Fondo v Mutiso & another (Civil Appeal E267 of 2021 & E953 of 2022 (Consolidated)) [2025] KEHC 5568 (KLR) (Civ) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E267 OF 2021 & E953 OF 2022 (CONSOLIDATED)

JN NJAGI, J

APRIL 25, 2025

BETWEEN

KATHLEEN ALICE DAMA FONDO ..... APPELLANT

AND

THOMAS MUTISO ..... 1ST RESPONDENT

WADIA CONSTRUCTION COMPANY LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. D. M. Kivuti, Principal Magistrate, in Milimani CMCC No. 8612 of 2019 delivered on 23/4/2021 and subsequent ruling of Hon. G. M. Gitonga, Principal Magistrate)

JUDGMENT

1. The appellant herein brought suit against the respondents seeking to recover general and special damages after she was injured in a road traffic accident involving a motor vehicle belonging to the respondents. The respondents denied the claim. After a full trial magistrate, Hon. D. M. Kivuti, apportioned liability in the ratio of 90:10 in favour of the appellant. According to the appellant the court awarded her Ksh.500,000/= in general damages. She was aggrieved by the finding of the court on liability and on the amount of quantum awarded. She lodged an appeal against the judgment in HCCA No.267 of 2021 vide a memorandum of appeal dated 4th May 2021.

2. The grounds of appeal are in summary that:

    i. That the learned magistrate erred in law in finding the appellant 10% liable.

    ii. That the learned magistrate erred in law in awarding manifestly low damages.

3. After the delivery of the judgment, the appellants obtained a decree of Ksh. 1,067,490/=. The respondents disputed the decree and moved the court in an application dated 2nd March 2022 seeking for orders that:

    i. The court be pleased to review and or vary its judgment issued on 9th April 2021 to reflect the terms of the judgment delivered on 23rd April 2021 to the effect that the plaintiff was awarded a total sum of Ksh.455,000/= plus costs.

    ii. There was no decree that was passed on 9th April 2021 as the judgment was delivered on 23rd April 2021.

4. The magistrate who handled the application, Hon. G. M. Gitonga, declined to consider the application on the ground that he was not the one who had made the judgment and consequently he had no power to review another magistrate`s judgment. He asked the parties to move to the High Court for determination of the issues raised in the decree. The respondents were aggrieved by the decision and filed an appeal in HCCA No. E953 of 2022 vide a memorandum of appeal dated 20th November 2022 in which they challenge the decision of Hon. G.M. Gitonga for declining to review the judgment

5. Both appeals were consolidated. For the purposes of hearing and determination of the appeals the appellant in HCCA No.267 of 2021 will be referred to as "the appellant" while the appellants in HCCA No. E953 of 2022 will be referred to as "the respondents".

6. The appeals were canvassed by way of written submissions of the counsels appearing for the parties.

Appellant`s Submissions

7. The appellant submitted on the issue of liability that the respondents did not adduce evidence at the lower court but their counsel cross-examined the appellant and the police officer. That it is an established position of the law that where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved. In this respect the appellant relied on the case of Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2012] eKLR where it was held that

    It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

8. It was submitted that the appellant gave direct evidence as to how the accident occurred which evidence was uncontroverted. Additionally, that in the absence of evidence to the contrary, the respondents ought to have been found 100% liable for the accident.

9. On quantum, the appellant submitted that she had sustained fractures of the pelvis (fracture of the pubic ramii), injury to the urinary bladder, soft tissue injuries and loss of pregnancy. That permanent incapacity was assessed at 15%. It was submitted that the award o Ksh.500,000/= was low fin face of the serious injuries suffered by the appellant. The appellant invited the court to interfere with the award and award her Ksh.3,000,000/= in general damages.

10. On the appeal on the review application, the appellant submitted that the same was not merited

Respondents` submissions

11. On the issue of liability in Civil Appeal No.267 of 2021, the respondents submitted that it is trite that where the court has apportioned liability according to the fault of the parties, its apportionment should

not be interfered with on appeal save in exceptional cases as where there is some error in principle, or the apportionment is manifestly erroneous. In support of this proposition, the respondents relied on the case o Rentco East Arica Ltd v Dominic Mutua Ngonzi [2021] eKLR where the High Court held that:

> " 52. The issue is however whether the said driver ought to have been found 100% liable. In this case the court is being called upon to interfere with the trial court's finding of liability. In Khambi and Another v Mahithi and Another [1968] EA 70, it was held that:
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> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

53. That seems to have been the position in Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

12. It was submitted that the appellant did not call the officer who investigated the traffic case as the officer who testified in the case PW1 was not the investigating officer and therefore that her evidence was hearsay which did not assist the court in determining liability.

13. It was submitted that the evidence of the appellant as to who was to blame for the accident was not corroborated by an independent witness though the appellant admitted having three friends in the vehicle. Neither did she call the driver of the other accident vehicle to provide clarity on the circumstances of the accident. Consequently, the respondents submitted that the appellant had failed to establish any error in principle by the trial court in apportioning liability in the ratio of 90:10 in favour of the appellant nor did she demonstrate that the apportionment is manifestly erroneous. The respondents urged the court to uphold the trial court`s finding on liability.

14. On quantum, the respondents submitted that the trial court properly considered the authorities cited by the parties and relied on comparable decisions in arriving at an award o Ksh.500,000/=. It was submitted that the appellant has failed to demonstrate that the award was inordinately low as to amount to an erroneous estimate of compensation or that the trial court`s exercise of discretion was wholly injurious or unreasonable. The respondent urged the court to uphold the award of Ksh.500,000/= and dismiss the appeal in HCCA No.267 of 2021 with costs.

15. On the appeal in HCCA No. E953 of 2022, the respondents who are the appellants submitted that the trial court erred in declining to consider their application.

Analysis and determination

16. This being a first appeal, I am mindful that it is my duty to re-evaluate the evidence adduced before the lower court and, on the basis thereof, come to my own conclusion, bearing in mind however, that

I did not have the advantage of seeing or hearing the witnesses. In Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

17. I have considered the grounds of appeal, the record of the trial court and the submissions tendered by the respective advocates for the parties herein. The issues for determination are as follows:

    i. Whether the trial court erred on its finding on liability.

    ii. Whether Hon. G. M. Gitonga erred in failing to review the judgment.

    iii. Whether the award made by the trial court was low.

    I will proceed to consider each of the issues.

Liability

18. The appellant testified in the case as PW2 and called one witness, a police officer. It was the evidence of the appellant that she was on the 21st May 2019 travelling in a motor vehicle registration No. KCR 640Q along Eastern bypass road when she saw a trailer reg. No. KCM 299F Z7448 being driven in a zig zag manner from the opposite direction. Her driver went off the road in an attempt to avoid the trailer but the trailer followed them off the road and hit their car thereby causing it to roll thrice before it came to a halt upside down. She found herself injured and she was taken to hospital.

19. The police officer PW1 in the case produced the police abstract as exhibit in the case. She said that she is not the one who investigated the case.

    As observed above, the respondent did not call any evidence in the case.

20. The trial magistrate in his judgment found that since the respondent did not tender any evidence in the case, the appellant`s evidence remained unchallenged.

21. It is trite law that where a party does not call evidence in support of its case, its pleadings remain mere unsubstantiated statements of fact with the consequence that the evidence adduced by the other party remains uncontroverted and unchallenged, see Trust Bank Limited v Paramount Universal Bank Limited & 2 others (supra).

22. The standard of proof in a civil case is on a balance of probabilities. Section 107 of the *Evidence Act* Cap 80 provides as follows:

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

Section 109 further provides that: -

"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."

23. It is trite law that he who alleges must prove. The appellant therefore being the party who wanted the court to believe that a set of facts did exist on how the accident occurred, had the burden of proving her case. The appellant gave evidence on how the accident occurred which evidence was uncontroverted and unchallenged. I find that the appellant had discharged her burden of proof and proved on a balance of probabilities that the cause of the accident was the act of the driver of the respondents losing control of his motor vehicle and thus hitting the car the appellant was travelling in. The fact that the appellant did not call other witnesses to corroborate her evidence was not fatal to her case as she was only required to prove her case on a balance of probabilities and not on a standard of beyond reasonable doubt.

24. The trial magistrate apportioned liability between appellant and the respondents in the ratio of 90:10 in favour of the appellant, meaning that the appellant was 10% to blame for causing the accident. The magistrate did not give any reason for finding the appellant to be 10% liable for the accident.

25. The appellant had pleaded in her plaint that she was a lawful passenger in the car registration No. KCR 650 Q that collided with the respondents` trailer. The respondents in their statement of defence denied the particulars of negligence attributed to them by the appellant in her plaint. They however pleaded in the alternative that the accident was caused and or was substantially contributed to by negligence on the part of the plaintiff/appellant. The respondents in their statement of defence enumerated particulars of negligence by the plaintiff/appellant which particulars were however attributed to the driver of motor vehicle registration No. KCR 650 Q and not to the appellant. The appellant was not the driver of the said motor vehicle but a passenger therein. She could therefore not be held liable for any negligence committed by the driver of the car. The respondents should have served third party notice on the driver of the car if they wanted liability to be apportioned between them and the driver of the car. The trial magistrate therefore erred in finding the appellant 10% liable for causing the accident when she was not the driver of the accident car but only a passenger. The trial court committed an error in principle in apportioning liability between the appellant and the respondent when there was no evidence that she was the driver of the motor vehicle she was travelling in. This is sufficient reason for this court to interfere with the apportionment. In my view, the respondents were 100% liable for the accident. The apportionment of liability between the appellant and the respondents is therefore set aside and the respondents are found to be wholly liable for causing the accident.

Review

26. It is proper for me to quote in full the judgment of the trial court on quantum due to the issues raised in the appeal. The judgment dated 9/4/2021 reads as follows:

> " 20. I am guided by the (?) cited herein and award to the plaintiff general damages of Ksh.500,000/= taking into consideration of the severity of the injuries sustained as well as the inflation rate since the authorities were cited."

Special damages

27. I make a total award of Ksh.2,500/= for preparation of medical legal report, Ksh.2,500/= on account of medical expenses and Ksh.1,100/= being cost of obtaining records of ownership of the accident vehicle as pleaded and Ksh. 61,390/= for taxi expenses. The sum is proved by receipts admitted in evidence.

F. Aggregated award

(a) General damages ..... Ksh.500,000/=

Less 10% ..... Ksh.450,000/=

Add special damages ..... Ksh.455,000/=

(b) Special damages ..... Ksh. 5,000/=

Total .....Ksh.455,000/=

G. Disposition

28. The upshot is that the plaintiff is granted Ksh.1,067,490/=. She will also have the costs of the suit and interest at court rates."

29. The application dated 2nd March 2022 for review of the court`s judgment was based on the ground that there was no decree issued on 9/4/2021 as judgment in the matter was delivered on 23/3/2021 in which the court awarded the appellant Ksh.450,000/= in general damages and Ksh.5,000/= in special damages. That after the delivery of the judgment the advocates for the appellant wrote a letter dated 30/4/2021 demanding payment of judgment amount and costs totaling to Ksh.558,055 which the respondents fully paid. That the appellant then extracted a decree of Ksh.1,095,959.04 which contradicted the judgment of the court.

30. The respondents who are the appellants in HCCA No. E953 of 2022 in their submissions in their appeal faulted Hon. Gitonga for failing to review the decree of the court issued on 9/4/2021 to reflect the terms of the judgment including the fact that the appellant herein was awarded Ksh.500,000/= in general damages.

31. The respondents submitted that the decree issued on 9/4/2021 has glaring errors apparent on the face of the record as it shows that the court in its judgment awarded Ksh.1,067,490/= when the correct amount is Ksh. 455,000/= plus costs. The respondents urged this court to correct the decree so as to align it with the judgment of the trial court. They submitted that the application meets the requisite legal grounds for review under section 80 and 99 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure rules, 2010.

32. The appellant on the other hand submitted that Paragraph F and G of the judgment were contradictory as the contents of the main body of the judgment was not marrying with paragraphs F and G. That it is clear that the intention of the court was to award general damages of Ksh.1,000,000/=, special damages of Ksh.67,490/= costs and interest but the latter did not make sense with the body of the judgment. It was submitted that the judgment was erroneous.

33. The appellant herein (who was the respondent) in the review application submitted that the judgment could not be reviewed and or varied as sought under Order 45 Rule 2 of the Civil Procedure Rules, 2010. She submitted that the application was made on the basis that there was an error on the face of the record. However, that the judgment could not be cured through a review as that would lead to the court overturning its own decision. Reference was made to the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR where an error apparent on the face of the record was discussed to be thus

> " In Attorney General & O'rs v Byanyima HCMA No. 1789 of 2000, the court citing Levi Outa v Uganda Transport Company [1995] HCB 340, held that the expression "Mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court

would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."

34. It was submitted that the court was functus officio and that Hon. Gitonga was right to decline considering the application.

35. The appellant submitted that the judgment could not be corrected under section 99 of the *Civil Procedure Act* (the slip rule) as the same is limited to correcting what would be classified as human errors the kind of which any reader of the judgment can identify and agree with, such as clerical errors so as to give effect to the judgment of the court. That changing the judgment sum from Ksh.1,067,490/= to Ksh.455,000/= as sought by the respondents would not give effect to the judgment of the court and therefore section 99 would not come to the aid of the respondents. The appellant in this respect cited the Court of Appeal decision in Alois George Dominic Omenye t/a Omenye & Associates v Prime Bank Limited [2017] eKLR where the court stated that:

In Raniga v. Jivraj [1965] EA 700, the predecessor of this Court was considering an application to vary its judgment. The Court stated that under section 3(2) of the *Appellate jurisdiction Act*, it had the same jurisdiction to amend judgments and orders that the High Court has under section 99 of the *Civil Procedure Act*.

Regarding that jurisdiction, the Court was emphatic that the power to correct errors will only be made where the court is fully satisfied that it is giving effect to intention of the court at the time when judgment was given, or in the case where a matter was overlooked, where it is satisfied beyond doubt that as to the order which it would have made had the matter been brought to its attention.

36. The appellant consequently submitted that errors complained of did not constitute errors that can be corrected under section 99 of the *Civil Procedure Act*. She urged the court to dismiss the appeal on the review application.

37. I have considered the arguments raised on the appeal on the review application. The review application was made under Sections 1A,1B 3A and 80 of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 rule 1. Section 80 of the *Civil Procedure Act* provides that: -

" Any person who considers himself aggrieved—

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

38. Further, Order 45 Rule 1 of the Civil Procedure Rules provides the conditions under which the court can allow an application for review. The rule provides as follows: -

" Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account

> of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

39. The conditions to be satisfied are:

    a) Discovery of new and important matter or evidence.

    b) Mistake or error apparent on the face of the record.

    c) Any other sufficient reason.

    d) the application must be made without unreasonable delay.

    See C Dorman Ltd v Kenya Railways Corporation (Environment & Land Case 1069 of 2015) [2024] KEELC 652 (KLR) (13 February 2024) (Ruling).

40. The application was made on the basis that there was an apparent error on the face of the record. In the case of Muyodi v Industrial and Commercial Development Corporation and Another EALR [2006] EA 243, the Court of Appeal while dealing with an issue of review described an error apparent on the face of record as follows:

> " In Nyamogo & Nyamogo v Kogo [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

41. The judgment of the trial court in this matter clearly showed that the court in the body of its judgment awarded the appellant Ksh.500,000/= in general damages together with Ksh.67,490/= in special damages. In the aggregated section of the judgment the court awarded Ksh. 455,0000/ which made no mention of Ksh.61,390/= that were mentioned in the body of the plaint. In its disposition section of the judgment, the court awarded a total of Ksh.1,067,490/=. It would appear from the disposition section of the judgment that the court awarded Ksh.1,000,000/= in general damages and Ksh.67,490/= in special damages. The question that arises is: what is the amount of general damages awarded by the trial court? Is it Ksh.500,000/= as stated in the body of the plaint or Ksh.1,000,000/= as alluded to in the disposition section of the judgment.

42. The respondents argued that the sum awarded by the court was Ksh.500,000/= (less contributory negligence) while the appellant seemed to suggest that it was Ksh.1,000,000/=. As observed by the court of Appeal in the Muyodi case cited above, where an error has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. In this case there are two opinions on the award of general damages made by the trial court - Ksh.500,000/= and Ksh.1,000,000/=. This therefore cannot

be an error apparent on the face of the record. The error could not be corrected under Order 45 rule 1 as sought by the respondents in the application dated 2nd March 2022. The appeal relating to the review application is thus dismissed

Whether the award of the trial court was low

43. The principles under which an appellate court may interfere with an award of general damages made by a lower court are settled. These are as was stated by the Court of Appeal in the case of Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company Advocates where it was held: -

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

44. The same principle was stated by the same Court in Butt v Khan [1981] KLR 349 where it was held per Law, JA:

> " ... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."

45. As observed above, the amount of general damages awarded by the trial court is not clear. Whether the trial court awarded Ksh.500,000/= or Ksh.1,000,000/=, it is the duty of this court to determine the appropriate award that ought to have been awarded to the appellant in general damages.

46. According to the medical report of Doctor MR. Wokabi, consultant surgeon, the appellant sustained blunt soft tissue injuries to the right leg which became swollen and ecchymosed, blunt soft tissue injury to the right shoulder, fracture of all 4 pubic ramii, injury to the urinary bladder and loss of an early pregnancy. At the time of examination by the said doctor on 24/10/2019 she complained of pain on the pelvic region, not able to walk or stand for long hours and was walking with aid of a clutch. The doctor assessed permanent disability at 15%.

47. Counsel for the appellant submitted that the trial court awarded Ksh. 500,000/ while relying on the cases of Ali Malik Motor (K) Ltd and another v Emmanuel Oduor Onyango Nrb HCCA No252 of 2016 (2018) eKLR where an award of Ksh.700,000/= was affirmed by the High Court for fracture of the pelvic, sprain hymen and cuts of the right knee and George Njenga and another v Daniel Wachira Mwangi (2017) eKLR where Ksh.800,000/= was affirmed for a pelvic fracture, unstable left knee and ankle joint, soft tissue injuries to the trunk on the anterior aspect of the left leg and posterior chest and laceration. The appellant urged the court to set aside the judgment of Ksh.500,000/= and award him Ksh.3,000,000/= in general damages and Ksh.67,490/= in special damages.

48. Counsel for the respondents on the other hand submitted that the appellant was examined for a second medical report by Dr. Waithaka Mwaura who confirmed the injuries as noted by Dr. Wokabi but assessed permanent disability at 8%. The doctor however observed that the loss of pregnancy could not totally be attributed to the accident. Counsel for the respondent urged the court to uphold the award of Ksh.500,000/= made by the trial court. The respondent cited the following authorities:

a. Tom Obita Ndago & another v Alfonse Omondi Otieno [2015] eKLR where the High Court upheld an award of Ksh.400,000/= in damages where the plaintiff suffered a fracture on the right tibia and fibula bone, a contused abdomen with an intra uterine foetal death of term with disability estimated at 10%.

b. Jane Muthoni Nyaga v Nicholas Wanjohi Thuo & another [2010] eKLR where an award of Ksh.300,000/= was upheld on appeal for fracture of the right and superior and inferior pubic ramii of pelvis, a cut on the right leg, central dislocation of the hip (but which could not be seen from x-ray taken) and disability assessed at 5%.

c. United Millers Limited v Tom Maina Sarara [2020] eKLR where the High court on appeal substituted an award of Ksh.1,000,000/= with Ksh.900,000/= for pelvic fracture with urethral injury, blunt trauma on the lower back and bruises on the legs. The plaintiff had undergone a supra pubic cystectomy.

49. The respondents submitted that the appellant has failed to demonstrate that the award of Ksh.500,000/= was inordinately low as to amount to an erroneous estimate of damages payable to the appellant. The respondent urged the court to decline the invitation by the appellant to disturb the award of Ksh.500,000/=.

50. I have considered the arguments raised on the appeal on quantum. Dr. Mr. Wokabi assessed permanent incapacity on the appellant at 15% while Dr. Waithaka assessed the same at 8%. Mr. Wokabi examined the appellant about 5 months after the accident during which time the injuries were in the process of healing. She at that time complained of pain on the pelvic region, not able to walk or stand for long hours and was walking with aid of a clutch. Dr. Waithaka on the other hand examined the appellant in August 2020 which was about one year and 3 months after the accident. He found her to be walking without support and had no noticeable limping gait. She complained of pain at the pelvic fracture sites and occasional right thigh muscle pains. In view of the fact that Dr. Waithaka examined the appellant a year and some months after the accident when the fractures had healed, I find his assessment of permanent disability at 8% to be more reasonable.

51. The report of Dr. Waithaka indicated that the appellant lost her pregnancy on 16/7/2019 which was close to 2 months after the accident. He was of the view that the loss of pregnancy could not be attributed to the accident though it may have contributed to the same. In my view there was no sufficient evidence that the loss of pregnancy was due to the accident.

52. The appellant at the lower court relied on the following authorities: Peace Kemuma Nyang`era v Michael Thuo & another [2014] eKLR, Penina Waithira Kaburu v LP [2019] eKLR and Gabriel Maina Mungai v Jane Wanjiku Mwaura v Jane Wanjiku Mwaura [2019] eKLR. I have perused the said authorities. The injuries in the case of Peace Kemuma were far more serious than those sustained by the appellant herein and hence an award of Ksh.2,500,000/= was made in that case. The injuries in the other two cases were not comparable to those suffered by the appellant herein and hence the authorities were irrelevant. In this appeal the appellant though urging the court to award Ksh.3 million in general damages did not support the proposal with any authority.

53. I have considered the authorities cited by the respondents in this appeal. The injuries in the case of Tom Obita Ndago & another v Alfonse Omondi Otieno involved tibia fractures which did not compare with the pubic fractures suffered by the appellant herein. The injuries in the cases of Jane Muthoni Nyaga v Nicholas Wanjohi Thuo & another and United Millers Limited v Tom Maina Sarara compared well with the injuries sustained by the appellant herein. However, the award of Ksh.300,000/= in the

former case was made in 2010 which is 15 years ago. The award of Ksh.900,000/= in the latter case is more recent and relevant.

54. I have also considered the cases cited by the trial court in making its award - Ali Malik Motor (K) Ltd and another v Emmanuel Oduor Onyango and George Njenga and another v Daniel Wachira Mwangi. The cases involved pelvic fractures and awards of Ksh.700,000/= and Ksh.800,000/= were made respectively. It is however to be noted that in those two cases and in the case of United Millers Limited v Tom Maina Sarara, there was no permanent disability as opposed to the case of the appellant herein where there was permanent disability of 8%.

55. Taking into account that the appellant herein sustained fractures of all 4 pubic ramii, injury to the urinary bladder and other soft tissue injuries and was left with permanent disability of 8%, I am of the considered view that an award of Ksh. 1,000,000/= is sufficient compensation in damages for the injuries suffered by the appellant.

Disposition

56. The upshot is that the appeal in HCCA No. E267 of 2021 succeeds on liability and consequently, the finding of the trial court on the same is set aside and the Respondents therein are held 100% liable for the accident. On quantum the award of the trial court is set aside and the appellant is awarded Ksh.1,000,000/= in general damages and special damages of Ksh.67,490/=. As it was not clear the amount of general damages awarded by the trial magistrate in the case, I order each party to bear its own costs in that appeal.

57. However, the appeal in HCCA No. E953 of 2022 is dismissed with the appellants therein, Thomas Mutiso and Wadia Construction Company Limited, ordered to bear the costs of the appeal to the Respondent therein, Kathleen Alice Dama Fondo.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL 2025

J. N. NJAGI

JUDGE

In the presence of:

Miss Nyabuto for Appellant

Mr. Gathua for Respondents

Court Assistant - Dennis