



**Kiiru t/a Kinamba General Supplier's & Transport v Kenya Ferry Services & another
(Civil Appeal E209 of 2023) [2025] KECA 664 (KLR) (11 April 2025) (Judgment)**

Neutral citation: [2025] KECA 664 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E209 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
APRIL 11, 2025**

BETWEEN

**DAVID KAROBIA KIIRU T/A KINAMBA GENERAL SUPPLIER'S &
TRANSPORT APPELLANT**

AND

KENYA FERRY SERVICES 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

*(Being an appeal from the judgement of the High Court of Kenya at Mombasa
(Kizito, J.) delivered on 22nd June 2023 in Civil Suit No. 275 of 2005)*

JUDGMENT

1. The suit filed by David Karobia Kiiru T/A Kinamba General Suppliers & Transport (the appellant) has a long history of amendment of the pleadings. The appellant initiated the suit before the trial court by a Plaint dated 14th December 2005 resting with the Further Further Further Amended Plaint dated 30th November 2021 by which he sought the following reliefs:
 - a. A declaration that the plaintiff is entitled to be paid by the defendants special damages as determined by this Honourable court;
 - b. General damages;
 - c. Special damages;
 - d. Costs of the suit;
 - b. Interest on (a) and (b) and (c) at court rates;
 - c. Any other or further relief as the trial court deems fit and just to grant.”



2. The background giving rise to the dispute and the evidence which emerged from the proceedings was as follows.
3. The appellant carries on the business of transportation within Eastern and Central Africa. He pleaded that he was the lawfully registered, insured and/or beneficial owner of motor vehicle registration number KAT xxxD-ZC1xxx a Renault Lorry Trailer (the lorry); that on 16th March 2005 at around 6.00 a.m. at the Likoni Ferry Mainland Ramp, the appellant's authorised driver was driving the lorry onto MV Harambee Ferry (the ferry) as a passenger destined for the Mombasa Island; and that the coxswain of the ferry so negligently and carelessly started the ferry before the lorry was fully on board the ferry and, as the consequence, the lorry fell off the ferry and sunk into the Indian Ocean causing an accident.
4. At paragraph 5 of the Further Further Further Amended Plaintiff, the appellant pleaded the particulars of negligence on the part of the 1st respondent's authorised coxswain, servant and/or agent of motor vessel M.V. Harambee Ferry as follows:
 - “ 5(a) Failing to take or any adequate precautions to ensure the safety of the plaintiff's Motor vehicle registration number KAT xxxD ZC xxxx aboard M.V. Harambee ferry.
 - b. Exposing the plaintiff to a risk of damage which they knew and or ought to have partially known.
 - c. Deliberately moving the ferry when the plaintiff's motor vehicle was halfway on the ramp and before it was full aboard the ferry M.V. Harambee.
 - b. Failing to exercise due care and attention while performing his duties.
 - c. Failing to exercise or maintain any or any sufficient control of the said ferry to avoid the accident.
 - d. Failing to exercise due care to avoid causing damage to the Plaintiff's motor vehicle.
 - e. Failing to make any warning signs and/or alert the Plaintiff or the danger.
 - f. Deliberately and suddenly moving the ferry when it was dangerous to do so.
 - g. In so far as may be necessary, the plaintiff will rely upon the doctrine RES-IPSA LIQUITOR.
5. The appellant's claim against the respondents was for special damages, loss of use and loss of business totalling to a sum of Ksh. 333, 343, 988 as pleaded at paragraph 5A of his plaint as follows:
 - a. Motor vehicle purchase deposit - Kshs. 1,600,000.
 - b. Hire purchase loan processing fee - Kshs. 64,000.
 - c. Loss of one-year comprehensive insurance cover - Kshs. 484,006.
 - d. Obstruction fee – Kshs. 9,000.
 - e. Towing fees – Kshs. 100,000.
 - f. Mileage expenses for inspection
(Nairobi to Mombasa to Nairobi) - Kshs. 30,912.
 - b. Assessment fees - Kshs. 11,600.



- c. On site repair (Mombasa) - Kshs. 100,000.
 - d. Spare parts and repair costs - Kshs.3,377,871. (Workshop-Nairobi)
 - e. Loss of motor vehicle as per Hire Purchase value - Kshs.8,211,606.
 - f. Loss/damage of goods (plaintiff compensated owner) - Kshs.525, 000.
 - g. Hire purchase instalments (loss from 10th February 2005 to 10th November 2005) - Kshs.2,282,361.
 - h. Lawyer’s fees Civil Cause No. 460 of 2005 - Kshs.210,000.
 - i. Loss of profit from April to December 2005 - Kshs.6,156,376.
 - j. Loss of business from January 2006 as per Accountant’s cash flow statement – Kshs.310,181,256.”
6. Kenya Ferry Services (the 1st respondent) and Kenya Ports Authority (the 2nd respondent) jointly referred to as the “the respondents” where applicable, filed a Joint Statement of Defence dated 2nd February 2022 in response to the Further Further Further Amended Plaint dated 30th November 2021. They denied the merits of the appellant’s claim and asked that the suit against them be dismissed with costs. In particular, they denied any negligence apportioned to them by the appellant as pleaded.
7. Conversely, the respondents, on a ‘without prejudice’ basis pleaded that, if an accident ever occurred, it was caused by the sole negligence of the appellant’s driver, servant and/or agent of the afore-stated motor vehicle, namely that:
- a. He drove an overloaded Motor Vehicle;
 - b. He failed to manage, control and/or drive the Motor Vehicle in such in a safe manner so as to board Motor Vessel thereby causing danger to all the lives and property therein;
 - c. He failed to exercise sufficient care, prudence and skill under the circumstances either by stopping, swerving or in any manner to avoid the alleged incident or accident;
 - d. He failed to heed and follow the coxswain’s directions orders and requests thereby endangering the lives of the people therein and the property thereon;
 - e. He drove, managed and/or controlled a defective Motor Vehicle thus endangering life and property;
 - f. He failed to drive, manage and/or control the Motor Vehicle so as to safely board the Motor Vessel;
 - g. He drove without any due care and attention to other Motor Vehicles, people and property thereat;
 - h. He severally wrongfully and forcefully re- engaged the Motor Vehicle with full momentum with a view of getting into the motor vessel which acts were of utmost danger to all the people and the property thereon;
 - i. He drove in a zig-zag and reckless manner;
 - j. He failed to observe the provisions of the law thereat applicable to the case; and
 - k. He caused damage to Motor Vessel Harambee.



8. Suffice it to state that the 1st respondent had initially filed a Statement of Defence dated 16th January 2006, and, later on, an Amended Statement of Defence dated 30th March 2006. We need not consider these pleadings in view of the join Amended Statement of Defence.
9. The suit before the trial court partly proceeded before Njoki Mwangi, J., who only took the evidence of PW1. Kizito, J. then took over the conduct of the trial to its logical conclusion. The record does not contain any order directing that PW1's evidence be taken afresh. Nonetheless, he testified afresh before Kizito, J. The hearing proceeded by way of viva voce evidence.
10. In his evidence-in-chief, David Karobia Kairu (PW1) wholly adopted his written statement dated 12th March 2023. However, our scrutiny of the record of appeal only shows a statement dated 12th March 2013, and we think the recording of the date may have been in error. That aside, it is on record that PW1 wrote several statements dated 12th March 2013, 19th February 2012, 24th May 2022 and 29th May 2022. It is unclear why he opted to adopt a statement of the year 2013, yet his last amended plaint is dated 30th November 2021. All the same, we note that, when he testified afresh, he gave detailed evidence which is in consonance with the Further Further Further Amended Plaint.
11. He testified as the sole proprietor of the appellant's business. He averred that the lorry was jointly owned by him and Stanbic Bank, the latter as the financier when he purchased it; that the lorry cost Kshs.5,000,000 and the trailer Kshs. 3,000,000 making the total cost Kshs. 8,000,000; and that the lorry was bought on a 4½ months' hire purchase terms.
12. It was PW1's evidence that, on 15th March 2005, a third party hired the lorry and contracted him to load calcium from the South Coast; that at around 6.00 a.m. of the same day, he spoke with his driver, George Njihia Karobia (PW3), who informed him that he was waiting to board the ferry; that an hour later, when the driver did not reach his intended destination, he went to Mombasa Island; that he boarded the ferry to take him to the Likoni side, on reaching the Likoni side, he found that the lorry was submerged in the Indian Ocean.
13. PW1 inquired from the turnboy, Gilbert Cherubet (PW4), on what transpired; that he was told that the 7th axle of the lorry did not embark fully into the ferry; that it was the 1st respondent's workers who instructed PW3 to disembark from the ferry but that when the driver attempted to embark once more, the last 2 axles had yet to board the ferry, when the coxswain started moving the ferry; that it was at that point that the 1st respondent's workers warned the driver and asked him to jump off the lorry lest he dies; that the driver did as he was instructed and the lorry slid into the Indian Ocean; that later, a breakdown vehicle came to the scene and pulled the lorry from the Indian Ocean; that the lorry was taken to Caltex Petrol Station; that on 18th March 2005, the appellant reported the incident with the 1st respondent and was asked to pay Kshs. 9,000 as obstruction fees; that he was then allowed to collect his lorry and was issued with a letter dated 18th March 2005 to that effect; and that he was later issued with a police abstract report.
14. PW1 stated that the lorry was assessed and that, in the 1st assessment report dated 31st March 2005 the costs of repair was assessed at Kshs.313,200 while the supplementary report dated 18th April 2005 assessed the costs to be Kshs. 584,640.
15. PW1 further produced an invoice dated 3rd May 2005 for Kshs. 2,051,574.48. He testified that his insurance, CIC, reimbursed him to the tune of Kshs.2,630,083 as the cost of repairs. He testified that the spares parts for repairing the motor vehicle cost him Kshs.3,083,000, and that the insurance deducted the excess of Kshs.453,199; that he paid Kshs.453,199 to the insurance; that he paid Kshs.481,400 for repair of the trailer to Nizam Engineering, Kshs.283,077, Kshs.199,253,



- Kshs.236,087.80 on 18th April 2005 and Kshs.269,120.50 to Heavy Vehicle and Plant Suppliers Limited for the spare parts of the lorry; and that the cost of the spare parts and repair came to Kshs.3,377,871; Kshs.11, 600 to a private investigator; a deposit of Kshs.1,600,000 vide a receipt dated 3rd December 2002 and approval fees of Kshs.64,000 as deposit for purchase of the lorry, and Kshs.454,006 vide a receipt dated 17th April 2005 for insurance cover for the lorry for a period of one year.
16. According to PW1, when he went to pick the lorry after it was repaired, he found a letter dated 20th July 2005 from Stanbic Bank stating that it had repossessed the lorry. Another assessment report dated 31st March 2005 was generated, which gave the cost of repair as Kshs.2,185,442. PW1 testified that he filed a suit in the High Court at Milimani, being HCCC No. 460 of 2005 against Stanbic Bank because, at that time, he alleged that he did not owe Stanbic Bank Limited any money. He produced a receipt for Kshs.210,000, being the filing fees for the suit; that he negotiated with the bank and he paid an accrued interest of Kshs.5,590,252; that he further paid Kshs.1,140,580 and Kshs.1,142,361.38 to the bank as instalments of the hire purchase financing of the lorry; and that, on 25th January 2006, Stanbic Bank's lawyers wrote to his (PW1) advocates informing him that the lorry will be repossessed once more, and it was eventually sold.
 17. It was PW1's testimony that when he lost the lorry through repossession, he lost profits in the sum of Kshs.6,156,376 for failure to transport animal feeds to and from Uganda and Tanzania; that, when the suit motor vehicle got into an accident, it had been hired by Decent Merchants to transport calcium worth Kshs.800,000; and that he negotiated with the owner of the goods and paid Kshs.525,000 by way of a cheque as compensation. He produced a receipt dated 15th April 2005 on this account. He also produced a delivery order and invoice from Decent Merchants and the agreement for carriage of the calcium.
 18. In cross examination, PW1 stated that he was shown the investigation report which indicated that the cause of the accident was due to the fact that the insured's driver was not familiar with the ferry services. He denied that this was the cause of the accident since the lorry had a capacity of 36 tonnes and the load was 32 tonnes; and that the coxswain was to blame. He further stated that Stanbic Bank took the lorry when it was still under repairs; and that he was claiming Kshs.999,600 for repairs.
 19. PW2, No. 9xxx PC James Makori of Kilindini Police Station was the investigating officer having taken over the investigations from PC Wabwire who was transferred from the station. He testified that, on 16th March 2005, an accident was reported at Kilindini Police Station vide OB No. 44/16/3/2005; that PC Njeru and Corporal Baraka (now retired) visited the scene; that he could not trace PC Njeru, who was transferred from the station; that the accident happened when the driver was told to reverse the lorry out of the ferry; that again, the driver was instructed to drive into the ferry and that, while doing so, the ferry started moving; and that, that is when the lorry fell into the sea. PW2 testified that no one was charged in court with respect to the accident. He produced in evidence the police abstract in respect of the accident.
 20. PW3, George Njihia Karobia was the driver of the subject lorry. He adopted his statement dated 12th December 2013. His evidence as recorded in the statement is that, as he was attempting to embark the whole body of the lorry onto the ferry, when the coxswain started moving the ferry; that, that necessitated him to jump out of the lorry to save his life; and that the accident occurred when he was instructed by the respondents' ramp controller to reverse the lorry.
 21. In cross examination, PW3 stated that he first drove through the ferry three weeks prior to the accident. He reiterated the fact that when he was instructed to reverse the lorry once more, the ferry moved



- before he could drive the lorry back onto the ferry. He blamed the ferry officials for asking him to move; and that he had no alternative but to jump from the lorry into the ferry to save himself.
22. PW4, Gilbert Kiprito Sang also known as Gilbert Cherubet adopted his statement dated 10th October 2020. He was the turnboy of the subject lorry. His evidence was that the lorry had 7 axles; that out of the 7 axles, only 3 axles got into the ferry and the other 4 did not; that therefore, the lorry had to be reversed; that the driver was then advised to drive back into the ferry at high speed; that, when he was embarking into the ferry, the coxswain moved the ferry; and that the driver had to jump from the lorry to save his life.
23. PW5, Salim Mkunya from Auto Decade Assessors, assessed the track lorry registration No. KAT xxxD with its trailer sometime in March 2005. The inspection was done at Shell Petrol Station where the lorry was towed after recovery from the ocean. The first part of the assessment which covered the defects, both software and hardware, was based on what was visible. He also carried out a supplementary assessment. To him, the repairs that would follow were very complicated as the lorry was extensively damaged; that the repairs were to be done progressively; and that this prompted the lorry to be taken to Nairobi for the repair. He assessed the cost of damage at Kshs.3,083,283. He produced the preliminary report dated 31st March 2005, the supplementary estimate dated 18th April 2005 and a receipt No. SS dated 3rd May 2005 for Kshs.11,600 by CIC Insurance. The latter receipt was in respect of his fees which was paid by the insurance.
24. PW6, Tom Kyaoyugi an auditor and partner from Shilsh and Associates produced the accounts for the appellant's firm for the year 2005, which were compared with those of the year 2004; that the income for the year 2004 was Kshs.54,603,000 while for the year 2005 was Kshs.211,706,133; and that there was a decline in income in 2005. He adduced in evidence the audit and income projection reports.
25. Only one witness, Cheleste Njeru Njagi (DW1), a coxswain, testified for the respondent's case. He adopted his statement of 17th March 2023. His testimony was that he had been working at the ferry for 26 years; that, on the material date, he was on duty with Salim, the then coxswain of the ferry in question; that he visited the scene when he heard of the accident, but that, by then, the lorry had already been moved; that he was 250 metres from the point of accident when the accident took place; that he saw the lorry slide into the ocean, but that he could not tell what its mechanical state was at the time; that the coxswain and the ramp controller told the driver to reverse; that he heard screams with people saying that the lorry was sinking into the sea; and that the then coxswain, Salim retired in 2015 and could not be traced to come and testify.
26. The learned Judge (Kizito, J.) rendered his judgement on 22nd June 2023. On the question as to who was liable for the accident, he held that, from the evidence on record, the driver of the lorry did not seem to have the requisite experience required to board the lorry into the ferry at the angle required; that this was evidenced by the fact that he had tried to drive the lorry onto the ferry three times without success; that, having failed the first time, should have warned him that he needed an experienced hand; that the adjacent ferry coxswain gave a vivid description of how the accident occurred; that despite the driver being given instructions, he was not experienced enough; that when the driver realised that he could not control the lorry, and fully park in the ferry, he jumped off the lorry; and that, therefore, the appellant was solely to blame for the accident. He apportioned no contributory negligence on the part of the respondents.
27. On quantum, it was held that the financial losses and the losses related to business were remote. The trial court opined that the only damages that are relatable to the accident were those of repair and losses of business during the time the motor vehicle was awarding (sic) repair; that the loss of business was



either the cost of getting alternative transport of profits foregone for that particular vehicle, which is limited to the time the lorry was under repair.

28. The court observed that the appellant pleaded Kshs.3,377,871 as spare parts and Kshs.8,211,806 for hire purchase; that the insurance paid some amount, but that it was not clear how much. The figures proposed by the appellant were found to be mind-dazzling; and that, had the appellant pleaded and proved an amount of Kshs.360,000, being the amount paid by the insurance, that would be the only damages payable if the appellant had proved liability.
29. The trial court dismissed the claim for general damages of Ksh.310,181,256 and general damages for breach of duty and care of Ksh.2,000,000, all totalling to Kshs.312, 181,256. The claim of loss of loan fees of Kshs.64,000, Insurance Cover - Kshs.484,006, costs for recovering and assessment- Kshs.9,000, mileage cost-Kshs.30,912 were found to be remote with no causal link to the accident. The costs of material loss of Kshs.8,211,606, loss of goods of Kshs.525,000, costs of the vehicle of Kshs.1,600,000, towing fees of Kshs.100,000, assessors' fees of Kshs.116,000, spare parts and repair of Kshs.3, 629,785 were found to have been paid by the insurance, and that in any case, the appellant was not claiming them under subrogation.
30. The learned Judge held that he would have awarded the appellant Kshs.340,000 being the portion of the repair charges he had incurred had he succeeded on liability. The claim for Kshs.335,344,388 and all other claims were dismissed.
31. In the end, the trial Judge held that the respondents were the successful parties in the suit and awarded them costs of Kshs.600,000.
32. The appellant, being dissatisfied by the decision of the trial Judge, filed this appeal raising 8 grounds of appeal. He faulted the learned judge for:
 - a. dismissing his oral and documentary evidence in support of the suit;
 - b. finding that he was empowered under Section 60
 1. of the *Evidence Act* to presume facts which may or may not have happened thus departing from the evidence and reaching an unjust finding;
 - c. departing from the well laid standard of proof to presume facts when there was evidence before the court thus failing to find that the appellant had proved his case on a balance of probabilities;
 - d. taking it upon himself to cross examine the appellant and his witnesses thus filling gaps in the defence case in contravention of the rules of evidence;
 - e. discrediting corroborated evidence of eye witnesses in support of the appellant's case;
 - f. failing to consider the appellant's submissions and persuasive authorities;
 - g. dismissing the appellant's suit on account that the driver of the motor vehicle did not testify when indeed the court record indicates that he testified as PW2 (should read PW3) on 8th March 2023; and
 - h. for acting ultra vires his jurisdiction in taxing the costs of the suit at Kshs. 600,000 despite not having jurisdiction to do so as taxation is reserved for the deputy registrar.
33. We heard this appeal virtually on 12th October 2024. Present in Court were learned counsel Ms. Karuga appearing for the appellant and learned counsel Ms. Jadi for the respondent. Both counsel entirely



relied on their respective written submissions without highlighting them. Those of the appellant are dated 7th August 2024 while those of the respondent are dated 20th August 2024.

34. On the part of the appellant, it was submitted that his case is hinged on negligence committed by a party against him; and that the standard of proof that he was required to discharge is on a balance of probabilities. He placed reliance on the case of *Donoghue vs. Stevenson (1932) AC 562 at 580* where Lord Atkin held that a party has a duty to take necessary reasonable care so as to avoid acts of omission which would likely injure their neighbour.
35. It was submitted that the appellant testified as the business owner and produced receipts and invoices showing the loss suffered as a result of the accident; that he lost business and income, and, as a consequence, he had to compensate the owner of the damaged calcium which the subject lorry was transporting at the time of the accident; that other costs were in the repair of the lorry which was later sold, ultimately driving him out of business, costs of retrieving the lorry from the ocean and those paid to the respondents as obstruction fees.
36. The appellant faulted the trial Judge for finding that the driver of the lorry did not testify despite him testifying as PW3; that the driver was following instructions from the ferry attendants and that he was directed to reverse the lorry; that the ferry moved before the lorry could fully board the ferry, which caused it to plunge into the ocean; that the driver had to jump off the lorry to save his life; that the judge chose not to believe PW3's testimony despite acknowledging that the driver was being guided by the ferry attendants; and that he proceeded to label the driver as 'incompetent.'
37. It was submitted that the evidence of DW1 confirmed that, indeed, the driver was following the instructions given to him as he testified that he heard the coxswain and the ramp controller telling the driver to reverse via the radio communication; that the coxswain and the ramp controller owed a duty of care to the appellant and his driver to ensure that the lorry boarded the ferry; and that they ought to have pointed out to the driver that it was impossible to board the ferry instead of encouraging him to do so.
38. As regards quantum, it was submitted that, once it is established that there is a breach of duty of care, then damage will be suffered automatically, and they ought to be awarded damages to compensate the loss; that the appellant particularised the loss suffered as legally required, but that all the claims were dismissed; and that although the learned Judge held that the only allowable claim was for material loss, he observed that the same was not pleaded. However, the appellant was of the view that a court can nonetheless determine an unpleaded issue. In this regard, reliance was placed on this Court's case of *Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 Others (2017) eKLR* where it was held that, although a court will normally base its decision on pleaded issues, '... if it appears from the cause followed at the trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue'. On this score, we were urged that, if we find that the respondents were liable for the accident, we should award the appellant damages for the loss incurred.
39. The appellant stated that the learned Judge misapplied the rules of evidence by taking it upon himself to cross-examine the witnesses, thus showing open bias against the appellant's witnesses with the intention to fill in the gaps left by the respondent's counsel, and that, section 146(1) of the *Evidence Act* does not contemplate a situation where the court, on its own motion will cross-examine witnesses. Regard was had to this Court's decision of *David Njoroge Macharia vs. Republic (2011) eKLR* where it was held that the court is to remain as an arbiter and not a pro-active participant in the proceedings.
40. On the issue as to whether the trial court departed from the applicable standard of proof, it was submitted that the learned Judge relied on section 60(1) of the *Evidence Act* to ignore the evidence



adduced by the appellant's witnesses; that presumptions should not supersede the evidence adduced, thus the Judge misapplied the rules of evidence; and the standard of prove applicable to proof the case; that the Judge was bias against the appellant whereas Article 27(1) of *the Constitution* dictates that everyone is equal before the law and is entitled to equal protection of the law.

41. Lastly, the appellant faulted the trial Judge for awarding costs which he personally assessed at Kshs.600,000, yet he lacked jurisdiction to tax costs; that taxation of costs is a function of the taxing officer who is a Registrar or a Deputy Registrar of the High Court or any other qualified officer appointed by the Chief Justice as defined under Paragraph 10 of the Advocates Remuneration Order; and that the learned Judge ought to have just awarded costs and leave it to the Deputy Registrar to tax the costs.
42. In conclusion, the appellant urged us to exercise our jurisdiction as an appellate court to re-evaluate the evidence, set aside the Judgement of the High Court, and allow the appeal by awarding the appellant the damages pleaded together with costs of the suit.
43. The respondents clustered and jointly addressed the grounds of appeal. On grounds 1, 2 and 3, the respondents referred to this Court's decision in *Timsales Limited vs. Stanley Njihia Macharia (2016) eKLR*, which referred to the decision of *South Nyanza Sugar Co. Limited vs. Wilson Ongumo Nyakweba (2008) eKLR* where Musinga, J. (as he then was) held that the burden of proof in any allegation lies with the plaintiff, to prove the causal link between negligence and the injury.
44. It was submitted that, the report of the appellant's investigators, Safety Surveyors Limited, concluded at paragraphs 8.0.1, 8.0.3. and 9.0 on pages 252 and 253 of the record that the incident occurred at 6.30 a.m. when it was still early and the vehicles awaiting to board the ferry were few; that any move by a heavy commercial vehicle to reverse up an ascending ramp while partly inside the ferry would cause the ferry to drift away from the ramp, and that this was the scenario in this case; that the report further observed that the driver did not appear to have been exposed to driving a heavy loaded truck onto the ferry; that the driver was required to simply park the vehicle inside the ferry and allow other vehicles to also park; that the lorry had previously been involved in an accident as admitted by the appellant; and that, as confirmed by the driver, it was the axle which refused to get onto the ferry.
45. The respondents submitted that the appellant failed to prove all the special damages and the particulars thereof; that the appellant was duly compensated for the accident; and that he should not be allowed to unjustly enrich himself against the insurance principle of indemnity.
46. On the consolidated grounds of appeal Nos. 4, 5 and 6, it was submitted that the learned Judge was not biased against the appellant's case; that his comment in the Judgment of having made a negative impression of the appellant should be taken as an 'arbiter dictum as the same did not strictly and/ordinarily, influence the decision' a court makes as was held by this Court in the case *Ranch Hoddas Keshvji Dewani (1958) EA 239*; that a perusal of the impugned judgement shows a distinction and the unbiased deliberation of the court's decision; that the court went ahead to give its ratio decidendi in relation to the decision made; that the learned Judge asked the witnesses questions with a view of seeking clarifications and that that did not amount to cross-examining the witnesses; and that, section 173 of the *Evidence Act* allows a court to seek further information or clarification on an issue.
47. On grounds 7 and 8, the respondents submitted that the appellant was not present when the accident occurred, and that, in fact, he did not witness the accident; and that his (appellant) failure to testify ultimately had a negative bearing on his case.



48. With respect to the evidence of the driver, the respondent contends that, in the Judgment, the learned Judge recounted the events leading up to the accident according to the driver's evidence; and that it is not factual that the appellant's case was dismissed because the driver did not testify.
49. Finally, on the issue of costs, it was contended that the trial court was right in awarding the specific amount to the respondent as there is nothing which bars a court from doing so; that there are instances in election petitions when Judges have awarded the winning party costs. Reliance was placed on the decision of the Supreme Court in *Westmont Holdings SDN BHD vs. Central Bank of Kenya & 2 Others* (2023) eKLR to buttress this submission; that furthermore, section 27 of the *Civil Procedure Act* allows a court to award and determine the extent of the costs to be paid; that the costs of Kshs.600,000 awarded is on the lower side considering that the appellant's claim was in the sum of Kshs.335,344,388; and that, if the costs were to be tabulated and taxed under the Advocates Remuneration Order, the award would have been much higher.
50. The respondents urged that the appeal lacks merit, and that it ought to be dismissed with costs.
51. As a first appellate court, it is our duty to reconsider the entire evidence, re-evaluate it ourselves and draw our own conclusions in determining whether or not to uphold the trial Judge's decision. Even as we do so, we bear in mind that unlike the trial court, we did not have the advantage of seeing and assessing the demeanour of witnesses. This mandate was well enunciated in *Selle vs. Associated Motor Boats Co. Limited & Others* (1968) EA 123. See also *Peters vs. Sunday Post Limited* [1958] EA 424.
52. Further, we are cognizant of the fact that we should not interfere with the findings of fact by the trial court simply because we would have arrived at a different finding. We would only interfere with the finding of fact by the trial court if it is based on no evidence, or on misapprehension of the evidence, or on the basis that the Judge acted on wrong principles. This principle was enunciated in *Ephantus Mwangi vs. Duncan Mwangi Wambugu* [1984] eKLR.
53. The same principle was restated in the case of *Bundi Murube vs. Joseph Omkuba Nyamuro* [1982-88] 1KAR 108 thus:
- “However, a Court on appeal will not normally interfere with a finding of fact by the trial Court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did.”
- In the same vein *Rahima Tayabb & Another V Ann Mary Kinamu* [1982-88] 1KAR 90 Law JA also stated:
- “An appellate Court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him.”
54. Having considered the pleadings, the documents in the record of appeal and the findings of the trial court, the appellant's grounds of appeal, the respective rival submissions and the law, we deduce that the issues which arise for our determination are:
- a. Who is to blame for the accident which occurred on 16th March 2005?
 - b. Based on our finding on (a) above, whether the appellant is entitled to any compensation of damages as prayed.
55. As we consider the first issue, we will consider the several aspects of the case, namely determining which party was negligent; whether the mechanical state of the lorry contributed to the accident; and whether



- the driver of the lorry was endowed with the proper skills required to control and/or manage the lorry in the particular circumstances.
56. The uncontested grounds are that, indeed, an accident involving the subject lorry did occur at the Likoni Port on 16th March 2005, and that George Njihia Karibia (George) was its driver.
57. According to the written statement of George, he testified that:
- “When other vehicles had embarked and it was my turn to embark into the ferry, the entire body of the lorry entered the ferry ramp except for rear axle which I struggled so much but failed and the lorry could not move further inside the ferry. I was told by the Kenya Ferry attendant to reverse so that I could come back with full momentum. I did as instructed. I disembarked and drove back to the ferry only for the truck to be half body into the ferry. Suddenly, the coxswain started moving off the ferry from pantone while half of the lorry was still in the ferry ramp. When I saw this, I realised that the actual destiny of the lorry was to fall off from the ferry ramp into the sea, because the ferry was not stopping and continued to move. As a result, I jumped out of the lorry into the ferry.”
58. The statement of Gilbert Cherubet, the turnboy/conductor, read in part:
- “On 16th March 2005, we arrived at 6.00a.m. at the ferry and we were told to wait. Later sometimes we were told to drive inside the ferry, MV Harambee. The truck got inside the ferry with the trailer, but one axle out of the seven remained outside. The driver was told by an attendant to reverse back, which he did. He reversed back four axles which moved out of the ferry and three remained in the ferry. He then moved to align his truck. At the same time, I saw the coxswain of the ferry start moving towards the ocean and immediately the truck driver saw that too and he jumped outside the truck into the ferry where he was carried by ferry and immediately the truck drowned into the ocean.”
59. The defence witness, Cheleste Njeru Njagi, a Senior Ferry Master adopted his witness statement dated 17th March 2023. However, we are unable to trace his witness statement in the record of appeal. His evidence in cross-examination shed light on what transpired. He stated that:
- “I was 250 metres from the accident point. We had contact radio communication going on between the ferries. I saw the motor vehicle entering into water....the vehicle was boarding and going back. It was unable to board. The same was on radio...the coxswain and the ramp controller were telling the driver to reverse. I heard screams that the motor vehicle was entering the sea.”
60. What comes out clearly from the statements above is that, after attempts to board the lorry into the ferry failed, George was instructed by the coxswain and the ramp controllers to reverse the lorry. He was then instructed to drive into the ferry at high speed, hoping that all the axles would get onto the ferry.
61. The appellant’s claim was founded on the fact that the respondents prematurely allowed the ferry to set off the before the lorry was fully boarded, thereby causing the accident. This is the basis on which the appellant apportions negligence on the part of the coxswain for which he holds the respondents accountable.



62. The general rule is that he who asserts must prove. Sections 107 and 109 of the *Evidence Act* are instructive. They provide as follows:

107(1) 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.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109 The burden of proof as to any particular 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 that fact shall lie on any particular person.

63. A claimant who relies on negligence must establish it. Clerk & Lindsell on Torts 18th Edition outlines the ingredients of the tort of negligence as follows:

1. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;
3. a causal connection between the defendant's careless conduct and the damage;
4. that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote. When these four requirements are satisfied the defendant is liable in negligence.

....A defendant will be regarded as in breach of a duty of care if his conduct falls below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the often cited words of Baron Alderson: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do". The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case."

64. The appellant entirely blames the respondents' coxswain for the accident, claiming that he caused the ferry to move away from the ramp before the lorry successfully boarded the ferry. On the other hand, the respondents' case is that the lorry driver was wholly to blame in that, he did not have sufficient skill to drive the lorry onto the ferry, more so a heavy commercial lorry, into a ferry. The Supreme Court in *Raila Amolo Odinga & Another vs. IEBC & 2 Others* [2017] eKLR explained circumstances when evidential burden has to shift as follows:

"(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, this, evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."



65. It is trite therefore that the burden of proof lies with the litigating parties, and may differ substantially premised on the circumstances of the case. And therefore, each party herein was required to establish the existence of a fact, on a balance of probabilities, being negligence on the part of the party he/it claimed against.
66. Upon considering the witness testimonies as we have reproduced above, and applying the holding by the Supreme Court in the *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (supra), we are left with no doubt that, to some extent, the tripartite parties involved, these being, the appellant's driver and vehicle, the coxswain and the ramp controller were all to blame in one way or the other to some degree for the occurrence of the accident. In as much as we do not have the job description of the coxswain and the ramp controller, we believe that they had a duty to ensure that the ferry was at all times, properly boarded by the passengers and the vehicles before sailing off. The coxswain ought to have waited for clearance from the ramp controller that all was well before starting the journey. By the same token, the appellant's driver ought to have possessed sufficient skill to enable him manoeuvre the heavy-laden lorry onto the ferry, which in turn should have boarded the ferry effortlessly.
67. We take cognizance of the fact that the burden of proving contributory negligence on the part of the plaintiff is on the defendant. See *Embu Road Services vs. Riimi* (1968) EA 22 at 25, *Mzuri Muhhidin vs. Nazzor Bin Seif* (1960) EA 201 and *Menezes Stylianides Ltd* (Civil Appeal No.46 of 1962 unreported) where the courts held, inter alia:
- “Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show, in the words of SIR ALISTAIR FORBES,
- ‘that there was a probable cause of the accident, which does not create negligence’ or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence”. See also *Odunga's Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).*
68. The evidence of DW1 was that he heard communication between the lorry driver and the then coxswain, one Salim over the radio communication. This points out to the fact that there was some means of communication available between the parties to enable the coxswain to know that the ferry was ready for take-off. The coxswain was not to proceed on assumptions. There was no evidence produced to show that the coxswain was not aware that the appellant's driver had been making attempts to board the ferry.
69. Turning to the other aspect as to whether the lorry was mechanically sound, there is no report produced before the trial court suggesting that the lorry was not mechanically sound prior to the occurrence of the accident. However, failure of the lorry to fully board the ramp with all its axles, and not once, but after a number of attempts should raise eyebrows. The evidence was that some axles were not boarding onto the ferry despite several attempts. This points to the fact that there was a likelihood that the lorry was experiencing some mechanical problems, more so bearing in mind and taking judicial notice of the fact that in order to board the ferry, vehicles ordinarily drive downhill, and the movement downhill would no doubt have made it easier for the lorry to board the ferry. Instead, after several attempts, some axles could not get onto the ferry. This failure must certainly have been occasioned by a hitch in the lorry.



70. The respondents argued that the driver was not skilled enough to manoeuvre the lorry and park it inside the ferry. The evidence of the driver was that, he was a qualified and licenced driver of heavy commercial lorries with an experience of 24 years. There was no evidence adduced of his previous infractions while engaged in his duties. Although DW1 testified that he had had an accident involving the same lorry prior to the instant accident, there was no evidence lead or adduced in this regard. Further, it was not stated that that previous accident was similar to the instant accident.
71. In cross-examination, he stated that the first time he drove the vehicle through the ferry was three weeks prior to the accident. This may point to an assumption that the driver was just beginning to learn how to embark onto a ferry. Needless to say, we opine that it is remote to say that it is the driver who had an issue, taking into account that he had previously embarked the lorry onto the ferry successfully.
72. As for the evidence of DW1, he was 250 metres away from the scene of the accident. He was not on site to confirm that the coxswain started moving the ferry before the lorry had fully boarded. DW1's evidence ought to have been treated with caution.
73. Summing up on the issue of negligence, we must depart from the findings of the learned Judge that the respondents were not to be blamed at all for the accident. It is our finding, as already explained that both the appellant and the respondents played a part in the occurrence of the accident. We find it appropriate to apportion liability at the ratio of 70:30 in favour of the appellant.
74. On the issue of special damages, a plethora of cases have settled the principle that the special damages must be specifically pleaded and strictly proved. This Court in *Supermarine Handling Services Ltd vs. Kenya Revenue Authority* (2010) eKLR had this to say:
- “The plaintiff's case is founded mainly, on special damages which must not only be specifically pleaded but also strictly proved.
- The degree of certainty and the circumstances particularly of proof required depend on the circumstances and the nature of the acts themselves. See *Hahn v Singh* [1985] KLR 716.”
75. We have considered the pleadings of special damages at paragraph 5B of the Plaintiff which we have also reproduced in this judgement. We have also scrutinized the record of appeal to establish the receipts which were issued to the appellant as evidence of payments made towards different services. We have been able to establish:
- a. At pages 214 and 215 of the Record of Appeal, there are receipts Nos. 472 and 468, both dated 16th March 2005 which total to Kshs.100,000. The sum was paid to Neo Makupa Garage as the towing fee of the motor vehicle.
 - b. There is also a receipt at page 216 of the Record of Kshs.9,000 which was payment to the Kenya Ferry Services for obstruction fees.
76. In addition, the following receipts were issued to the appellant after payment of money for spare parts' purchase and repair charges from both Heavy Vehicle & Plant Supplies Limited and to Nizam Engineering as follows:
- a. At page 217- receipt No. 93 for Kshs.481,400.
 - b. At page 218 receipt No. 1605 for Kshs.283, 077.
 - c. At page 219 receipt No. 1606 for Kshs.199,523.
 - d. At page 220 receipt No. 1608 for Kshs.236, 087.80.



- e. At page 221 receipt No. 1609 for Kshs.269,120.50.
- f. At page 230 receipt No. 2220 for Kshs.2,051,574.48.
77. The total amount shown on the receipts issued to the appellant in respect to the purchase of spare parts and repairs was Kshs.3,520,782.78.
78. There is a Claims Requisition Voucher from CIC Insurance dated 23rd May 2005 for Kshs.2,630,083 and a cheque was issued for the same amount on 30th May 2005. The appellant admitted as much in his evidence. On the other hand, the appellant expended Kshs.3,520,782.78 towards spare parts and repairs. In our view, although the appellant was compensated to the tune of Ksh. 2,630,083 by the insurance for spare parts and repairs, he is entitled in full, in compensation by the respondents, for the total sum expended in spare parts and repairs of Ksh. 3,520,782.78. We shall accordingly award him this sum under this head.
79. We have also seen the receipt confirming that the appellant paid Kshs.484,006 as the insurance fee to CIC insurance. We do not find it necessary to make an award under this head since this is a statutory requirement which the appellant must comply with in accordance with traffic laws. In any event, he did benefit from the payment of the premiums by being paid Kshs.2,630,083 towards repairing the lorry.
80. There is a receipt No. 385 at page 331 for Kshs.525,000 paid for the 32 tonnes of calcium lime powder to Descent Merchants Limited, the company which had contracted the appellant to transport the calcium. We find that the appellant deserves to be awarded this amount because, save for the accident, the calcium would have been delivered successfully.
81. Still on special damages, the appellant pleaded for loss of user for 9 months at Kshs.9,551,026 and loss of motor vehicle (repossessed by Stanbic Bank)- Kshs.8,000,000, loss of profits from April to December 2005 of Kshs.6,156,376 and loss/damage of goods at Kshs.120,000 per 2 days Kshs.10,800,000.
82. What the appellant is claiming is loss of future profits. With all due respect, the appellant is required to prove the difference between the position he is in and the position he would have been had it not been for the respondents' negligence.
83. Nyamweya, JA. in *Micro-City Computers Limited & another vs. National Social Security Fund Board of Trustees & another* (2024) KECA 444 (KLR) referred to the Legal Text in Chapter on Damages and Proof by Adam Kramer in the text 'Commercial Remedies: Resolving Controversies, 2017 Edn' where the author stated:
- “The breach position is a question of historical and actual fact, and what happened, what was spent, and what was received can be established with precision by the claimant on the balance of probabilities. On the other hand, the non-breach position is of its nature a hypothetical, and proof of it is a different type of exercise, namely an approximation of how the parties would have operated and the situation the claimant would have been in if the primary contractual obligations had been performed.”
84. As for the claim of loss of user, it is described as the 'temporary or permanent inability to use personal property,
- real property, or a body part due to the negligence or wrongdoings of another, an accident, or some other action.' (<https://www.law.cornell.edu>).
85. We agree with the High Court sitting at Malindi (Nyakundi, J.) in *Chumba & another vs. Kwick Servess Shuttle Ltd* (Civil Appeal E137 of 2023) [2024] KEHC 4532 (KLR) (11 March 2024)



(Judgment) where the learned Judge, whilst discussing the applicable standard of proving damages for loss of user had this to say:

18. Under English Common Law, loss of user or profits is strictly a special claim. The Court of Appeal in Civil Appeal No. 283 of 1996, (David Bagine versus Martin Bundi) stated that damages which are claimed under the title “loss of user” are special damages which must be proved. The Court stated as follows:

“We must and ought to make it clear that damages claimed under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can”. These damages as pointed out earlier by us must be strictly proved.”

19. The Court of Appeal in Ryce Motors Limited & Another versus Elias Muroki (1996) eKLR stated that a claim for loss of user must be supported by acceptable evidence. The Court stated as follows:

“The learned judge had before him by way of plaintiff’s evidence Exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act. These pieces of paper do not show at all if the alleged accounts were in respect of ‘the matatu’, or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Kshs.4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety.”

19. Samuel Kariuki Nyangoti v Johaan Distelberger (supra), where the appellant had claimed loss of user of his matatu which had been involved in an accident, the Court of Appeal stated:

“(16) The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases.” (emphasis)



19. The Court of Appeal also cited with approval the decision of Apaloo, J. (as he then was) in *Wambua v Patel & Another* [1986] KLR 336, where the court had found the plaintiff had not kept proper records of what he earned but stated:
- “Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method” But a victim does not lose his remedy in damages because the quantification is difficult.”
86. What is clear from the above cited decisions is that, it is not quite settled whether damages for loss of user are strictly special damages. Nevertheless, the claimant is obligated to demonstrate, by adducing evidence, the justification upon which he/she claims those damages. The appellant in this case claimed loss of user for 9 months amounting to Ksh.9,551,026. With respect, he did not explain how the figure of Kshs.9,551,026 was arrived at, and what the loss would relate to. Notably, he used to do a structured business, and it would be expected that he kept records of the flow of the business. This is the only way by which he would have discharged the burden under this head. The law requires that a claimant proves with specificity the earnings gained, be it on a daily or periodic basis, depending on the nature of the business, to warrant the compensation for it. It is not enough to make a sweeping statement that this and that figure was the income that was being earned from the business, and was lost due to the misfortune so as to warrant a compensation.
87. On the loss of Kshs.6,156,376, the appellant pleaded that it was for lost profit for the period between April and December 2005. The appellant produced the previous vouchers and orders the customers had paid for the work he did for them. Although the appellant did not in particular testify which client he was referring to, we suppose that it was the transport agreements with Transtrac dated 18th February 2005 and Bayland Freight Agencies dated 9th March 2005. In the said agreements, the appellant was required to transport goods between different countries within the Eastern Africa zone.
88. We have seen several invoices generated in the US Dollar currency to several clients. The invoices were raised between the months of February and March 2005. It is trite that an invoice does not equate to a payment already made. It is a notification to the debtor that some amount is due. We think that he muddled up this claim because the amount being pleaded by him as the lost profit is Kshs.9,551,026, but he did not go on to further explain if that would be the same amount he would have expected to earn between the months of April to December 2005, and the justification thereof. We are constrained to find that the appellant did not prove this anticipated loss and the claim under this head is dismissed.
89. The same fate befalls the claim of loss/damage of goods at Kshs.120,000 per 2 days totalling Kshs.10,800,000. The appellant did not explain in detail what this would entail. Neither can we guess what it was all about. As earlier stated, he who asserts has the burden of proving the existence of the fact. He has failed to discharge this burden.
90. On the amount of Kshs.2,282,361 paid to Stanbic Bank on account of the hire purchase terms, we think that this was an amount ultimately due to the bank for the purchase of the subject lorry. The appellant was buying the lorry as a private property, but not as a property due for reimbursement on expended purchase price by the bank. Surely, this is an amount that the respondents are not entitled to compensate him for as they were not obligated to buy the lorry for him. This claim must ultimately fail.
91. For the prayer/claim of general damages pleaded by the appellant, we bear in mind that no evidence was led in this regard. However, we take to mind, as the chronology of events attests, that the appellant



underwent a lot of pain, inconvenience and difficulties as a result of the accident. We also acknowledge that there is no formula for converting pain and suffering a person has undergone into monetary terms as was held by the Supreme Court of Canada in *Andrew vs. Grand & Toy Alberta Ltd* [197] 83 DLR 452. Speaking in a similar tone, the Court of Appeal in *Ugenya Bus Service v Gachuki* CA No 66 of (1981 – 1986) KLR 567 stated that “General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties.”

92. We are alive to the fact that award of general damages is discretionary, but which discretion should be exercised judiciously. This Court in *Mohamed Mahmoud Jabane vs. HigHighstone Butty Tongoi Olenja* (1986) KECA 71 [KLR] gave guidance on the proper approach that courts should take while awarding damages as follows:

1. Each case depends on its own facts;
2. awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic);
3. compensable injuries should attract comparable awards;
4. inflation should be taken into account; and
5. Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.”

93. As stated above, money cannot quite replace the pain that a person has suffered. Neither can it renew the battered and shattered loss already experienced. Where a party has suffered loss, courts have awarded nominal damages which are intended to give some solace by way of reasonable compensation. The amount awarded should be reasonable, comparable with the circumstances of the case and reflect the current economic situation. In other words, it must also serve the public interest.

94. So then, what is nominal damages that is awarded as general damages? In *Jogoo Kimakia Bus Services LTD vs Electrocom International LTD* [1992] eKLR, the Court of Appeal stated:

“In ‘Medina’ and the ‘Mediana’ [1900] AC 113, 116 Earl of Halsbury LC as he then was defined nominal damages: -

“My Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages.

‘Nominal damages’ is a technical phrase which means that you have negated anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages.”

95. In the case of *Mbarak vs. Freedom Limited (Civil Appeal E028 of 2022)* [2024] KECA 160 (KLR) (23 February 2024) (Judgment), this Court (Murgor, Laibuta & Odunga, JJ.A.) allowed the appellant’s appeal by setting aside the Land and Environment Court’s judgment (Matheka, J.) vide which the respondent had been declared the owner of the suit property after its title was transferred to it on 12th



- November 2010 after an irregular sale. This Court declared the sale as null and void and, in addition other orders that were issued, awarded the appellant compensation of a sum of Ksh. 5,000,000.00 as general damages in view of the forced eviction of the deceased's (original owner) family from the suit land and in total disregard of their right over the land.
96. This Court in *Nyamogo & Nyamogo Advocates vs. Barclays Bank of Kenya* (2015) eKLR set aside an award of Ksh.10,000,000.00 as nominal damages granted by the High Court for breach of a contract and substituted it therefor with an award of Kshs.500,000.00 under the same head.
97. In the instant case, we take to mind that the appellant had his business disrupted, and the journey from the moment his lorry slid into the Indian Ocean up to the time that it was repossessed by the bank, was no doubt agonising; very painful indeed. And, as the respondents contributed to this agony, we cannot be out of order in awarding a nominal reasonable compensation in the sum of Ksh.1,000,000/= as general damages.
98. Lastly, it is trite that assessment of costs is undertaken administratively by the Deputy Registrar pursuant to Paragraph 10 of the Advocates Remuneration Order. All the trial court is required to do is to make a general order on whether or not costs are granted. The assessment of costs is then left to the Deputy Registrar after the successful party files a Bill of Costs. It suffices to say that election petitions are special proceedings which are governed by specific statutes that also provide on how costs are awarded. They cannot therefore be equated with normal civil proceedings where it is settled law as regards to how assessment of costs should be done. Of course, there are exceptions to the general rule where parties agree on costs or instances where a court may award a specific figure for a specific item. And, in the exceptional circumstances, the reason for the award of costs by the court is given and justified in the circumstances. In contrast, costs upon finalization of proceedings must be assessed by a Deputy Registrar. It then follows that the award of Kshs.600,000 as costs is hereby set aside and substituted for an order that the parties be at liberty to pursue taxation of such costs by the Taxing Officer.
99. In the end, we find and hold that the appeal partly succeeds on the issue of quantum and liability. The decision of the learned Judge (Kizito, J.) dated and delivered on 22nd June 2023 is hereby set aside and substituted therefor with the following orders and awards:
1. Liability shall be apportioned at the ratio of 70:30 % in favour of the appellant.
 2. General damages Ksh. 1,000,000.00;
 3. Special damages in the total sum of Ksh.5,154,782.78 made up as follows:
 - a. Costs of repair and spare parts Kshs. 3,520,782.78
 - b. Compensation paid to Descent Merchants - Kshs. 525,000.00
 - c. Towing fees - Kshs. 100,000.00
 - d. Obstruction fees - Kshs. 9,000.00
 4. The sums aforesaid to be apportioned in the ratio of 30%/70% in favour of the appellant; and
 5. 30% of the costs to be assessed by the Taxing Officer of the Court.
100. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025.

A. K. MURGOR



.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

