



REPUBLIC OF KENYA



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Mutonde v Kyalo (Civil Appeal 4 of 2020)
[2024] KEHC 1796 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1796 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 4 OF 2020
TM MATHEKA, J
FEBRUARY 23, 2024

BETWEEN

GEORGE MUTISYA MUTONDE APPELLANT

AND

DOMINIC KYALO RESPONDENT

(Appeal from the Judgment of Hon. Otieno J (RM) in the Resident Magistrate's Court at Makueni, Civil Case No.14 of 2019, delivered on 18th December 2019)

JUDGMENT

1. The respondent filed a suit in the lower Court seeking general damages for pain, suffering and loss of amenities, general damages for reduced/diminished earning capacity, special damages, costs of the suit and interest. His cause of action arose from personal injuries sustained from a road accident on 15th November 2017 along the Kalongo-Ukia earth road. He averred that he was a passenger in motor vehicle registration No. KBJ 867W which was driven so negligently and carelessly that it lost control, veered off the road, overturned violently and rolled several times.
2. The appellant filed a statement of defence denying all the allegations in the plaint and put the plaintiff to strict proof of all the allegations made. He averred that if the accident occurred as alleged, it was occasioned by the respondent's negligence and carelessness.
3. The respondent replied to the defence where he joined issues with the defendant/appellant and reiterated the contents of his plaint.
4. After the preliminaries, the matter proceeded to trial and judgment was eventually delivered in favor of the respondent together with costs and interest. The trial magistrate found the appellant 100% liable and assessed damages as follows;

General damages kshs 1,200,000



Diminished earning capacity kshs 150,000

Special damages kshs 30,370

Total kshs 1,380,370

5. Aggrieved by the decision, the appellant filed this appeal and raised the following grounds;
- a. The learned magistrate erred in law and fact in making an award of general damages that was excessively high.
 - b. The learned magistrate erred in law and fact in assessing general damages awardable at Ksh 1,200,000/= which is inordinately high in the circumstances
 - c. The learned magistrate erred in law and fact by apportioning liability at 100% to the defendant.
 - d. The learned magistrate erred in law and fact/or misapprehended the law in arriving at an award which amount is excessively high in the circumstances of this case.
 - e. The learned magistrate misdirected himself into using wrong principles in arriving at an award for loss of earning capacity.
 - f. The learned magistrate erred in law and departed and ignored the decided authorities relied upon by the defendant without justification.
 - g. The learned magistrate erred in law and fact in failing to consider the submissions made by the appellant on the issue of quantum and the legal authorities provided thereof.
 - h. The learned magistrate erred in law and fact in failing to apply and follow the principle of a ratio decidendi and stare decisis thus ignoring the established principles of law applicable in assessment of damages.
 - i. The learned magistrate totally misdirected himself into applying unknown and/or wrong principles of law in arriving at his said decision which influenced him into arriving at an erroneous and unreasonably high award.
6. The parties elected to canvass the appeal through written submissions and appropriate directions were given. Accordingly, they complied and filed their respective submissions.

Appellant's Submissions

7. On liability, the appellant submitted that the respondent did not adduce any substantial evidence to prove negligence and carelessness. He relied on Section 107 (1) of the Evidence Act for the submission that; "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." He also relied on Amal Ramadhan Yusuf & Another –vs- Ruth Achieng Onditi & Another, High Court Civil Appeal NO. 234 OF 2005 where the court stated;

"It is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and or negligence ipso facto must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence, as he who asserts must prove."



8. The appellant referred this court to the evidence of the driver-DW2- who, on cross examination, testified that the respondent had not fastened his safety belt, was on his phone and attempted to jump out of the motor vehicle. He submitted that if the respondent had fastened his seat belt and had not jumped out of the vehicle, his injuries would not have been extensive. That during the hearing, it was confirmed that there were other passengers in the vehicle but the respondent was the one who sustained serious injuries. He contended that the respondent was less than candid while adducing evidence.
9. The appellant relied on Lenson Products Limited –vs- Mary Waithira Ndirangu & another (Suing as joint administrators of the Estate of David Mwaura, deceased) [2020] eKLR where the appellate court revised the 100%liability awarded and apportioned it at 80:20. The Court held that if the Respondent (deceased) had his safety belt and had not jumped out of the car, he would still have been alive just like other passengers.
10. Further, the appellant submitted that the police had not blamed him for the accident as was evidenced by the police abstract and the police officer who testified did not give sufficient evidence to the effect that he (appellant) was to blame for the accident. Accordingly, he submitted that it was erroneous for the trial magistrate to find him 100% liable. He urged this court to disturb the judgment and apportion liability at 50:50.
11. On to quantum, the appellant relied on Butt –vs- Khan [1982-88] for the submission that:

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.
12. The appellant also relied on Hussein Dairy Limited & another –vs- Asha Moteo Athman & 3 others [2021] eKLR where it was stated that:

“In assessing damages, the general approach should be that comparable injuries should as far as possible be compensated by comparable awards. However, it must be recalled that no two cases are exactly alike...”
13. He submitted that the award of Ksh. 1,200,000 is not a comparable assessment for the injuries sustained by the respondent. To buttress his submission, he relied on the following cases;
 - a. Florence Njoki Mwangi –vs- Peter Chege Mbitiru [2014] eKLR where the appellant had suffered broken femurs bilaterally, two degloving injuries of the right knee and the right ankle. An award of Kshs. 700,000 was upheld.
 - b. Benuel Bosire –vs- Lydia Kemunto Mokora [2019] eKLR. The Respondent sustained compound fracture of the left femur, extreme degloving injury of the left thigh extending from the knee to the iliac area, deep degloving injury on the left popliteal area and extreme laceration on the upper 3rd of the left leg and 40% permanent disability. On appeal the lower courts award of Ksh. 2,000,000.00 was reduced to Ksh. 700,000.00.
 - c. Dedan Njoroge Mwangi & another –vs- Jane Wanjiru [2020] eKLR. The Respondent sustained a degloving injury (open wound) on the right arm, fracture of the right radius and ulna, bruises on the right side of the head, the right thigh and right upper arm. The appellate court reduced the award of Ksh. 2,000,000.00 on general damages to Ksh. 600,000.00.



14. Accordingly, he submitted that the award of Ksh. 1,200,000 excessively high and should be reduced to Ksh 700,000.
15. On the aspect of diminished earning capacity, he submitted that the learned magistrate erred by awarding it under general damages and relied on Cecilia W. Mwangi & Anor –vs- Ruth Mwangi (1997) eKLR where the Court of Appeal held that;

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of ‘loss of earning capacity’ can be classified as general damages but these have also to be proved on a balance of probability.”
16. Further, he relied on Alpharama Limited –vs- Joseph Kariuki Cebron [2017] eKLR where the court stated;

“To assess loss of earning capacity in the future, the court must consider to what extent the claimant’s ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the “multiplicand”), which is the annual loss of earnings. The multiplicand will then be multiplied by a “multiplier”. The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired.”
17. He submitted that the learned magistrate erred by failing to take into account relevant factors such as the respondent’s ability to earn income. That the respondent’s own evidence was that the fractures had united.
18. In conclusion, he urged this court to set aside the trial court’s decision on liability and quantum.

Respondent’s Submissions

19. The respondent opposed the appeal through the firm of S.N Ngare & Co. Advocates.
20. On liability, he submitted that the same revolves around three issues to wit; ownership of the suit motor vehicle; occurrence of the accident and who is to blame for the accident. He submitted that despite denial of the occurrence of the accident in the defence, DW1 and 2 confirmed its occurrence in their evidence. He submitted that in the respondent’s evidence before the trial court, he denied the particulars of negligence attributed to him and also denied that he jumped out of the suit motor vehicle or had not fastened his safety belt. He submitted that the evidence of the police officer was that the accident was self-involving whereby the motor vehicle lost control, veered off the road, rolled several times and finally landed in a valley.
21. It was submitted for the respondent that the trial magistrate correctly found that the cause of the accident had nothing to do with the appellant’s assertions against him and contended that the veracity of the appellant’s allegations is not material in so far as liability is concerned. That what is material is the proximate cause of the accident. He submitted that even if an assumption was made that he had not fastened his seat belt and attempted to jump out of the vehicle, the uncontroverted cause of the accident was the driver driving at high speed, failing to control the motor vehicle /and or maintain the motor vehicle on the road, failing to do anything to avoid the accident and losing control, veering off



the road, overturning and rolling several times. He relied on Eustus Njoroge Mwaura –vs- Anmwaralli & Brothers Ltd & Anor [2019] eKLR where the learned Judge rendered himself thus:

- “ 17. In the words of the trial court the reason the deceased was found to have been to blame partly for the accident was the fact that he took a ride on top of a motor tractor. That may as well have been a reckless and negligence on the face of it including being an affront to the *traffic act*. However, the negligence that was material to the determination of the court was what the law calls proximate cause. Here even if the deceased assumed the risk by ridding as aforesaid, how that was act related to or contributed to the accident! Was that action, by itself, ipso facto, the cause of the accident and resultant injury?
 18. For me I do find that merely riding on the tractor was not by itself the cause of the accident unless it be proved that the rider interfered with the drivers attention and control of the tractor. The proximate and only cause of the accident was the manner of driving of the pick-up which resulted on ramming onto the tractor from behind. It is the singular duty of every driver, on a public road, to be on the look-out at all times in order that he does avoid and obviate colliding with or causing injury to other road users[3]
 19. The equitable principle that first in time is stronger in law can be applied to the rule of the road that he who is first on the road has a right of way even if he was there unlawfully. From that rule flows the other rule of logic that the driver who rammed onto another from behind is ipso facto at fault and negligent. A motor vehicle being driven on the road when hit from behind must be viewed to be moving away from the one that hits it from behind. To assign any wrong to the person hit from behind unless there be evidence that it was reversing or suddenly stopped, would be to assign liability without fault yet the law is that in such matter there cannot be liability without fault.
 20. Put in the context of this case it being uncontroverted that the motor tractor was rammed onto from behind, the proximate cause of the accident was the negligence of the pick-up driver and the deceased had no part to play in the manner and velocity with which he so rammed. I cannot but find that the sole cause of the accident which resulted in the death of the deceased, and therefore the damage suffered by the plaintiff, was the negligence of the 2nd Respondent, and him having been the undisputed driver and servant of the 1st Respondent, the said 1st Respondent was and remain vicariously liable for such negligence. Having so found it follows that the deceased had no blame for accident and therefore the trial court’s finding and apportionment of liability was contrary to evidence and erroneous on the application on the principle of proximate cause when looked at from the prism of the evidence led. It being erroneous, it cannot be upheld but must be upset and interfered with. I do interfere; set the finding on liability aside and in its place substitute a finding that the Respondents were wholly to blame.”
22. Further, he relied on Rose Makombo Masanju –vs- Night Flora Alias Nightie Flora & Anor [2016] eKLR and John Kibicho Thirima –vs- Emmanuel Parsmei Mkoitiko [2017] eKLR for the submission that failure to fasten a seat belt cannot cause an accident. He submitted that the appellant failed to prove his assertions to the required standard. That the Court was not told why the other loader, who



was also a passenger in the motor vehicle, was not called as a witness and the Court was also not told why the appellant did not report his claims to the police, yet he was the one who made the report through his wife. He relied on *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] eKLR where the court stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities.”

23. He contended that the assertion of trying to jump out of the motor vehicle was an afterthought and the fact that it was made after the suit had been filed evidently militates against its veracity. Further, it was his contention that if indeed he was at fault, the appellant would not have taken the trouble of paying for some of his medical bills because naturally, no one would take up such responsibility if they are not at fault. That the inference to be drawn from the appellant’s actions is that he knew he was at fault and was trying to mitigate the damage. He relied on the persuasive holding in *Joseph Mwangi Macheru Irungu & Anor -vs- Wahome Githinji & Anor* [2015] eKLR to buttress his submission.
24. The respondent submitted that the appellant did not demonstrate, through evidence, how the fastening of the safety belt and attempting to jump out were relevant to apportioning liability. He submitted that the case relied on by the appellant (*Lenson Products Limited-supra*) is inapplicable because liability in that case was apportioned on the basis of uncontroverted evidence that the Deceased failed to remain in his seat and failed to alight even when asked to.
25. He pointed out that the appellant seemed to be connecting the severity of injuries to the assertions of failure to belt up and attempt to jump. In response, he submitted that the contention lacked basis in law and fact because the nature and extent of injuries sustained by the other passengers was not proved. He submitted that according to DW 2’s testimony, all the occupants of the motor vehicle were taken to Makueni Hospital and as such, there must have been treatment notes issued, which treatment notes were not produced. Secondly, he submitted that it does not always follow that jumping out of a motor vehicle causes severe injuries hence the need to demonstrate such a fact otherwise the Court would be acting on speculation and conjecture.
26. The respondent submitted that even if this Court was to believe that the Respondent attempted to jump out of the motor vehicle, such action was borne out of the appellant’s driver’s negligence, and should not form a basis for contributory negligence. He relied on *t Farrah –vs- Kenya Ports Authority* [1992] eKLR where the court of appeal held :-

“A man is not bound to wait until disaster befalls him and then attempt to extricate himself from it. He is entitled, and indeed bound, if he is not to be guilty of any contributory negligence, to take reasonable precautions to avoid injury to himself...If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences; if, therefore, you should be of opinion, that the reins were effective, did this circumstance create security for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril.”

27. Further, he submitted that other sufficient reasons to find the appellant 100% liable include; that being a passenger, he had no control over the motor vehicle and cannot therefore be blamed for poor workmanship of the driver. He relied on *Boniface Waiti & Anor –vs- Michael Kariuki Kamau* [2007] eKLR to buttress that submission. Secondly, that the driver did absolutely nothing to avoid the



accident by braking, swerving or even stopping. He relied on Agnes Akinyi Okeyo –vs- Marie Stopes - Kenya [2004] eKLR to buttress that submission. Thirdly, that no sufficient explanation was tendered as to why the motor vehicle overturned. He relied on Mbaka Nguru & Anor –vs- James George Rakwar [1998] eKLR where the Court of Appeal rendered itself thus:

“It is trite that when a vehicle overturns it is for the driver to explain the reason for such overturning and in the absence of a reasonable explanation, connoting no negligence, the negligence of the driver is presumed.”

28. In conclusion, he submitted that the appellant has not shown that the trial Court acted on wrong principles or misapprehended the evidence on record. That the trial Court weighed all the evidence and arrived at a reasonable decision hence no basis has been laid to warrant interference with the decision.
29. On quantum, the respondent submitted that the award on general damages was not inordinately high as to warrant the interference of this Court. That the appellant had not laid a basis for this Court’s interference with the award and the mere fact that this Court would have awarded a different figure would not be reason to warrant interference.
30. It was submitted that the injuries sustained by the respondent were pleaded in the plaint and set out in the treatments notes from various hospitals and the medical report by Dr. Wokabi who confirmed the injuries and testified that the (respondent) sustained multiple fractures and was operated on at Makueni County Referral Hospital where the fractures were fixed with metal fixators and a plaster cast. That the doctor classified the injuries as major associated with pain and blood loss and he also assessed the degree of incapacity as 6%. It was also submitted that they had testified and stated that he had problems with walking or standing for long because his leg would swell and he felt pain when the weather was cold. That the injuries had an adverse effect on his economic life as he could work as he used to
31. The Respondent submitted that his proposal for general damages in the trial court was Ksh 1, 000, 000/= which he supported with the following decisions:
 - a. Alphonse Muli Nzuki –vs- Brian Charles Ochuodho [2014] eKLR. The Respondent sustained a compound comminuted fracture right tibia and fibula and degloving injury on the medial aspect of right leg and foot. The High Court affirmed an award of Kshs. 800,000/= as general damages for pain, suffering and loss of amenities on 20th November 2014.
 - b. Kennedy Oseur –vs- Musa Locho & 2 Others [2009] eKLR
The Plaintiff sustained severe compound fractures of the right tibia and fibula with extensive loss of skin muscles, bones tendons and nerves. General damages for pain and suffering and loss of amenities assessed at Kshs.2, 000,000/= on the 30th September 2009.
 - c. Geoffrey Mwaniki Mwinzi –vs- Ibero (K) Ltd & Anor [2014] eKLR. The Plaintiff sustained extensive compound fractures of the left tibia and fibula, extensive damage to the soft tissues of the left leg, and fracture left collar bone. General damages for pain and suffering and loss of amenities assessed at Kshs.2, 000,000/= on the 30th July 2014.
32. He submitted that the appellant proposed an award of Ksh. 300, 000/= based on the decisions in:
 - a. F A (Minor suing through next friend and father) AFWK –vs- Kariuki Jane & Another [2018] eKLR. The Appellant sustained a degloving injury on the left ankle and a fracture of the distal femur. The High Court affirmed an award of Kshs. 500, 000/= as general damages for pain and suffering and loss of amenities on the 6th July 2018.



- b. Al Samah Enterprises Limited & Abubakar Omar –vs- DM (Minor suing through mother & next friend) CGK [2016] eKLR. The Respondent sustained a degloving injury measuring 25 x 5 centimeters and extending between the right knee and the leg. The High Court affirmed an award of Kshs. 400, 000/= as general damages for pain and suffering and loss of amenities on the 19th August 2016.
33. The respondent submitted that the authorities cited by the appellant in this appeal are different from those cited before the Learned Magistrate. He contended that on several occasions, courts have held that it is improper use of the appeal process to place before the Appellate Court material that was not placed before the trial Court. He relied on the case of Sila Tiren & Anor –vs- Simon Ombati Omiambo [2014] eKLR where the court rendered itself thus:
- “None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal.”
34. Consequently, he submitted that, this Court is perfectly entitled to disregard the appellant’s cited decisions. Further, he submitted that if the Court is minded to consider them, the same are inapplicable as they relate to substantially different injuries compared to those he sustained. He contended that in all the three decisions cited, none involved compound fractures of the tibia fibula.
35. He submitted that in law, it is established that comparable injuries should as far as possible attract comparable awards and that is the key principle upon which assessment of damages is done, both at the trial stage and at the appellate stage. He contended that the authorities cited by the appellant are an affront to that principle and as such, they do not provide an appropriate guide to this Court and should be disregarded. That even the authorities cited by that appellant in the lower Court were also an affront to the stated principle as none of them involved compound fractures of the tibia fibula.
36. Consequently, he submitted that, the appellant had not placed material before this Court to show that the award by the trial Court was inordinately high. That as it is established in law, it is not enough to allege that an award is high, that fact must be demonstrated.
37. He submitted that on a consideration of the material placed before the trial Court, it cannot be said that the award was inordinately high. That the cited decision in Alphonse Muli Nzuki (supra) is the one that is comparable to the instant case.
38. On the award for diminished earning capacity, the respondent submitted that it was firmly established in fact and in law hence the Learned Magistrate had a basis in fact and in law to make the award. That the appellant did not lead any evidence to show that his (respondent’s) earning capacity had not been diminished. He referred to Dr. Wokabi’s testimony to the effect that even at optimum rehabilitation, he would still have a permanent disability. He attributed his inability to work effectively to the pain he experiences as a result of the injuries. The fact that the fractures had united, he contended, does not mean that he was not incapacitated.



39. He submitted that in law, the justification for the award is to compensate a claimant for the risk that the disability has exposed him to. That due to the disability caused by the accident, the likelihood of competing fairly with others in the job market is dented and he is at a relative disadvantage in terms of the work he used to do before the accident. He relied on the Court of Appeal decision in *S J –vs- Francesco Di Nello & Anor* [2015] eKLR to buttress his submission as well as *Mariga –vs- Musila* [1984] eKLR where Chesoni Ag. J.A. rendered himself thus:

“As regards the award of Kshs 500,000 for “lost years” I agree with what my learned brother Hancox JA has said in his judgment. A victim whose earning capacity has been diminished by the defendant’s negligence is entitled to compensation for the “lost years”. This is a matter of not only sound logic but justice. The accident has diminished the respondent’s capacity of earning. It is an economic loss for which the appellant must compensate the respondent. The learned judge quite correctly followed *Pickett v British Rail Engineering Ltd* [1979] 1 ALL ER 774 as to “lost years”. The principles in that case represent substantial justice and sound logic.

It is a common sense approach to the issue. If a man through the negligence of another is deprived of the capacity of earning for a period, he is entitled to fair compensation for the lost period occasioned by the wrongdoer.”

40. Further, he relied on the Court of Appeal decision in *Mumias Sugar Company Ltd –vs- Francis Wanalo* [2007] eKLR where it was held as follows;

“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future.

Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

41. He submitted that quantifying an award for loss of future earning capacity is a notoriously difficult task given the multitude of factors and future uncertainties at play. That it is often a matter of assessment and judgment, guided by the basic principle that a claimant is entitled to be placed in the same position she would have been in but for the accident, and directed at producing an award that is reasonable and fair to all parties. He cited the sentiments of the court in the case of *Francesco Di Nello* (supra) thus:

“The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to suggest any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market.”



42. He submitted that from the jurisprudence of the superior courts on the award for loss of earning capacity, such an award may either be a global sum (Mumias Sugar Company Ltd –vs- Francis Wanalo (supra) or based on the multiplier/multiplicand formula (Butler –vs- Butler [1984] KLR 225) . He submitted that the appellant has not demonstrated how the trial Court erred in arriving at the global award of Ksh 150,000/=.
43. In conclusion, he urged this court to uphold the judgment of the trial Court in its entirety.
44. Both parties reminded the court of its duty as an appellate court by citing the text from *Selle vs Associated Motor Boat Company Limited* (1986) EA 123:

I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal 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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (emphasis mine)

45. On the court’s duty with respect to the issue of quantum of damages on appeal, the respondent cited *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR* on the principles that the must follows in determining whether or not to disturb the award on damages, and *Catholic Diocese of Kisumu v Tete [2004] eKLR* to emphasize that the assessment of general damages is at the discretion of the trial court.
46. It appears to me that from the record, and submissions the following issues arise for determination:
 - a. Whether the trial court erred by holding the appellant 100% liable for the accident.
 - b. Whether the award on general damages should be disturbed.

Analysis & Determination

47. The respondent pleaded that he was lawfully travelling as a passenger in motor vehicle registration No. KBJ 867W which was driven so negligently and carelessly that it lost control, veered off the road, overturned violently and rolled several times. He testified as PW3 and adopted her statement, which was restatement of the plaint as her evidence in chief. She also tendered the documents in her list as P. Ex 1 to 11. He testified that; “I was a passenger in the motor vehicle. I was with Shadrack, the driver, John Ndavi and I. John was also employed by the vehicles owner. There was rainfall on that day. I had tied my seat belt. I have not mentioned it though I did not jump out of the vehicle when it was rolling though I vomited.”
48. PW2 No 68533 P.C David Chebii from Makueni Traffic Base. testified that; “It was a self-involved accident on 15th November 2017 along Ukia-

Kalongo earth Road at 1630hrs involving a motor vehicle registration KBJ 867W Mitsubishi Canter driven by Shadrack Muwando whereby he lost control of the vehicle, it veered off the road and rolled several times and landed on the valley.” On cross examination, he said; “I am not the investigating officer in this matter. I have not produced an extract of OB.



The Investigating Officer visited the scene. The accident was reported by one Lucy. It rolled several times down the valley. It was not raining. I don't know how the weather was..."

49. On his part, the appellant testified as DW1 and adopted his statement as his evidence in chief where he stated that he blamed the respondent for failing to wear a seat belt and using his phone hence did not pay attention and keep proper look out. He also stated that the respondent jumped out of a moving vehicle and knowingly and willingly exposed himself to the risks of injuries and damages. In his evidence in court, he testified; "I blame him, he never tied his seat belt, he attempted to jump thus the serious injuries."
50. DW2 Shadrack Mwanzia, was the lorry driver. He adopted his statement as his evidence in chief in which he stated; "After offloading, on our journey back along the same road, the vehicle behind me, a probox was intending to overtake, I slowed down while on the left lane. The road is a

murram road and since it was raining, the road was extremely slippery. I attempted to brake and unfortunately, the vehicle slid and veered off the road. The road was up a hill and the vehicle rolled about two times before being stopped by a tree. On seeing this, the plaintiff who was sited at the far left, attempted to jump out of the vehicle and save himself. He sustained further injuries that he would otherwise not sustain."
51. On cross examination, DW2 stated that; "I was the driver. Dominic was a passenger on the left end near the door. I don't know the registration details of the probox. I was breaking for probox to overtake and veered off the road. He had not tied the seatbelt and was using his phone."
52. The police abstract produced as P.Exh 7 indicates that the passengers were Dominic Kyalo and John Ndavi and the motor vehicle involved in the accident was KBJ 867W-Mitsubishi Canter. The result of investigations or prosecutions was indicated to be pending under investigations.
53. From the evidence, it is not in doubt that the respondent was a passenger in the lorry and that the accident was self-involving as no other motor vehicle was involved. According to the appellant, the respondent is to blame for failing to fasten his seatbelt and attempting to jump out of the vehicle. These assertions were denied by the respondent.
54. Firstly, the appellant's evidence that the respondent jumped out of the m/v and had not fastened his seat belt is hearsay as he was not there. His own driver's (DW2) testimony was that the respondent attempted to jump out of the m/vehicle. This difference in evidence makes it unbelievable and creates the impression of an afterthought.
55. Even if the respondent had jumped in sight of the danger the accident presented it would only be natural for a person to get out of danger in the way that presents itself. The appellant's having created the dangerous situation could not have expected the respondent to 'kufa kisabuni/kikondoo' (to die like soap or sheep) as the Kiswahili saying goes; without trying to save himself. He was not in charge of the m/v there is no evidence that he attempted to interfere with the safe driving of the m/v. A passenger is not in control of the motor vehicle hence the origin of the danger has to be the person in control of the motor vehicle, a third party or an act of God.
56. The occurrence of the accident is prima facie evidence that the duty of care owed to the respondent by the driver was breached because ordinarily, no liability can be attached to passengers as they have no control of the vehicle. The doctrine of Res Ipsa Loquitur is applicable in this case. It is common knowledge that vehicles do not always get into accidents because it is raining and the roads are slippery otherwise, no vehicle would be allowed on the road in such conditions. Bad weather is evident and as such, drivers are called upon to be more careful in such conditions. In this case, there is no evidence



to suggest that the lorry was faulty in any way and the driver's evidence was that they were on their return trip after offloading the cargo hence its weight was not an issue. It is therefore my considered view that the cause of the accident boiled down to the manner it was being driven. In Nairobi CA 179 of 2003 Rahab Micere Murage (estate of Esther Wakiini Murage) –vs- Attorney General & 2 others [2015] eKLR the Court of Appeal reiterated that: "Well driven motor vehicles do not just get involved in accidents....". See also Daniel Kaluu Kieti –vs- Mutuvi Ali Nyalo & another [2016] eKLR where the court stated;

"In this case, the driver of the vehicle did not disprove the allegation that he was negligent. The slippery and muddy state of the road could not by itself have caused the motor vehicle to reverse on its own and land on its side after hitting a tree on the side of the road. The driver was under a duty to drive carefully and if the road was impassable, stop and make no move upon realization that the road was muddy and slippery...It was dangerous for the 1st defendant's driver to drive on such a road. He was endangering the lives of the passengers. That danger was foreseeable in the circumstances of this case".

57. The appellant relied on Lenson Products Limited-supra to support the alleged fact that the respondent was to blame for jumping out of the motor vehicle. However, the that the case does not advance the appellant's cause because even though the deceased in that case jumped out of the vehicle, the court found that in itself was not the proximate cause of the accident. The relevant paragraph states as follows;

"32. From the totality of the evidence, I cannot see any way in which the deceased was liable for the accident that occurred on the material day. Whether he was a fare paying passenger or not, the accident was not due to his action of jumping out of the vehicle. I am of the considered opinion that it was instinctive of a reasonable person foreseeing an accident and attempting to save his life. The deceased could not be blamed for taking this action in the face of an impending accident going by the movement of the suit motor vehicle. The only person who could have given a clearer picture in evidence as to how the accident happened was the driver, but since he did not testify, the evidence of the respondents on negligence on the part of the driver remained unchallenged. The driver was best placed to explain how a vehicle that is presumably well maintained and serviced and did not have any mechanical problems as per the evidence of DW2 could start moving in a zig zag manner and cause an accident."

From the foregoing it is also well demonstrated that the evidence spoke for itself that the driver was negligent in the manner in which he controlled the m/v as there was no reasonable explanation as to why the m/v would just veer off the road and roll severally it is clear that there is nothing to support the submission for disturbing the award on liability.

Quantum

58. The injuries sustained were pleaded as follows;
- a) Extensive skin loss on the left leg (degloving injury);
 - b) Compound (open) fractures of left tibia;
 - c) Compound (open) fractures of the left fibula; and



59. The existing complaints at the time of filing plaint were particularized as;
- a. Difficulties of getting around;
 - b. He cannot walk or stand without external support;
 - c. Permanent incapacity of about 6%.
60. The respondent produced a medical report by Dr. Dr. Wokabi (P.Ex 1a), treatment notes from various hospitals (P.Exh.4) and P3 form (P.Exh.6) which particularized the injuries and complaints as above. It went on to state that the respondent would require another 8 to 12 months to achieve optimum rehabilitation whereupon the permanent disability would settle at 6%.
61. The appellant's proposal in the trial court was Ksh 300,000/= and he submitted two authorities where awards of Ksh 500,000/= and 400,000/= were made. In this appeal however, he has relied on different cases where awards of Ksh 600,000/= and Ksh 700,000/= were made hence his proposal for reduction of the award to Ksh 700,000/=. It appears to me that this is an acknowledgement that the subordinate court was correct in making an award higher than the one they had proposed before that court, and that it is the appellant who was in error and not the court. Evidently the appellant ought to have at least taken some time to explain in the submissions the departure from their original recommendations the subordinate court.
62. The respondent proposed Ksh 2,000,000/= and relied on cases where awards of Ksh 800,000/= and 2 million were made. It is Alphonse Muli Nzuki (supra) that turns out to be is comparable though the respondent therein did not sustain extensive skin loss and there was no resultant incapacity. An award of Ksh 800,000/= as general damages was affirmed by the High Court in 2014.
63. In assessing the general damages, the learned trial magistrate analysed the authorities cited by both sides and considered the doctor's prognosis of the respondent's future health and the rate of inflation and arrived at Ksh 1, 200,000. I am alive to the fact that as an appellate court I cannot interfere with the decision unless it is shown that the trial court proceeded on the wrong principle of law and arrived at misconceived estimates see Butt -vs- Khan (1981-88) KLR 349. I have considered the same. The respondent sustained skin loss and fractures of the bones of the left leg, the accident happened on the 15th November 2017. By 22nd November 2018, the fractures had reunited and the prognosis was that he would heal and rehabilitate well within 1 year therefrom. Other than the 6% disability there would be no other future issues with the leg.
64. Factoring this in the assessment of damages and even looking at more recent persuasive authorities from this court for instance Haco Industries (K) Limited-vs- Tabitha Njoki Njeru [2021] eKLR where the respondent sustained; compound (open) fractures of the tibia, Left fibula talus bones, dislocation of the big toe, an extensive degloving injury on the right leg in the region of the ankle joint and permanent disability of 15% where an award of Ksh 1,500,000/= was reviewed downwards to Ksh 1,000,000/=. I am of the view that the award of 1.2M was on the higher side.
65. As for the award for diminished earning capacity, the respondent testified that he could no longer work due to the injuries, was still in pain and was still going through physiotherapy. I have looked at the medical report. It is not in doubt that the respondent was put out off the labour market for a while and would be out while rehabilitating. The opinion of the surgeon was that it would take the respondent 8 to 12 months to achieve optimum rehabilitation and because of his young age he would rehabilitate 'quite well going forwards'. Evidently despite the 6 % disability the respondent would not be unable to work. Had that been a possibility the doctor would have said so. But clearly he indicated that the appellant's left leg would heal well. In the circumstances it is my view that he would only be entitled



to diminished earning capacity for the period that he would be unable to work. This would be 8 to 12 months. His salary was 9000 a month with Ksh 400 deductions as NHIF. That would 8600. I would consider two years. The global sum by the trial magistrate is sufficient.

66. In the upshot the appeal succeeds in part.
67. The Award for general damages of Ksh 1,200,000 is set aside and substituted with an award of Ksh 850,000.
68. The final Judgment.

Liability against the appellant – 100%

General damages for pain and suffering Ksh 850,000

Diminished earning capacity Ksh 150,000

Special damages Ksh 30, 370

The respondent will have costs and interest at court rates from the date of the judgment below.

Considering the outcome of appeal, the appellant will have one third of the costs of this appeal.

DATED AND SIGNED THIS 23RD DAY OF FEBRUARY 2024

.....

MUMBUA T MATHEKA

JUDGE

Delivered by email this 23rd day of February 2024

CA Nelima

Advocates for the Appellant

Kibatia & Co Advocates

Advocates for the Respondent

S,N Ngare & Co Advocates

