



REPUBLIC OF KENYA



**KENYA LAW**  
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**Akothe v Busolo (Civil Appeal E071 of 2022)  
[2025] KECA 1155 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1155 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL E071 OF 2022  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
JUNE 20, 2025**

**BETWEEN**

**JAMES ITHALE AKOTHE ..... APPELLANT**

**AND**

**EDWIN SUYA BUSOLO ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Malindi  
(Nyakundi, J.) delivered on 15th April 2020 in Civil Appeal No. E041 of 2018)*

**JUDGMENT**

1. This is a second appeal in which the appellant, James Ithale Akothe, is challenging the Judgement and Decree of the High Court of Kenya at Malindi [Nyakundi, J.] in Malindi Civil Appeal No. E071 of 2022 dated 15<sup>th</sup> April 2020, which dismissed the appellant's appeal against the decision of Kilifi Senior Principal Magistrates' Court [R. K. Ondieki, SPM] which was delivered in favour of the respondent, Edwin Suyu Busolo.
2. The brief background to the appeal is that, by a plaint dated 15<sup>th</sup> February 2016, the respondent pleaded that the appellant was the beneficial owner of motor vehicle registration number KBW 920E while Sony Motors Limited [named as the 2<sup>nd</sup> defendant] was the registered owner of the motor vehicle; that, on or about 30<sup>th</sup> July 2015, he was riding his motorcycle registration number KMCU 152H along the Mombasa-Malindi Road when, at Mtwapa, the appellant and/or his authorised driver, servant, agent and/or employee negligently and/or carelessly drove the suit motor vehicle causing it to violently collide with his motorcycle, thereby occasioning him to sustain serious injuries, loss and damage.
3. The particulars of negligence attributed to the appellant, his authorised driver, servant, employee and/or agent were as follows:
  - i. driving at a speed which was excessive in the circumstances;



- ii. failing to exercise any or any sufficient caution in the driving of the suit motor vehicle;
  - iii. failing to have any or any sufficient regard or care for the safety of other road users who were travelling along the same road;
  - iv. losing control of the motor vehicle;
  - v. failing to hoot or warn the oncoming traffic of the presence of the motorcycle on the said road, if any, before the accident; and
  - vi. failing to apply breaks, slow down, swerve, stop or in any other way so as to manage or control the motor vehicle to avoid the accident.
4. As a result, the respondent contended that he suffered the following injuries:
- a. comminuted and displaced fracture of the right femur;
  - b. compound/open, comminuted and displaced fracture of the right lower tibia extending into the ankle joint;
  - c. compound/open, comminuted and displaced fracture of the right lower fibula extending into the ankle joint;
  - d. degloving injury to the right upper arm with several lacerations on the forearm and right shoulder;
  - e. blunt injury to the right knee joint; and
  - f. lacerations around the right eye.
5. The respondent prayed that judgment be entered against the appellant for: general damages; special damages of Kshs.2,000 for medical report; costs of, and incidental to, the suit; and interest of the foregoing at court rates.
6. The appellant filed a statement of defence dated 9<sup>th</sup> March 2016. He denied: ownership of the motor vehicle; and that the accident occurred on the date, or at the time or place, or in the manner described by the respondent. He further stated that, if the accident ever occurred, it was contributed to by the sole negligence of the respondent or the rider of the motorcycle. He particularised the negligence of the respondent or rider as follows:
- i. riding at a speed that was excessive in the circumstances of the location, time and situation;
  - ii. failing to take notice and/or have regard to the vehicles on the road, particularly to the motor vehicle;
  - iii. riding on the wrong side of the road;
  - iv. dangerously and suddenly attempting to cut into and/or enter onto the road without ascertaining if it was safe to do so and from the wrong side of the road;
  - v. failing to notice and/or have regard to the presence of the motor vehicle before attempting to enter and /or fall back onto the road;
  - vi. failing to have regard to the traffic signs, the Highway Code and the traffic rules;
  - vii. voluntarily embarking and/or undertaking a highly risky and/or dangerous manoeuvre;
  - viii. riding a motorcycle without the proper qualifications or licence; and



- ix. failing to ensure and use appropriate appliances, clothing and safety devices required of a rider of a motorcycle.
7. The respondent thus prayed that the suit against him be dismissed with costs.
8. On 4<sup>th</sup> September 2017, parties recorded consent judgment on liability at the ratio of 40:60 % as against the respondent and the appellant respectively. Thereafter, the matter proceeded to assessment of damages.
9. At the hearing of the suit, the appellant [PW1] adopted his witness statement dated 15<sup>th</sup> February 2016, which basically reiterated the contents of the plaint on the circumstances which led to the accident. The respondent further produced the documents in his List of Documents also dated 15<sup>th</sup> February 2016 in evidence, namely the initial treatment notes from Coast Provincial General Hospital; a P3 Form dated 14<sup>th</sup> April 2025; a Police Abstract report dated 28<sup>th</sup> April 2025 from Mtwapa Traffic Base; a Medical Report from Dr. S.K. Ndegwa dated 28<sup>th</sup> April 2025; and a copy of Motor Vehicle Search for motor vehicle registration No. KBW 920E dated 6<sup>th</sup> May 2025 from the Registrar of Motor Vehicles. He further testified that, he sustained fractures of the right hand, knees and left side of his face; that he had not fully healed; and that he still was going to hospital for medication.
10. In cross-examination, he stated that he was injured on the right side of his face; that he sustained a cut on his right femur, which was fractured; and that he was examined by Dr. Udayan on 21<sup>st</sup> April 2016.
11. Dr. S. K. Ndegwa [PW2] produced the Medical Examination Report dated 28<sup>th</sup> April 2015 as [PEXH1]; a receipt of Kshs. 2,000 [PEXH 2], being charges for writing the medical report; a receipt of Kshs.10,000 [PEXH 3]; and treatment notes [PEXH 4]. In cross-examination, he stated that he could not assess the percentage of disability as at the time he examined the respondent since he was still undergoing treatment.
12. In defence, the appellant called Dr. Udayan Sheth [DW1] whose testimony was that he examined the respondent on 21<sup>st</sup> April 2016 and prepared a report on 30<sup>th</sup> July 2014 [DEXH1]. He assessed the respondent's permanent disability at 10%.
13. The learned Magistrate found it inexplicable that the two doctors who examined the respondent came up with two different medical opinions. Based on this fact, and while referring to the decision of Lord Scarman in *Maynard v West Midlands Regional Health Authority* reported in Times of May 1993, in which it was held that, where differences of opinion and practice exists in the medical field as in other professions, the court may prefer one body of opinion to the other, he held that he had the option of relying on any one of the medical reports. He then awarded the respondent Kshs.2,000,000 as general damages after contribution [read contributory] negligence; special damages of Kshs.2,000; costs and interest.
14. Dissatisfied with the Judgment of the learned Magistrate, the appellant filed an appeal to the High Court at Malindi, in Malindi High Court Civil Appeal No. 41 of 2018 - James Ithale Akothe v Edwin Suya Busolo - in which he raised eight [8] grounds of appeal. He basically complained that the assessment and award of general damages was excessive; that, in the assessment, the trial court applied the wrong principles; that the trial court erred in failing to make an award on a wholesome basis before deduction of the respondent's agreed contributory negligence; that the trial court failed to appreciate that the medical report of Dr. Udayan R. Sheth constituted the latest report as to the recovery status of the respondent; and that the trial court failed to appreciate that special damages must be specifically pleaded and strictly proved.



15. After re-assessing and re-analysing the evidence adduced before the trial court and the record before him, the learned Judge [Nyakundi, J.] upheld the decision of the learned Magistrate. In doing so, he had regard to the medical reports dated 22<sup>nd</sup> January 2015 and 12<sup>th</sup> September 2014 from Coast General Hospital, which indicated that, as at the time the x-ray was taken, it showed that the injuries the respondent had suffered were fractures of the right femur tibia and fibula; and that the injuries precipitated the admission of the respondent to hospital between 30<sup>th</sup> July 2014 and 22<sup>nd</sup> January 2015.
16. The learned Judge also analysed the medical report by Dr. Ndegwa dated 28<sup>th</sup> April 2015 and that of Dr. Sheth dated 21<sup>st</sup> April 2016. He noted that the two reports were not at variance as regards the injuries the respondent sustained; that they [injuries] reflected the particulars of injuries as pleaded by the respondent; that, according to Dr. Sheth, the respondent would have suffered 10% permanent incapacity due to a stiff right ankle for which he would require skin grafting for the wound over the right leg; and that the period of hospitalization was a testament of the harrowing experience the respondent went through as a result of the injuries.
17. As regards the complaint that the trial court failed to appreciate the medical report prepared by Dr. Sheth, the learned Judge held that the appellant did not succinctly state why the report of Dr. Sheth was of higher probative value than that of Dr. Ndegwa; and that there was no evidence that the expert opinion did not follow the well-known accepted path to bolster the evidence on which the trial court's judgement was based. Consequently, the learned Judge did not find any reason to interfere with the decision of the trial court and dismissed the appeal with costs.
18. Still dissatisfied, the appellant has now proffered the instant appeal. He has raised eleven [11] grounds of appeal which we have condensed into four [4], namely that the learned Judge:
  - i. failed to appreciate, comprehend and undertake his role and duty as the first appellate court considering the nature of the dispute before him;
  - ii. erred in law in failing to consider and determine the issues which were before him in the appeal;
  - iii. erred in failing to consider and/or determine whether the awards on general damages made by the lower court in the primary suit were inordinately high and/or excessive; and
  - iv. erred in awarding the respondent costs of their respective claims.
19. We heard this appeal virtually on 28<sup>th</sup> January 2025. Learned counsel Mr. Onyango appeared for the appellant while learned counsel Mr. Mutubia appeared for the respondent. Both counsel relied on respective parties' written submissions which they also orally highlighted in Court. Those of the appellant are dated 21<sup>st</sup> January 2025 while those of the respondent are dated 27<sup>th</sup> January 2025.
20. Mr. Onyango submitted that the first appellate court has a duty to re-evaluate the evidence before it, unlike in this Court when sitting as a second appellate court, only issues of law are considered. To the counsel, although the learned Magistrate made the award he did while exercising his discretion, he failed to determine all the issues before him, which fact the first appellate court ought to have taken note of.
21. The appellant took issue with the fact that the trial court did not give reasons for preferring to rely on one medical report as opposed to the other, and for awarding the damages after contribution. Reliance was placed on the decisions of this Court of Mohammed Eltaff & 3 Others v Dream Camp Limited [2005] KECA 90 [KLR]; and Samuel Osoro Nyamwaro & 2 Others v Boniface Kamau & Another [1995] KECA 125 [KLR] which stressed that a judgement should deal with all issues raised, and that it should not be scanty.



22. Counsel submitted that there was no analysis of the injuries that the respondent suffered and that, therefore, there was no basis upon which the trial court made an award of Kshs.2,000,000 in as much as it was exercising its discretion; that, for this reason and, as was stressed in the case of Samuel Osoro Nyamwaro & others v Boniface Kamau & another [1995] eKLR, the trial court made a gross error of law; that, furthermore, no analysis of comparable case law was made to warrant the award made; and that, for this reason, the first appellate court was obligated to overturn the award made by the trial court. For this submission, reliance was placed on Kiragari v Agripina Mary Aya [1982-88] KAR 758 and Tayab v Kinanu [1983] eKLR in which this Court affirmed the central role the nature and extent of injuries play in assessment of damages.
23. The appellant further contended that the two courts below did not advance reasons as to why they did not rely on the two medical reports. According to the appellant, the two medical reports produced by PW2 and DW1 were at variance with the P3 form, as well as the treatment notes from Coast General Hospital in so far as the injuries the respondent suffered were concerned; that the trial court stated that, due to the variance of the content in the medical reports, he was at liberty to use any one of them in assessing the damages; that, unfortunately, the Magistrate did not state which medical report he relied upon and why; that the learned Judge did not make it better in that he did not also fault the trial court for the approach it took while assessing the damages; and that there was good reason why the two courts below rejected the medical reports which were themselves expert evidence. Reliance was placed on this Court's decision of Stephen Kinini Wang'ondou v The Ark Limited [2016] eKLR which laid down the principles upon which a court can test or reject expert evidence. It was submitted that the variance of the two medical reports was a ground to reject any of them; that, in the circumstances, the two courts below ought to have relied on the primary documents which the respondent had availed, being the P3 form and medical notes. Counsel urged us to be persuaded by the decision of Gabriel Kariuki Kigathi & Another v Monica Wangui Wangechi [2015] KEHC [106] KLR which held that, if faced with two medical reports, the court should be inclined towards the latest and more recent as presenting the likely accurate and latest position on the nature of injuries and extent of recovery.
24. It was also contended that the assessment of damages ought to have been done on a wholesome assessment as opposed to 'after contribution'; that the assessment of damages was improper as it failed to separate the compensation from liability; that, for this reason, the trial Magistrate improperly exercised his discretion for the reason that assessment of damages is not tied to apportionment of liability; that such an approach has the potential of awarding excessive damages; that the trial court was under a duty to make an assessment of damages premised on the injuries the respondent suffered as well as comparable case law, which it did not; and that, for this misstep, the award of Kshs.500,000 as general damages was reasonable and justifiable.
25. On the part of the respondent, it was contended that, this being a second appeal, the Court is limited to determining only matters of law as was held in Kenya Breweries Limited vs Godfrey Odoyo [2010] eKLR and Stephen Muriungi & another v Republic [1982-88] 1 KAR 360; that the award of Kshs.2,000,000 was based on the injuries the respondent sustained; that the injuries were demonstrated by the medical reports prepared by Dr. Ndegwa and Dr. Udayan, and which were considered accordingly by the two courts below; that, before assessing the damages, the trial court concluded that he [the respondent] went through pain and suffering for which he had to be compensated; that the trial court considered the principles for assessment of damages as enumerated in the case of Ugenya Bus Services v James Kongo Gachohi Civil Appeal No. 66 of 2018, where Madan, JA. decried the award of small and stingy awards; that the injuries the respondent sustained were severe, namely fractures of the right tibia and fibula; that the medical reports indicated that the respondent



would require surgery after 2 years; that, therefore, the award of Kshs.2,000,000 was based on both evidence and the law.

26. On the submission that both the trial court and the High Court did not properly exercise their discretion in awarding the damages and affirming them respectively, it is contended that the first appellate court relied on the initial treatment notes which did not differ with the medical reports of Dr. Ndegwa and Dr. Sheth; and that the appellant's insistence that Dr. Udayan's medical report was the best is confounding.
27. On the proposed award of Kshs.500,000, the respondent submitted that the proposal was stingy and not comparable to the nature of injuries the respondent suffered; and that the injuries in the authorities the appellant relied upon were not comparable to the injuries the respondent in the instant case suffered.
28. As regards the contention that the assessment ought to be wholesome, but not 'after contribution', it is submitted that the award of damages 'after contribution' was meant to ensure clarity in the judgement so as to save the parties the agony of seeking to interpret the award thereafter.
29. In conclusion, the respondent submits that the judgment of the first appellate court was merited and, as such, the appeal should be dismissed.
30. We have considered the record of appeal, the grounds in support thereof, the respective rival submissions and the law. Our limited jurisdiction on second appeal is confined to matters of law as provided in Section 72[1] of the *Civil Procedure Act*. In *Kenya Breweries Limited v Godfrey Odoyo* [2010] KECA 498 [KLR], Onyango Otieno, JA. put it succinctly in the following words:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

31. This appeal is limited to the issue of the quantum of damages, the issue of liability having been settled with the consent of the parties. It is a generally accepted principle that assessment of damages is a matter of discretion. In *Agnes Kamene Mulyali v Harvest Limited* [2017] KECA 764 [KLR], this Court stated as follows concerning a second appeal on quantum:

“As this is a second appeal, we address issues of law only and the quantum or assessment of damages is a question of law. We have before us two concurrent findings on quantum with which we are asked to interfere. Awards of damages of course lie in the discretion of the court but it is exercisable on settled principles. Appellate courts are slow to interfere with the same and will do so only in well-known circumstances. In *Kenya Bus Services & Another v Mayende* [1992] 2 EA 232 at 235, this court put it thus: ‘The principles on which an appellate court will interfere with a trial court’s assessment of damages are now settled in Kenya. Kneller, JA. as he then was, put it thus in *Kitavi v Coastal Bottles Limited* [1984] LLR 213 [CAK]; ‘the court of appeal in Kenya then should as its forerunners did only disturb an award of damages, when the trial judge has taken into account a factor he ought not to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. *Singh v Singh and another* [1955] 22 EACR at 129; *Butt v Khan* [1977] LLR 2 [CAK].’ ”



32. In addressing the trial court’s duty in assessment of damages, this Court in the case of Kimatu Mbuvi t/a KECA 130 held:

“It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in *H. West & Son Ltd v Shephard* [1964] AC 326 at page 353.

“The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.’”

33. The appellant’s arguments are two-fold. Firstly, he faults the trial court for placing a higher probative value to the medical report by Dr. Ndegwa than that of Dr. Udayan, a trajectory which the appellate court followed instead of reverting to the hospital medical reports and the P3 form. Secondly, he complains that the damages awarded were excessive.

34. We have considered the findings of the two courts below. To answer the appellant on his concern that the trial court relied on one medical report at the expense of the other, the learned Judge had this to say:

“Learned Counsel for the appellant point is all about the learned Magistrate ignoring the medical report by Dr. Sheth and sought to rely heavily on Dr. Ndegwa’s medical report and as a consequence arrived at an erroneous quantum. I have [sic] answer for learned Counsel. First, the test here is not on prognosis and level of disability as opined by the two doctors... and secondly, the statutory provisions of Section 48 of the *Evidence Act* on expert evidence and the importance of it in the final decision of the court is a matter purely within the realm of that trial court discretion.”

35. In *Mohammed Hassan Musa & Another v Peter M. Mailanyi & Another* [2000] KECA 31 [KLR], this Court opined the place of doctors’ medical reports to be as follows:

“Though doctors are experts in their own right, their evidence is really of an advisory character given on the facts submitted to them. The functions of expert witnesses were succinctly stated by Lord President Cooper in *Davie v Edinburgh Magistrates* [1953] SC 34 when he said:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury, to form their own independent judgment by the application of these criteria to the facts proved in evidence.’

The testimony of an expert is likely to carry more weight, and more readily relate to an ultimate issue than that of an ordinary witness.”



36. We have had the advantage of perusing the two medical reports. The medical report prepared by Dr. Ndegwa is dated 28<sup>th</sup> April 2015. The injuries sustained by the respondent were outlined as follows:
- a. comminuted and displaced fracture of the right femur;
  - b. compound/open, comminuted and displaced fracture of the right lower tibia extending into the ankle joint;
  - c. compound/open, comminuted and displaced fracture of the right lower fibula extending to the ankle joint;
  - d. degloving injury to the right upper arm with several lacerations on the forearm and right shoulder;
  - e. blunt injury to the right knee joint; and
  - f. lacerations around the right eye.
37. Dr. Ndegwa recommended corrective surgery at a cost of Kshs.300,000. However, he could not assess the degree of permanent disability until after 3 months for the reason that the respondent was still undergoing treatment.
38. One year later, on 21<sup>st</sup> April 2016, Dr. Udayan Sheth examined the respondent. His observations on the injuries and treatment were as follows:
- “Comminuted displaced fracture right femur, compound comminuted fracture right lower end of tibia -fibula, lacerated wound over right arm and forearm, cut wound near right eye. He was done surgical toilet of the wound; right femur fracture was fixed with nail and screws. Fracture tibia – fibula was treated on external fixator and regular dressing.”
39. In Dr. Sheth’s opinion, the respondent had a permanent incapacitation of 10% due to shortening of, and stiff right ankle. He also opined that the respondent would need skin grafting for raw wound over the right ankle.
40. In both reports, the doctors confirmed that the respondent suffered injuries of the right lower end of tibia and fibula, occasioning a fracture, which lends credence to the fact that, there was no contradiction of the two medical reports. It is also worthy of note that, Dr. Sheth whose medical report the appellant says was relied upon by the trial court, was appointed by the appellant, yet he takes issue with Dr. Sheth’s report that largely favours him.
41. In our view, the report by Dr. Sheth merely cemented the assertion that the respondent suffered very serious injuries to the extent that a year later, he was adjudged to have sustained 10% permanent disability. The respondent was also hospitalised from 30<sup>th</sup> July 2014 and discharged 6 months later, on 27<sup>th</sup> January 2015.
42. Whichever way we look at it, and notwithstanding which medical report was used, the fact remains that both medical reports agree as to the extent of the injuries suffered by the respondent. The appellant has not been heard to suggest that the medical doctors were incompetent or lacked the necessary expertise or qualifications to prepare the reports. Neither has he impugned the contents of the report by Dr. Sheth. All matters considered, both medical reports were of equal probative value.
43. As to the assessment of the damages, the appellant is suggesting that a sum of Kshs.500,000 would have been sufficient to compensate the respondent. We have considered the submissions by both parties in the trial court on the proposed award of damages. In the decision of the superior court in



David Kiplangat Sang v Richard Kipkoech Langat & Another [2006] eKLR, the plaintiff therein was awarded Kshs.500,000 for injuries sustained after an accident, being severe head injuries with loss of consciousness for four days; blunt chest injury with fracture of two ribs; fracture of the tibia/fibula, upper tibia [tibia plate]; and left acetabulum and hip dislocation. The permanent disability was assessed at 30%. This decision was delivered in the year 2006.

44. It is trite law that, in assessing award of damages, the court should take into account, so far as possible, comparable injuries and the passage of time from when the award was made, that is the rate of inflation. This Court observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] KECA 755 [KLR] that:

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

45. In the case of *Arrow Car Limited v Elijah Shamalla Bimomo & 2 others* [2004] KECA 136 [KLR], it was stated that:

“...But even a more important aspect which has led us to interfere is that the learned Commissioner appears to have misapprehended the general principles in assessment of damages in personal injury cases. It is our view that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

46. Certainly, in the superior court’s decision of *David Kiplangat* [supra], the plaintiff therein suffered comparable injuries to the respondent herein, but the lapse of time between the time when the decision was made to the instant decision is 12 years. The award of Kshs.500,000, in our view, would not be reasonable compensation in the circumstances.

47. On the other hand, after citing several decisions which had comparable injuries, the respondent asked for a compensation of Kshs.3,000,000, but the trial Magistrate awarded a sum of Kshs.2,000,000. We find no plausible reasons advanced by the appellant’s counsel at this stage to warrant us to disturb the award made by the trial court and upheld on 1<sup>st</sup> appeal.

48. If we may further observe, there is a letter dated 8<sup>th</sup> May 2020 from the appellant’s insurance company which is not on a without prejudice basis, advising its counsel that the award of Kshs.2,000,000 may not be tenable, but that it should consider an award of between Kshs.1,200,000 to Kshs.1,500,000 as reasonable compensation. Thus, we question the submission now that we should consider an award of Kshs.500,000.

49. We have no reason to find that the two courts below exercised their discretion injudiciously, or that they did not follow the laid down principles set out in decided cases, in assessing the damages awarded to the respondent. In the same vein, we find and hold, that the learned Judge properly exercised his mandate as a first appellate court to re-evaluate and reconsider the evidence adduced in the trial court to uphold the trial court’s judgment.

50. Finally, we turn to the contested issue of the award of damages: whether the award should have been made in lumpsum or subject to the apportionment of liability. The appellant takes issue and contends that the trial court awarded damages after allocating contribution, and that this was a principle not known in law. However, Mr. Onyango did not specifically point out how the allocation affected the final award. To the contrary, it is a principle in law that a trial court must first make a finding on liability and, in the event of a finding on contributory negligence, proceed to apportion liability to the parties



on the basis of the degree of their contribution. Thereafter, the trial court proceeds to award damages, which are payable subject to the liability as apportioned. In our view, that is what the trial court did. The damages were awarded after the trial court considered the degree of contribution attributable to each party. We therefore find no merit in this ground of appeal. However, the learned Magistrate should have specifically pronounced himself that the Ksh. 2,000,000 general damages was payable less 40% contributory negligence, an error which the learned Judge did not correct. On this ground, we uphold the award of Ksh. 2,000,000 subject to the contributory negligence.

51. For all the foregoing reasons, it is our view that the learned Judge did not err in upholding the decision of the trial court. We find that the appeal lacks merit and is hereby dismissed with costs to the respondent. We accordingly uphold the Judgment in the High Court at Malindi [Nyakundi, J.] delivered on 15<sup>th</sup> April, 2020.

**DATED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE- MACHARIA**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

