

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL CASE NO. E064 OF 2023

MICHAEL NDERITU WAIREGI.....APPELLANT

VERSUS

STANLEY KARANJA KAMAU.....RESPONDENT

JUDGEMENT

1. Before this Court are two appeals emanating from the same proceedings in the Lower Court. On **5th February 2026**, the court directed that the two files being **Civil Appeal No. 020/2024 and Civil Appeal No. 064/2023** be consolidated and heard as one.

BACKGROUND

2. The Plaintiff **MICHAEL NDERITU WAIREGI** (the Appellant in Appeal No. 064/2023) filed in the Lower Court a suit in respect of a road traffic accident which occurred on **20th June 2019** at about 1845 hours. The Plaintiff in his written statement claimed that on the material day he was walking along the Mweiga-Chaka road when suddenly a motor vehicle

Registration **KBU 453 H** Mitsubishi Outlander which was being driven recklessly and negligently along the same road rolled over a slope and hit the appellant occasioning him serious injuries. After the accident the plaintiff was rushed to the Consolata Hospital Mathari where he was treated.

3. Vide the plaint dated **4th October 2021**, the plaintiff prayed for judgment against the Defendant for:-

“(a) General Damages.

(b) Special damages of Kshs. 526,199/=.

(c) Costs of this suit.

(d) Interest on (a) and (b) at court rates.

4. The Defendant **STANLEY KARANJA KAMAU** put in a statement of defence dated **16th November 2021** denying any culpability for the accident. The Defendant instead alleged that it was the appellant whose negligent caused the accident. The particulars of the negligence attributed to the defendant were set out in paragraph (4) of the Defence as follows;-

“(i) Crossing the road at an un-designated point.

(ii) Failure to walk on the pedestrian walkway.

(iii) Failure to exercise reasonable care expected of a pedestrian in the circumstances.

(iv) Failure to obey the Highway Code; and

(v) Conducting himself in a manner that would cause him personal harm.

5. The suit was duly heard in the Lower Court and on **15th November 2022, HON. M. OKUCHE, PRINCIPAL MAGISTRATE** delivered his judgment in which he found in favour of the plaintiff and awarded damages of **Kshs. 408,480/=**. The court also awarded costs of the suit and interest to the Respondent.

6. Being aggrieved by this decision the Defendant filed this appeal which is premised upon the following grounds:-

“1. The Learned Trial Magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general

damages for pain and suffering which was inordinately high;

- 2. The Learned Trial Magistrate erred in fact and law by failing to apply the correct legal principles in appropriate liability and awarding general damages for injuries suffered which sum was inordinately high;**
- 3. The Learned Trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on liability and quantum thereby arriving at an erroneous figure on quantum.**
- 4. The Learned Trial Magistrate erred in law and in fact by failing to take into account the pertinent issues raised in the appellants' submissions;**
- 5. The Learned Trial Magistrate erred in law and in fact by failing to appreciate the appellant's contentions and arguments;**

6. **The Learned Trial Magistrate erred in law and in fact by disregarding the evidence on record thus arriving at an erroneous decision;**
7. **The Learned Trial Magistrate misdirected himself by considering erroneous facts and evidence hence reached a wrong conclusion of law and;**
8. **The Learned Trial Magistrate’s judgment consequently occasioned a miscarriage of justice.”**

7. Following delivery of the judgment the Plaintiff/Applicant filed a Notice of Motion seeking the following orders:-

“1. SPENT.

2. THAT this court be pleased to admit as evidence the

receipts of the difference of the special damages as pleaded in the plaint herein.

3. THAT the court be pleased to review its orders and judgment delivered on 23/11/2022 so as to include the sum of Kshs. 515,599 in its final judgment being the difference of the Special damages awarded by the court and pleaded by the applicant herein.

4. THAT the costs be provided for.”

8. The trial magistrate heard that application but dismissed the same in a ruling delivered on **28th August 2023**.

9. Once again being aggrieved by the said ruling the plaintiff filed

the Memorandum of Appeal dated **22nd September 2023** which was premised upon the following grounds:-

“1. That the learned trial Magistrate failed to consider the weight of the evidence by the Appellant and ended up with a wrong finding.

2. That the learned trial magistrate erred fatally in entering a finding that the

applicant was meant to add new evidence but failed to appreciate that the same was a result of technological challenges and hence ended up with the wrong finding.

- 3. The Learned trial Magistrate erred in law and fact by failing to consider the application in its entirety including the supporting affidavit and the annexures thereto.**
- 4. The learned trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities thereby ending up with a wrong finding.**
- 5. The learned trial Magistrate erred in law and fact in finding that the application was unmerited while the facts and evidence was clear.**
- 6. That the entire ruling and order is flawed and is against the weight of evidence and against the rules of natural justice."**

10. Since the two appeals now before the court emanate from the same matter in the Lower Court it was directed that they be heard together. The appeals were canvassed by way of written submissions. The Appellant filed the written submissions dated **18th February 2026** whilst the Respondent relied upon his written submissions dated **9th December 2025**.

ANALYSIS AND DETERMINATION

11. I have considered the appeal before this court, the Record of appeal

as well as the written submissions filed by both parties.

12. This is a first appeal and in this regard I take cognizance of the holding in **Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)** in which the Court of Appeal stated as follows:-

This being a first appeal it is trite law, that this Court is not

bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the

principles upon which this Court acts in such an appeal is are well settled. Briefly put, they are that this court must reconsider 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 this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V Brown [1970] E.A.L

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters -vs- Sunday Post Ltd [1958] EA 424. In its own words:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is evidence to support a particular conclusion, or if it is shown that the trial judge has failed to

appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.....”

13. The Defendant did challenge the trial courts apportionment of **80%** liability against himself. In his testimony the Plaintiff stated that on **20th June 2019** he was walking along the Mweiga-Chaka road. That as he was crossing the road at a designated spot the defendant suddenly emerged driving a motor vehicle Registration **KBU 453** Mitsubishi. That the vehicle was being driven at a high speed and knocked down the plaintiff.
14. **PW2 PC MUNA** an officer attached to Mweiga Police Station produced the police abstract proving that the occurrence of the accident was reported to police.
15. Despite alleging that the accident was caused by the plaintiff's negligence the defendant did not call any evidence, to prove this alleged negligence. The Defendant did not controvert the plaintiff's narration on how the

accident occurred. As such I find that the apportionment of **80% liability** against the driver of the vehicle

Was sound and I uphold the same.

16. The Plaintiff made a claim of **Kshs. 1,500,000** as general damages however the trial court made an award of **Kshs. 500,000**.

17. As a general principle the measure of quantum lies at the discretion of the judicial officer hearing the case. [See **SOUTHERN ENGINEERING CO. LTD -VS- MUSUNGU MUTIA [1985] KLR**]. In the case of **BASHIR AHMED BUTT -VS- UWAIS AHMED KHAN [1982-88] KAR** the Court of Appeal set out the parameters under which an appellate court would interfere with award of general damages made by the trial court as follows:-

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material

respect and so arrived at a figure which was either inordinately high or low....”

18. The evidence of the plaintiff was that as a result of the accident he suffered mild injuries which included mild head injury, mild trauma and bruises. He also suffered tenderness of the left chest area, tenderness of both knees and pain in the pelvic area.
19. In awarding general damages a court will exercise its discretion in the best way to ensure a fair compensation to the victim of an accident whilst reflecting the nature and gravity of the injuries suffered. Though no two cases would have identical injuries courts usually employ the approach of looking at previous decisions on comparable injuries. The court should also consider inflation, the value of one shilling and the state of the economy. These principles will serve to ensure that awards made are not astronomical such as would stifle the insurance industry or unduly punish the person paying. The overall objective is fair compensation to the claimant.

20. In the case of **MBAKA NGURU & Another -vs- JAMES GEORGE RAKWAR [1998] eKLR** the court stated thus;

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

21. I note that in his judgment the trial magistrate did not make a comparison of cases involving similar and comparable injuries.

22. The following decisions offer comparative injuries to the one suffered by the Respondent herein:

- a) In **Makami v Obong’o (Civil Appeal E062 of 2021) [2023] KEHC 922 (KLR)** where the Court substituted the award of Kshs. 100,000/- with Kshs. 80,000/- for marked swelling and bruises on the forehead, marked neck and chest pain, cut wound on the right elbow joint and right knee joint.

- b) In **Rege v LA (Minor suing through her father and next friend GAA) (Civil Appeal E111 of 2021) [2022] KEHC 16634 (KLR)** where an award of Kshs. 400,000/- was substituted with that of Kshs. 80,000/- for bruises on the right hand, blunt trauma to the right hand and chest contusion.
- c) In **Manase & another v Muga (Civil Appeal E040 of 2020) [2022] KEHC 10487 (KLR)** where an award of **Kshs. 200,000/=** was substituted with an award of Kshs. 100,000/= for a cut wound on the forehead, tenderness of the neck, chest, back, left elbow and left hand and bruises on both knees.
- d) In **Edward Mutevu Maithya & another v Edwin Nyamweya [2022] eKLR** where an award of Kshs. 550,000/- was reduced to that of Kshs. 100,000/= for cut wounds on the scalp (head region), bruises to the back, right upper limb and the left lower limb.

23. Taking into account current inflationary trends I find that the award of **Kshs. 500,000** was on the higher side. It is my

view that an award of **Kshs. 400,000** would have been more appropriate. Accordingly

I set aside the award of **Kshs. 500,000** and in its place award general damages of **Kshs. 400,000**.

24. The plaintiff made a claim of **Kshs. 526,199** as special damages. It is trite law that special damages must be specifically pleaded and proved. The trial court found that only special damages of **Kshs. 10,600** had been specifically proved and awarded that amount under that heading.
25. Following delivery of the judgment by the trial magistrate the
Plaintiff sought by way of a Notice of Motion dated **1st December 2022** leave to file receipts to prove the special damages which had been claimed.
26. By a ruling delivered the trial court (rightly in my opinion) dismissed this application to adduce evidence **after** delivery of the judgment.
27. Once a judgment or ruling is delivered the Court is '**functus officio.**' The issues under consideration in the trial cannot be re-opened once the judgment has been delivered.

28. By that application the plaintiff sought to have the judgment of the trial court reviewed to include receipts to prove the difference of the special damages and so as to include an award of **Kshs. 515,599** under this heading.
29. The obvious question that would arise is why were these receipts not produced during the trial. No reasonable explanation has been given for the omission save for stating that said receipts were not uploaded on the courts portal. I find this excuse given by the plaintiff to be wanting for several reasons.
30. Firstly the lower court conducted a full trial where parties were heard. The plaintiff called their witnesses and proceeded to close their case without alerting the court that they had experienced any problems in uploading evidence on the portal.
31. Secondly I do agree with the trial court that the said receipts cannot be said to amount to new evidence as the same were at all times in the possession of the plaintiff. I do agree with the trial court that the plaintiff slept on his rights. The plaintiff

could have applied to have the judgment arrested while canvassing an application to adduce this evidence. They did not do this. Instead the plaintiff waited until judgment had been delivered knowing full well that he had in his possession relevant material. I find no merit in the appeal against the ruling delivered on **28th August 2023** and the same is dismissed in its entirety.

32. Finally and in conclusion with respect to the two appeals (consolidated) the court finds as follows;-

(i) The apportionment of liability at 80:20 in favour of the

plaintiff is upheld by this court.

(ii) This court makes an award of Kshs. 400,000/= as General damages.

(iii) The award for special damages of Kshs. 10,600/= is upheld.

(iv) The total amount payable to the plaintiff as damages is Kshs. 308,480 plus interest.

(v) Each party to meet its own costs for the two appeals.

Dated in Nyeri this 8th day of May 2026.

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MAUREEN A. ODERO
JUDGE

ORIGINAL