



**Kamau & another v Ngethe & 2 others; Guardian Coach Limited  
(Third party) (Civil Appeal 729 of 2016 & 747 of 2019 (Consolidated))  
[2023] KEHC 27426 (KLR) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 27426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL 729 OF 2016 & 747 OF 2019 (CONSOLIDATED)  
DO CHEPKWONY, J  
AUGUST 24, 2023**

**BETWEEN**

**JOSEPH WANYOIKE KAMAU ..... 1<sup>ST</sup> APPELLANT**

**MWAURA JEREMIAH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEORGE MUIRU NGETHE ..... RESPONDENT**

**AND**

**THE GUARDIAN COACH LIMITED ..... THIRD PARTY**

**AS CONSOLIDATED WITH**

**CIVIL APPEAL 747 OF 2019**

**BETWEEN**

**JOSEPH WANYOIKE KAMAU ..... 1<sup>ST</sup> APPELLANT**

**MWAURA JEREMIAH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REBECCA KANANU ..... 1<sup>ST</sup> RESPONDENT**

**ELOLOIRUSHA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

*(Being Appeal from the Judgment delivered by the Honourable Chief  
Magistrate R. Ngetich (Mrs) on the 14th of November 2016 Nairobi  
CMCC NO. 6240 of 2014 AND Nairobi CMCC NO. 7095 of 2014)*



## JUDGMENT

### Background

1. Vide a Complaint dated 15<sup>th</sup> October, 2014, the Respondent in Civil Appeal No. 729 of 2016 filed a suit against the Appellants seeking for general damages, special damages of Kshs. 405,831/=, costs of this suit and interest.
2. In the Complaint, the Respondent stated that on or about 6<sup>th</sup> December, 2013, he was lawfully a traveling passenger inside Motor Vehicle Registration Number KBF 488S along Ring Road near the Shell Petrol Station, Ngara, Nairobi when the 1<sup>st</sup> Defendant, his driver and or agent so negligently and carelessly drove managed and/or controlled the said motor vehicle and caused it to collide and or be hit by the Motor Vehicle Registration Number KBM 952P a consequence of which the Plaintiff sustained serious injuries.
3. The Respondent pleaded particulars of negligence on the part of the 1<sup>st</sup> Appellant as particularized in Paragraph 4 of the Complaint as follows:-
  - a. Failing to maintain any or any adequate or effective control of the motor vehicle.
  - b. Driving the motor vehicle without due regard to the safety of other road users.
  - c. Failing to adhere to the provisions of the Traffic Act and thereby driving the said motor vehicle carelessly.
  - d. Failing to stop, slow down, swerve or in any other way to manage or control the said motor vehicle so as to avoid the accident.
4. As a result of the said accident, the Respondent suffered damage resulting to injuries of compound fracture of the right fibula/tibia and blood loss, thus the Respondent sought for general damages for pain and suffering.
5. In response, (in regards to the first appeal), the Appellants entered appearance and filed a joint defence dated 3<sup>rd</sup> December, 2014 before the trial court. In summary the Appellants denied the contents of the Complaint and particularly that the Respondent was a lawful passenger in the said Motor Vehicle Registration Number KBF 488S. The Appellants aver that any such occurrence was caused solely and or was substantially contributed by the Respondent's negligence.

### Evidence

6. The matter proceeded for hearing on 9<sup>th</sup> May, 2016. In his testimony, PW1-Dr. Anthony Obwero Wandugu stated that on 22<sup>nd</sup> September, 2014, he examined George Muiro Ngethe who had sustained injuries of compound fracture of right tibia (lower leg). The fracture was accompanied by bone infection. That he had lost blood and treatment included surgical intervention (screw and plates and plaster of Paris). He also stated that he had pain in the injured areas, had scars and severe injury on the affected leg. PW1 classified the injuries as grievous harm as they are permanent and he would require another surgical operation to remove the plates at a minimum cost of Kshs. 500,000/=.
7. PW2 - PC Derik Mogaka testified that the police abstract and occurrence book were in reference to an accident that occurred on 6<sup>th</sup> December, 2013 along Ring Road near Shell Petrol Station involving Motor Vehicles Registration Number KBF 488S Toyota matatu and KBM 952P, Scania bus and a



report was made to the Police Station. At the time of filing police abstract, it indicated that the case was pending under investigations. The accident was reported vide the occurrence book number 22 of December, 2013. PW2 told court that there was a fatal and injuries. He had a P3 form for Rebecca Kananu who was a passenger together with George Ngethe in the same vehicle, Registration No.KBF 488S. He stated that according to the occurrence book, both vehicles were heading to town from Thika when the Scania bus hit KBF 488S from behind. The injured passengers did not report the accident at the same time. George reported on 23<sup>rd</sup> April, 2014 and Rebecca on 16<sup>th</sup> April, 2014. He stated that casualties can report an accident at any time as most of the time they are taken to hospital. He produced the police abstract as evidence. On cross examination, he stated that at the time the police abstract was issued the case was under investigation. He was not aware if it had been concluded. He said that it was Motor Vehicle Registration Number KBM 952S which was to blame for the accident.

8. PW3-George Muiru Ngethe stated in his testimony that he recorded a statement which he adopted as evidence in examination in chief. PW3 stated that he was involved in an accident on 6<sup>th</sup> December, 2013 at Ring Road Pangani which involved a Nissan Registration Number KBF 488S which was knocked by a bus. He told court that he was a passenger in the Nissan which had a tyre burst but they were told to remain inside as the tyre was being changed. PW3 went on to state that suddenly he heard a bang from behind as the Nissan had remained on the road. He blamed the Nissan for failing to be removed from the road and failure to put a life saver sign to indicate that the motor vehicle was having a problem on the road. It was his evidence that if there had been a life saver, the accident would not have occurred. PW3 went on to state that he sustained injuries on the arms and face and fractures on the left leg below the knee for which he was treated at Kenyatta Hospital and spent Kshs. 323,331/= for treatment. He produced documents marked as 1-4, 8-9 as exhibits which were marked as Exhibit B. He stated that he used to do business before the accident but now he was not working. He also stated that he cannot walk and needs future medical treatment at a cost of Kshs. 500,000/=. He asked the court to be compensated for what he had spent and for future treatment. He urged the court to find that the Nissan was to blame.
9. During cross examination, PW3 stated that the Nissan was to blame for remaining on the road after it had a tyre burst. They wanted to come out but were told to remain inside. He never saw them put a life saver and had they would put it, he would have seen it since he was seated behind. They locked the door of the Nissan and did not know what caused the puncture.
10. On 4<sup>th</sup> October, 2016, DW1- Police Inspector Edward Nyimpoi testified that he was attached to Pangani Traffic Base as In-Charge of Patrols. He stated that an accident occurred on 6<sup>th</sup> December, 2013 involving Motor Vehicle Registration Number KBF 488S, Nissan matatu and KBM 952P. The accident occurred along Ring road near Shell Petrol Station. Both vehicles were heading towards the City Centre from Thika direction and on reaching the location of the accident, Motor Vehicle Registration Number KBM 952P, Isuzu bus rammed into the rear of the Motor Vehicle Registration Number KBF 488S which was ahead of the bus, a result of which the accident occurred and one passenger namely Veronica Wanjiru died on the spot. The scene was visited by PCW Gladys and PC Driver Aden Ibrahim. He stated that it is not indicated who was to blame for the accident but according to the explanation in the Occurrence Book, Motor Vehicle Registration Number KBM952P was to blame for the accident for ramming into Motor Vehicle Registration Number KBF 488S Nissan which was ahead. He produced the OB extract as evidence marked as evidence marked Defendant's Exhibit 1.
11. During cross examination, he stated that it is not indicated who reported the accident in respect of OB extract he produced as evidence. He was not the investigating officer and could not know how the accident occurred. The bus Motor Vehicle Registration Number KBM 952P rammed into a matatu Motor Vehicle Registration Number KBF 488S. There is no mention of a stationery vehicle in the OB



extract. What is indicated is that the vehicles were moving towards the same direction. PC Amolo is still at Pangani Police Station. He was only required to produce the occurrence book and the investigating officer had to give reasons for not blaming any one for the accident. According to what is recorded, a car that rams into the other is to blame. According to the OB extract, nobody was charged. There is no indication that a sketch plan was taken by the officers who visited the scene. On re-examination, he stated that Motor Vehicle Registration Number KBF 488S had stalled because of a puncture. If he was to rely on what is written in the OB, he would blame Motor Vehicle Registration Number KBM 952P.

12. In her testimony, DW2-Dr. Leah Wainaina stated that she had a medical report by Dr. Eric Mungai dated 2<sup>nd</sup> October, 2014, who had recommended that the Plaintiff to be seen by a specialist as the report was not comprehensive. DW2 stated that the 2<sup>nd</sup> report dated 17<sup>th</sup> May 2016 is by Jeniffer Kahutho wherein she had relied on treatment notes from Kenyatta National Hospital and Medihil Nursing Home, Medical report dated 22<sup>nd</sup> September 2014 by Dr. Wandugu, Medical report dated 14<sup>th</sup> April, 2016 by Dr. David Kamau, X-ray report and clinical examination by Dr. Eric Mungai and Dr. Kamau. It was concluded that the Plaintiff sustained fractures to the left tibia and fibula. Dr. Kamau recorded permanent disability at 24% and recommended corrective surgery and removal of implants at a cost of Kshs. 100,000/= . DW2 produced the report marked as Defence Exhibit 2. In Dr. Wandugu's report, the cost of future treatment is Kshs. 80,000/= and the 2<sup>nd</sup> report indicates Kshs. 500,000/= . On cross examination, DW2 stated that the Plaintiff requires surgery and confirmed that permanent disability was assessed at 24%.
13. Upon considering the evidence adduced by both sides, the learned trial Magistrate delivered her Judgment on 14<sup>th</sup> November, 2016 in favour of the Respondent awarding him a sum of Kshs. 1,200,000/= as general damages for pain and suffering, Kshs. 600,000/= for loss of earning capacity, Kshs. 352,831/= as special damages and Kshs. 80,000/= for future treatment. Therefore, the total amount awarded was Kshs. 1,803,831/= plus costs and interest.
14. being dissatisfied by the decision, the Appellants proffered an appeal vide a Memorandum of Appeal dated 1<sup>st</sup> December, 2016 filed in court on 2<sup>nd</sup> December 2016. The Appellants preferred the following grounds of appeal:-
  - a. The learned Magistrate erred in law and misdirected herself when she failed to consider the Appellants submissions on both points of law and facts.
  - b. The learned Magistrate erred in law and fact in finding the Appellants 100% liable in view of the evidence produced before the trial court and in particular the following; -
    - i. That the Appellants had enjoined a third party and interlocutory Judgment against the 2<sup>nd</sup> Respondent was entered on 27<sup>th</sup> September, 2016.
    - ii. That the Appellants having enjoined the 2<sup>nd</sup> Respondent to the suit and directions taken failed to establish their case against the Appellants.
    - iii. That the Appellants gave evidence that the driver of Motor Vehicle Registration KBM 952P was blamed for the accident.
    - iv. That the 1<sup>st</sup> Respondent in his testimony did not prove his case against the Appellants.
    - v. That the Appellants called the Police Officer who produced the OB extract as DEX1 which blamed the driver of the subject Motor Vehicle Registration KBM 952P for hitting Motor Vehicle Registration No. KBF 488S from the rear while both motor vehicles were in motion.



- c. The learned Magistrate erred in law and in fact in awarding general damages of Kshs. 1,200,000/=, Kshs. 600,000/= as loss of earning capacity, Kshs. 325,831/= as special damages and Kshs. 80,000/= as future medical expenses that were excessive and unjust in the circumstances considering the nature of injuries sustained and the conventional awards in relation to such injuries.
- d. The learned trial Magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice in awarding damages for loss of earning capacity and special damages when in fact the Plaintiff failed to specifically plead and prove the same.
- e. The learned trial Magistrate erred in condemning the Appellants to pay costs to the 1<sup>st</sup> Respondent.

It is proposed to ask the court for the following orders: -

- a. That this appeal be allowed.
  - b. That this Honourable Court sets aside the decree and Judgment of the subordinate court and substitutes it with an order dismissing the 1<sup>st</sup> Respondent's claim against the Appellants entirely with costs and/or enters Judgment against the 2<sup>nd</sup> Respondent.
  - c. That without prejudice to prayer (b) above this Honourable Court re-assesses and reduces the apportionment on liability and award on quantum.
  - d. That the costs of this appeal and that of the trial court be awarded to the Appellants.
15. In Civil Appeal No. 747 of 2016, the 1<sup>st</sup> Respondent's claim was initiated by a Plaint dated 27<sup>th</sup> November, 2014 filed in court on 28<sup>th</sup> November, 2014 seeking similar prayers. As a result of the accident, the 1<sup>st</sup> Respondent suffered damages as particularized under Paragraph 5 of the Plaint. She pleaded having suffered fracture, compound of the right tibia/fibula proximal end, and fracture to the left femur, deep cut wound between the eyes, bruises to the leg and blood loss. She pleaded particulars of special damages amounting to Kshs. 2,500/=. The plaint was amended on 29<sup>th</sup> January, 2015 thereby bringing the amount in special damages to Kshs. 239,500/=.
16. In response, the 1<sup>st</sup> Respondent filed a defence dated 19<sup>th</sup> February, 2013 (must have been erroneous) and filed on 20<sup>th</sup> February, 2015. The Appellants denied the contents of the Plaint and averred that any such occurrence occurred without negligence on their part and that the said accident was solely and or substantially contributed to by the negligence of the driver of Motor Vehicle Registration Number KBM 952P whilst the Motor Vehicle Registration Number KBF 488S was being driven with due care and attention. It is also pleaded that the driver of Motor Vehicle Registration Number KBM 952P failed to maintain proper control of the said vehicle causing it to ram into the Appellants' motor vehicle. According to the 1<sup>st</sup> Respondent, the accident occurred without negligence on the part of the Defendants' agent, servant and or driver.

### **Evidence**

17. PW1 - Dr. Anthony Obiera Wandugu stated that he examined Rebecca Kananu on 24<sup>th</sup> November, 2014. That she gave a history of a road traffic accident where she sustained injuries, fractures of the right tibia and fibula, fracture of the left femur, deep cut wounds between the eyes, bruises on the left leg and blood loss which he categorized as grievous harm. PW1 produced the medical report marked as Exhibit 2, receipts marked as Exhibit 1(a-c). He went on to state that she will require future medical



treatment at a cost of Kshs. 800,000/=, which was arrived at due to the seriousness of the injuries and removal of the plates.

18. PW2 - Rebecca Kananu adopted her witness statement dated 27<sup>th</sup> November, 2014 in the examination in chief. She stated that she was involved in an accident on 6<sup>th</sup> December 2013 at Pangani while travelling in a Nissan Vehicle Registration Number KBF 488S. where she was injured and suffered a fracture below the knee, fracture of the left leg in the upper palm and a blunt cut in the forehead. PW2 told court that she was treated at Kenyatta National Hospital and spent Kshs. 400,000/= on treatment. She produced receipts and bundle of documents as evidence. She blamed the Nissan vehicle she was travelling in for causing the accident. According to PW1, the Nissan Vehicle had a tyre burst and was not removed from the road and neither was a life saver sign put on the road to show that there was a broken down vehicle. PW2 also testified that the metal plates had not been removed from her leg and agreed with Dr. Wandugu that she needed Kshs. 800,000/= for future treatment. She also testified that she used to do business and plant crops to take to Muthurwa Market but could no longer work. She further stated that she was chased by her husband after the accident. She prayed for compensation and blamed the Nissan Vehicle Registration Number KBF 488S for the accident.
19. On cross examination, PW2 stated that she blamed the Nissan Vehicle Registration Number KBF 488S she was travelling in. The motor vehicle had a tyre burst and they should have put a life saver to show that the vehicle had broken down. She could not tell whether it was in the middle of the road as it was at night. That they were refused to go out of the vehicle. The boot was open and she could see if a life saver had been put as there was light from other vehicles. One of her feet is short. During re-examination she stated that Nissan Vehicle Registration Number KBF 488S failed to put a life saver and forced them to remain in the vehicle and locked the door.
20. In her evidence, DW1 - Leah Wainaina stated that she was producing a medical report in respect of Rebecca Kananu dated 4<sup>th</sup> December, 2014. She relied on treatment records from Kenyatta National Hospital, medical report by Dr. Wandugu, x-ray report and clinical examination. Her conclusion was that the 1<sup>st</sup> Respondent sustained compound fracture of right tibia and fibula and fracture of the left femur. She estimated that Rebecca would require a sum of Kshs. 40,000/= for removal of the implant. DW2 produced medical report marked as D exhibit1. That Dr. Wandugu indicated that she would require Kshs. 80,000/= for removal of implants. She had seen Dr. Wandugu's second medical report dated 24<sup>th</sup> November, 2014 estimating cost of future treatment at Kshs. 800,000/=.
21. During cross examination, DW1 stated that it is in the report that there was bone loss. She stated that at the time of examination, she still had external fixation (external metals) and X-ray confirmed a fracture of femur. The figure of Kshs. 800,000/= is absurd as his first report proposed Kshs. 80,000/= which is the correct estimate.
22. Upon considering the evidence on record, the trial court delivered its judgment on 14<sup>th</sup> November, 2016 in favour of the 1<sup>st</sup> Respondent awarding her a sum of Kshs. 1,500,000/= as general damages for pain and suffering, Kshs. 159,500/= as special damages and Kshs. 80,000/= for future treatment. Therefore, the total amount awarded was Kshs. 1,739,500/= plus costs and interest.
23. Being dissatisfied with the Judgment, the Appellant preferred the following Grounds of Appeal:-
  - a. The learned Magistrate erred in law and misdirected herself when she failed to consider the Appellants submissions on both points of law and facts.
  - b. The learned Magistrate erred in law and fact in finding the Appellants 100% liable in view of the evidence produced before the trial court and in particular the following; -



- i. That this suit was consolidated with CMCC No. 6240 of 2014 for purposes of determining Judgment on liability as it emanated from a series of two claims.
  - ii. That the Appellants had enjoined a third party and interlocutory Judgment against the 2<sup>nd</sup> Respondent was entered on 27<sup>th</sup> September, 2016.
  - iii. That the Appellants having enjoined the 2<sup>nd</sup> Respondent to the suit and directions taken failed to establish their case against the Appellants.
  - iv. That the Appellants gave evidence that the driver of Motor Vehicle Registration No. KBM 952P was blamed for the accident.
  - v. That the 1<sup>st</sup> Respondent in his testimony did not prove his case against the Appellants.
  - vi. That the Appellants called the Police Officer who produced the OB extract as DEX1 which blamed the driver of the subject Motor Vehicle Registration No. KBM 952P for hitting Motor Vehicle Registration No. KBF 488S from the rear while both motor vehicles were in motion.
- c. The learned Magistrate erred in law and in fact in awarding general damages of Kshs. 1,500,000/=, Kshs. Kshs. 159,500/= as special damages and Kshs. 80,000/= as future medical expenses that were excessive and unjust in the circumstances considering the nature of injuries sustained and the conventional awards in relation to such injuries.
  - d. The learned trial Magistrate’s decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice in awarding damages for loss of earning capacity and special damages when infact the Plaintiff failed to specifically plead and prove the same.
  - e. The learned trial Magistrate erred in condemning the Appellants to pay costs to the 1<sup>st</sup> Respondent.
24. Ideally, the prayers in the second appeal are similar and there is no reason of duplicating them.
25. The appeals were consolidated and on 9<sup>th</sup> March, 2020, this court directed that the consolidated appeals be canvassed by way of written submissions. On 25<sup>th</sup> May, 2020, the Appellants filed their written submissions dated 29<sup>th</sup> March, 2020 while the 1<sup>st</sup> Respondent filed his written submissions dated 10<sup>th</sup> March, 2020 on 12<sup>th</sup> March, 2020.

### **Analysis and Determination**

26. This is a first appeal and therefore it is important for this court to remind itself of its duty as a first appellate court. The duty of a first appellate court is well settled. In the case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2004] eKLR, where the court held that:-

“As a first appellate Court we are not bound by the findings of fact made by the superior court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial judge and the caution is always appropriate as O’Connor P. stated in Peters v Sunday Post Ltd. (1958) EA 424, at Pg. 429:

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness.”



27. Therefore, this being a first appellate court, it is required to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that it did not have the opportunity to see the witnesses testify. I am guided by the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the court held 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 the 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.”

28. In considering and determining the appeal herein, the court will proceed to consider the principles outlined in the above mentioned authorities against the evidence adduced before the trial court. It is also important to keep in mind the principle set out in the case of *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* (supra) the court stated that it can only interfere with a finding of a trial court where the finding is based on no evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding.

29. Having considered the grounds raised in the Memorandum of Appeal, Record of Appeal, the submissions by the Appellant and the authorities relied upon, this court finds that the following issues arise for determination:-

- a. Whether the trial court erred in apportioning liability at 100% against the appellants;
- b. Whether the general damages awarded were excessively high; and
- c. Whether the Respondents proved their cases to the required standard before the trial court.

30. In answering the first issue, this court needs to appreciate the law on evidence in regard to the legal burden of proof. It is trite law that he who alleges must prove the existence of such facts. The burden of proof is provided for under Section 107 (1) of the *Evidence Act*. It provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

31. It is therefore only after the Plaintiff has discharged its burden of proof that the Defendant is called upon to submit evidence to controvert any allegations that may have been made by the Plaintiff by way of evidence. This burden is called the evidentiary burden that is provided for under Section 109 of the *Evidence Act* which states 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.”

32. Further, Section 112 provides that:-

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”



33. In determining this issue, this court is guided by the Court of Appeal decision in *Kirugi & Another –vs- Kabiya & 3 Others* (1987) KLR 347, where the court held that:-

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. The plaintiff must adduce evidence which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

34. In the instant case, it is not in dispute that the accident occurred. What is in dispute is the question on the apportionment of liability. The trial court made a finding of 100% liability in favour of the Appellants. I have perused the evidence on record in Civil Appeal No.729 of 2016 and noted that in his testimony, PW2-Derik Mogaka blamed Motor Vehicle Registration Number KBM 952P for the accident whereas PW3-George Muiru Ngethe blamed the Motor Vehicle Registration Number KBF 488S, Nissan Matatu which remained on the road after a tyre burst with no life saver sign to warn other road users that it had experienced a problem. PW3's evidence was supported by that of DW1-Police Inspector Edward Nyimpoi who stated that it was not indicated who was to blame for the accident but according to the explanation in the occurrence book Motor Vehicle Registration Number KBM 952P was to blame for ramming onto Motor Vehicle Registration Number KBF 488S. This evidence was buttressed by PW1 - Rebecca Kananu who equally blamed Motor Vehicle Registration Number KBF 488S in which she was travelling. That the motor vehicle had a tyre burst and they ought to have put a life saver to show that the vehicle had broken down on the middle of the road after having a tyre burst.
35. It has also been submitted that the Third Party was served with Third Party Notice but failed to enter appearance or file any defence before the trial court. That this is in line with the provisions of Order 1 Rule 15(1) and Rule 17 of the Civil Procedure Rules which provides that:-

- “(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —
- a. that he is entitled to contribution or indemnity; or
  - b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the Plaintiff; or
  - c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Plaintiff and the defendant and should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff and Defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party



notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

- (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

[17]. If a person not a party to the suit who is served as mentioned in Rule 15 (hereinafter called the third party) desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice: Provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the Court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit."

36. The aforementioned provision is to the effect that Third Party proceedings are a matter between the Defendant and the Third party and are subject to a strict procedure which must be adhered to. If a third party fails to enter appearance after service of the Notice, he is presumed to have accepted to settle the entire claim by the Defendant as set out in the Third Party notice if a decree is passed against the defendant after trial or even by consent of the parties.
37. In the case of Kenya Commercial Bank –vs- Suntra Investment Bank Ltd (2015)eKLR, the court held that:-

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 Rule 15-22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant, and has given directions under Order 1 Rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the Defendant.”

38. In the instant case, the Third party was served with the Third Party Notice but failed to enter appearance or file defence. The trial court then entered an interlocutory Judgment against the Third Party.
39. It is this court's view, the evidence that was adduced by the witnesses in one way or the other is proof that there was some degree of contribution by the Motor Vehicle Registration Number KBM 952P in causing the accident. As a result, it is my opinion that the Respondents were able to establish the Appellants' and Third Party's contribution in causing the accident. Therefore, on the issue of liability, this court is of the considered view that 80% liability should



be shouldered by the Appellants and 20% by the Third Party, which would be appropriate in the circumstances.

40. On whether the general damages awarded were excessively high, it is a general rule that, courts will only interfere with an award where it is shown to be inordinately high or inordinately low. The Court of Appeal in the case of Odinga Jacktone Ouma –vs- Moureen Achieng Odera [2016] eKLR stated that “comparable injuries should attract comparable awards.”
41. In the instant appeal, the Respondent, George Muiru Ngethe in Civil Appeal No. 729 of 2016 suffered compound fractures of the right fibula/tibia and blood loss as confirmed by PW1-Dr. Anthony Obwero Wandugu in his testimony. The Appellant has urged that an award of Kshs. 1,200,000/= as general damages was inordinately high, manifestly excessive and unjustified based on misapprehension of law in view of the injuries sustained by the Respondents.
42. The Appellants cited several cases and awarded a figure of between Kshs. 250,000/= to Kshs. 500,000/=. I have perused the authorities relied upon by the Appellants and find that they were rendered from 2003 to 2018.
43. On the other hand, the Respondent submitted that the award of damages was based on the injuries sustained after considering the authorities relied upon.
44. After a careful consideration of the evidence adduced and arguments raised in submissions, I find no reason to interfere with the trial court’s Judgment in respect of the Respondent in Civil Appeal No. 729 of 2016. However, the said award of Kshs. 1,803,831/= will be subjected to contribution of 20% by the Third Party.
45. In Civil Appeal No.747 of 2016, the Respondent Rebecca Kananu sustained injuries of fractures of the right tibia and fibula, fracture of the left femur, deep cut wounds between the eyes, bruises in the leg and blood loss. The injuries were classified as grievous harm. On this, reliance was placed on the case of Joseph Mwangi Thuita –vs- Joyce Mwole (2018) eKLR where the Plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support and the court awarded Kshs. 700,000 as general damages. This Judgment was determined in 2018. In view of the rate of inflation and changes in economic times, this court is of the view that an award of Kshs. 1,000,000/= would be sufficient to grant in the circumstances. And again, this figure shall be subject to a 20% contribution by the 3<sup>rd</sup> Party.
46. As for the rest of the award, the same were not contested, hence the court will not interfere with them.
47. The court proceeds to award the Respondent in Civil Appeal No.747 of 2016 the following:-
  - a. General damages for pain and suffering - Kshs. 1,000,000/=
  - b. Special damages - Kshs. 159,5000/=
  - c. Future treatment - Kshs. 80,000/=Total - Kshs. 1,239,500/=
48. In the end, this appeal partially succeeds and the Respondents are awarded as follows:-
  - a. In Civil Appeal No.729 of 2016 George Muiru Ngethe, a sum of Kshs. 1,803,831/=
  - b. In Civil Appeal No.746 of 2016 Rebecca Kananu, a sum of Kshs. 1, 239,500/=



49. Each award shall be subjected to a contribution of 80%:20% liability for the Appellants and Third Party respectively.

It is so ordered.

**RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 24<sup>TH</sup> DAY OF AUGUST , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

