability remains uncontroverted. It is an established position that where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved. In ***Interchemie EA***

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Limited v Nakuru Veterinary Centre Limited, it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. A similar position was held in ***Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*** where it was held: - "*it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.*"

24. Further, as regards the issue of liability, reliance was placed in the case of ***Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR)*** where the court stated as follows in regards to the issue of establishing liability where the Appellant chooses not to adduce evidence:

"The appellant's counsel did not adduce evidence in the lower court, but cross-examined the Respondent. The purpose of cross-examination is

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three-fold. First, to elicit evidence in support of the party cross-examining. Second, to cast doubts on, or undermine the witness's evidence to weaken the opponent's case. Three, to undermine the witness's credibility. Fourth, to put the party's case and challenge disputed evidence. However, once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Accordingly, the assault on the argument casting doubts on the findings on liability fails. In every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. In my view, in the instant case, to meet this standard, the appellants were required to do much more in the lower court. By opting not to adduce evidence to rebut the Respondent's evidence, they took the risk of leaving the Respondent's evidence unchallenged."

28. In light of the foregoing, it was submitted that it is true that the Appellant or his agents was in control of the motor vehicle and thus had the duty to prove to the trial

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Court that the accident was not caused as a result of his negligence as posited by the Respondent. That the Appellant however offered no substantive explanation or evidence to rebut the Respondent's assertion that the Appellant was indeed negligent as per the particulars of negligence enumerated under para 6(a-i) of the Plaint. It was urged that this court upholds the trial court decision on liability.

29. On whether damages awarded by the trial magistrate were manifestly excessive, it was submitted that the law on circumstances under which an appellate court would interfere with an award of damages is settled. An appellate court will not interfere with an award of general damages by a trial court unless the trial court acted under a mistake of law, or where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage. Reliance was placed on the following authorities:

Kivati v Coastal Bottlers Ltd where the court of Appeal stated as follows:

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> **"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."**

Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates it was stated as follows:

> **"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."**

30. It was further submitted that an award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into

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account the prevailing economic environment. That the issue of quantum, the Respondent submits that the trial court fully took into account the relevant factors being the pleadings, evidence on record and the submissions by the plaintiff/respondent and awarded the plaintiff's/respondent’s general damages as the plaintiff had proved the injuries pleaded on a balance of probabilities. The Respondent submits that the award was therefore reasonable and sufficient considering the type and extent of injuries the respondent sustained based on comparable awards.

The Respondent suffered the following injuries:

a) Commuted fractures of the distal tibia fibula

b) Deformed right leg distal tibia, fibula with mild bruises

c) Tender anterior chest wall

d) Tenderness on right lateral chest wall

e) Cut wound on the right upper limb

31. In support of his claim to injuries, the respondent (PW1) testified in the trial court that he sustained the above injuries and was treated at Sega Mission Hospital and produced medical documents to that effect. The Appellant herein now alleges that the Respondent’s fracture re-united and had no deformity without any

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medical proof. It was submitted that the best way to challenge medical evidence is to subject the injured person to a second medical examination by a doctor of one's choice and produce the resultant medical report. In the instant case, the appellant failed to do that and the only evidence before the court are the ones produced by the respondent. As a matter of fact, the Appellant did not adduce evidence at all thus the evidence by the Respondent remains uncontroverted. Reliance was placed in the following authorities:

Beatrice Nthenya Sila Vs Ruth Mbithe Kitisia & 3 Others [2014] eKLR

Some of the grounds of appeal were that the medical report was prepared three months after the accident, no initial treatment notes and P3 were produced and that the medical report referred to treatment notes and P3 which were not produced. The court held that the medical report was not challenged by production of a contrary report further each respondent gave evidence and details of the injuries they had suffered following the accident therefore lack of medical evidence is not fatal to the plaintiff's claim in civil proceedings where proof is on a balance of probability.

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32. In quantifying the respondent's injuries, learned counsel reiterated their authorities filed in the trial Court, that is the case of ***Peter Muanda Wanje v Capture Transport Limited & Anor (2020) eKLR*** where the plaintiff had sustained injuries as those sustained by the Plaintiff herein. He was awarded Kshs. 1,800,000 general damages for pain suffering and loss of amenities. Taking into account the injuries of the present respondent and the age of the cited authorities vis a vis the effect of inflation of the value of Kenya Shilling.

Further, counsel reiterated that the award of Kshs 700,000/= awarded by the trial court in general damages is in-fact on the lower side however the respondent chose to live with it.

33. I have considered the record and submissions tendered. I find the issue for determination is whether the appeal has merit.

34. On the issue of liability, section 107 of the Evidence Act provides as follows:

> **1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist**.
>
> **2) When a person is bound to prove the existence of any fact it is said**

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that the burden of proof lies on that person.

The Respondent as the Plaintiff in the suit for damages due to negligence on the part of the Appellant was under obligation to prove the allegations of negligence on a balance of probability. He stated that he was a pedal cyclist on the material date and cycling home from work along Ukwala- Sega road near Sega Girls when the Appellant's vehicle registration number KDE 398D hit him from behind and that he suffered a fracture on the leg in addition to other injuries. That the accident was investigated and was issued with a police abstract which was produced by consent and which indicated that the matter was referred to insurance. The Respondent duly tendered his evidence on how the accident took place. Even though the Respondent was hit from behind, it is quite ingenious for the Appellant to poke holes on such evidence as to how the vehicle had hit him. Of course, the Respondent did not have extra eyes on the back and thus the fact that he was hit from behind by the Appellant who was supposed to have a proper lookout and to slow down and apply brakes before the vehicle came into contact with the Respondent left no doubt that it was the Appellant's driver who was at fault.. The Appellant had the opportunity to controvert the Respondent's evidence but did not tender evidence despite filing a defence denying responsibility. This then leaves the Respondent to back up his case on the

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doctrine of ‘’Res ipsa loquitor’’ which was duly pleaded vide paragraph 10 of the Plaint dated 14/7/2023.

Learned counsel for the Respondent cited Halsbury’s Laws of England regarding the aspect of negligence and causation as well as the need to establish the duty of care in order to justify for compensation in negligence as hereunder:

> **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff, between which the breach of duty, a causal connection must be established."**

It was contended that the trial court failed to note that the police abstract did not indicate the party to blame as there was no visit to the scene and drawing of sketch maps so as to give the true position as to how the accident took place. It was further contended that the apportionment of liability against the Appellant at 100% was unjustified. As noted above, the Appellant had the

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opportunity to challenge the Respondent's evidence but did not do utilize it when he failed to give evidence in rebuttal to that of the Respondent which remained unchallenged. Indeed, there is no contest that the accident occurred and that the Respondent sustained injuries as enumerated under paragraph 8 of the Plaint. The evidence adduced in Court by the Respondent herein unequivocally established that he suffered severe injuries as a result of the accident that was caused by the Appellant or his agents. The Respondent's witness statement which was adopted by the trial Court as his evidence in Chief, gave a detailed account of how the accident occurred and the injuries sustained thereon. He was particular about which vehicle knocked him from behind as he was cycling and hence, it is therefore not true that there was no indication as to who was to be blamed for the accident. The Respondent also produced documents that namely, P.Exh 1-7 as per the list of documents filed alongside the Plaint in support of the claim that the Appellant was liable for the accident. The Police Abstract (P.Exh 5) confirmed that indeed the

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Appellant's Motor-vehicle was involved in an accident whereupon the Respondent was hit from behind and suffered serious injuries. Even though the matter was referred to insurance did not imply that the issue of liability was abandoned. It is noted that Appellant opted not to adduce evidence despite filing a defense denying liability thus the Respondent's evidence on liability remains uncontroverted. It is trite that where a party fails to adduce evidence, his pleadings remain mere allegations and must be deemed as not proved since where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. In the case of ***Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2012] eKLR*** the court held:

> **"It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means**

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that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

Also in the case of ***Mursal & Another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR)*** the court stated as follows in regard to the issue of establishing liability where the Appellant chooses not to adduce evidence:

"The appellant's counsel did not adduce evidence in the lower court, but cross-examined the Respondent. The purpose of cross-examination is three-fold. First, to elicit evidence in support of the party cross-examining. Second, to cast doubts on, or undermine the witness's evidence to weaken the opponent's case. Three, to undermine the witness's credibility. Fourth, to put the party's case and challenge disputed evidence. However, once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Accordingly, the assault on the argument casting doubts on the findings on liability fails. In every legal proceeding, the parties

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are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. In my view, in the instant case, to meet this standard, the appellants were required to do much more in the lower court. By opting not to adduce evidence to rebut the Respondent's evidence, they took the risk of leaving the Respondent's evidence unchallenged."

35. In light of the foregoing, it is apparent that it was the Appellant's vehicle which had hit the Respondent from behind and that at the time the Appellant or his agent was in control of the motor vehicle. It is only natural that the Appellant or his agent to give his side of the story as to how the accident took place from his view point and go ahead to prove to the trial Court that the accident was not caused as a result of his negligence as contended by the Respondent. The Appellant however offered no substantive explanation or evidence to rebut the Respondent's assertion that the Appellant was indeed negligent as per the particulars of negligence enumerated under para 6(a-i) of the Plaint dated

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14/7/2023. It is clear that the Appellant or his driver did not observe the Highway Code of traffic by maintaining a safe distance and controlling the vehicle. Had that been observed, the accident could have been avoided. Looking at the circumstances of the case and evidence presented, iam unable to attribute contributory negligence on the part of the Respondent and to wholly blame the Appellant for the accident. Consequently, iam inclined to agree with the finding of the trial court regarding liability.

36. As regards the issue of the award of damages by the trial court, it is noted that the Appellant has contended that the same is inordinately high and excessive as the Respondent sustained minor injuries and hence the same should be whittled down to about Kshs 350,000/. On the other hand, the Respondent maintains that the sums awarded were not inordinately high and ought to be sustained. Indeed, the law on circumstances under which an appellate court would interfere with an award of damages is settled, namely, that an appellate court will not interfere with an award of general damages by a trial court unless the trial court acted under a mistake of law, or where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate

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court does not interfere; and, where the amount awarded is either inordinately low or inordinately high that it must have been an erroneous estimate of the damage. The following authorities stress this point succinctly:

Bashir Ahmed Butt Vs Uwais Ahmed Khan [1982-88]KAR it was held:

‘An Appellate court will not disturb an award for general damages unless it is 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 low or high….’

Also, in **Kivati v Coastal Bottlers Ltd Civil Appeal No. 69 of 1964** where the court of Appeal stated as follows:

"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

Also, in **Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates [2013] KECA 251 (KLR)** it was stated as follows:

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"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."

37. As noted from the foregoing authorities, an award of damages is an exercise of discretion of the trial court but that the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous estimate. The award must also take into account the prevailing economic environment. The court also must determine the appropriate level of compensation bearing in mind that comparable injuries should as far as possible be compensated by comparable awards as the Court of Appeal observed in **Simon Taveta vs Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 (2014) eKLR.** The evaluation is determined by the nature and extent of injuries and comparable awards made in the past. The compensation ought to be reasonable and to a considerable extent conventional. The principles were further summarized by the same court as follows; –

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i) An award of damages is not meant to enrich but to compensate such victim for the injuries sustained.

ii) The award should be commensurable with the injuries sustained.

iii) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

iv) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

v) The awards should not be inordinately low or high (**see Boniface Waiti & Another vs Michael Kariuki Kamau (2007) eKLR**

38. It is noted that the Respondent suffered the following injuries:

a) Commuted fractures of the distal tibia fibula.

b) Deformed right leg distal tibia fibula with mild bruises.

c) Tender anterior chest wall.

d) Tenderness on right lateral chest wall.

e) Cut wound on the right upper limb.

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39. It is noted that the Respondent testified that he sustained the above injuries and was treated at Sega Mission Hospital and later referred to Siaya County Referral Hospital. He produced medical documents to that effect. The Appellant herein now contends that the Respondent's fracture re-united and had no deformity. During the Respondent's cross-examination by the Appellant's counsel, he stated that no metal plate was inserted in his leg and that he had been walking with the use of crutches and that the last time he visited the hospital was in December 2023. Learned counsel for the Appellant in her submissions confirms that treatment notes and other documents establish that there was indeed a fracture suffered by the Respondent but that there was no deformity and hence an award of Kshs. 350,000/= is reasonable in the circumstance and that this court be persuaded with the court's decision in the cases of Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor[2020] eKLR where the court awarded Kshs. 400,000/= for similar injuries and Kimani v Mwangi & 2 others (Civil Appeal E071 of 2023) [2024] KEHC 6744 (KLR) (6 June 2024) (Judgment) where the court awarded Kshs. 550,000/= for similar injuries with 5% disability.

On the other hand, counsel for the Respondent is of the view that the best way to challenge medical evidence is to subject the injured person to a second medical examination by a doctor of one's choice and produce the

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resultant medical report. That in the instant case, the Appellant failed to do that and that the only evidence before the court are the ones presented by the Respondent and further that the Appellant did not adduce evidence at all thus the evidence by the Respondent remains uncontroverted. Reliance was placed in the case of **Beatrice Nthenya Sila V Ruth Mbithe Kitisia & 3 Others [2014*]* eKLR** where the court held:

"Some of the grounds of appeal were that the medical report was prepared three months after the accident, no initial treatment notes and P3 were produced and that the medical report referred to treatment notes and P3 which were not produced. The court held that the medical report was not challenged by production of a contrary report further each respondent gave evidence and details of the injuries they had suffered following the accident therefore lack of medical evidence is not fatal to the plaintiff's claim in civil proceedings where proof is on a balance of probability.''

40. The Respondent's counsel has vouched for the retention of the award of damages by the trial court and placed reliance on the case of **Peter Muanda Wanje v Capture Transport Limited & Anor (2020) eKLR** where the plaintiff had sustained injuries as those sustained by the Respondent herein and was awarded Kshs. 1,800,000 general damages for pain suffering and loss of amenities. Taking into account the injuries of the

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present respondent and the age of the cited authorities vis a vis the effect of inflation of the value of shilling, it was contended that the award of Kshs 700,000/= by the trial court in general damages is in-fact on the lower side but however the Respondent chose to live with it.

41. An analysis of the foregoing authorities and the evidence tendered by the Respondent, it is not in dispute that the Respondent sustained commuted fractures on chest wall, and right upper limb of right leg distal tibia fibula with mild bruises as well as soft tissue injuries. The authorities cited by the counsel for the Appellant namely Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor [2020] eKLR where the court awarded Kshs. 400,000/= for similar injuries and Kimani v Mwangi & 2 others (Civil Appeal E071 of 2023) [2024] KEHC 6744 (KLR) (6 June 2024) (Judgment) where the court awarded Kshs. 550,000/= for similar injuries with 5% disability appear to be in tandem with the Respondent's circumstances. However, it is noted that the said cases were determined quite some time and hence the effects of inflation on the economy must be taken into consideration. Iam of the considered view that the award of Kshs 700, 000/ as general damages for pain, suffering and loss of amenities is not inordinately high as to represent an erroneous estimate of the damages. I find that the trial court did not take into account irrelevant factors or left out of account relevant ones when arriving

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at the award. I find that the award was reasonable in the circumstances and must be upheld.

42. As the Appellant did not challenge the award of special damages, I find that the same shall remain undisturbed.

43. In the result, it is my finding that the appeal lacks merit. The same is dismissed with costs to the Respondent.

Dated and delivered at Siaya this. 23rd day of April 2026

D.KEMEI

JUDGE

In the presence of:

M/s Ngome for M/s Ongonga……………….for Appellant

M/s Arekula……………………………………for Respondent

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M/s Mourine...Court Assistant

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