



REPUBLIC OF KENYA



**Mwangi & another v Kimani & 5 others (Civil Appeal 200 of 2020)
[2022] KEHC 14905 (KLR) (Civ) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 200 OF 2020

CW MEOLI, J

OCTOBER 28, 2022

BETWEEN

JULIUS MAINA MWANGI 1ST APPELLANT

NEWLIGHT JUNIOR ACADEMY 2ND APPELLANT

AND

JAMES MUGO KIMANI 1ST RESPONDENT

FRANCIS MWANGI 2ND RESPONDENT

ALEX MUNGAI 3RD RESPONDENT

MUTAI JIMSON LONGIRO 4TH RESPONDENT

D.T DOBIE LTD 5TH RESPONDENT

STANLEY NGARUIYA 6TH RESPONDENT

*(Being an appeal from the judgment of A.M Obura (Mrs.), SPM. delivered
on 30th April 2020 in Nairobi Milimani CMCC No. 5149 of 2012)*

JUDGMENT

1. This appeal emanates from the judgment delivered on April 30, 2020 in Nairobi Milimani CMCC No. 5149 of 2012. The suit for damages had been commenced by way of a plaint filed on September 4, 2012 by James Mugo Kimani the Plaintiff in the lower court (hereafter the 1st Respondent) against Francis Mwangi, Alex Mungai, Mutai Jimson Longiro, Julius Maina Mwangi, New Light Academy, D.T Dobie Ltd and Stanley Ngaruiya Mburu, the Defendants in the lower court (hereafter the 2nd Respondent, 3rd Respondent, 4th Respondent, 1st Appellant, 2nd Appellant, 5th Respondent and 6th



Respondent, respectively). The claim was arisen from a road traffic accident involving three vehicles that occurred on September 23, 2010. It was averred that the 1st Respondent was lawfully travelling in motor vehicle registration number KAS XXXZ , matatu as a fare paying passenger when the 2nd Respondent and 1st Appellant with the authority and in the course of their employment by the 3rd Respondent, 4th Respondent, 2nd Appellant and 5th Respondent respectively and 6th Respondent so negligently drove, managed and or controlled motor vehicles registration number KAS XXXZ, KAE XXXG and KAC XXXC respectively that they caused and or permitted the said motor vehicles to collide. It was further averred that as a result, the 1st Respondent sustained severe bodily injuries, and suffered loss and damage.

2. The 2nd, 3rd and 4th Respondents filed an amended statement of defence denying the key averments in the plaint and pleaded negligence as against the 1st Respondent and 1st Appellant. The 1st and 2nd Appellant on their part filed a statement of defence denying the key averments in the plaint and pleaded negligence as against the driver of the 2nd – 4th Respondent and the 6th Respondent. The 5th Respondent filed a statement of defence denying the key averments in the plaint. Lastly the 6th Respondent filed a statement of defence denying the key averments in the plaint and pleaded contributory negligence as against the 1st Respondent and negligence as against the driver of the 1st Appellant and against the 2nd, 3rd and 4 Respondent.
3. The suit proceeded to full hearing during which all the respective parties adduced evidence save for the 2nd, 3rd and 4th Respondent. In its judgment, the trial court found in favour of the 1st Respondent wherein the Appellants and the 6th Respondent were held liable in the ratio 90:10 for causing the accident. Judgment was thus entered in favour of the 1st Respondent in the sum of Kshs. 303,000/- made up as follows:
 - a. General damages Kshs. 300,000/-;
 - b. Special Damages: Kshs. 3,000/-.Total - Kes. 303,000/-
4. Aggrieved with the outcome, the Appellants preferred this appeal which is based on the following grounds: -
 - “ a. Thatthe learned magistrate erred in fact in holding the Appellants 90% liable despite overwhelming evidence to the contrary.
 - b. Thatthe honorable learned magistrate erred in law and fact in awarding excessive general damages to the 1st Respondent amounting to Kshs. 300,000/ =.
 - c. Thatthe learned magistrate erred in law and fact in disregarding crucial evidence in arriving at her decision based on only partial evidence.” (sic)
5. The appeal was canvassed by way of written submissions. Counsel for the Appellants collapsed the grounds of appeal into two issues firstly, concerning the trial court’s finding on liability, and secondly on damages. On the first issue counsel cited the provisions of Section 119 of the *Evidence Act* and the decision in *Elijah Ole Kool v George Ikonya Thuo* [2001] eKLR to argue that applying the principle of causation and proximate cause, the 1st Respondent failed to prove that the 1st Appellant’s negligence caused or materially contributed to his injuries and loss and damage. It was submitted that the evidence before the trial court points towards the negligence of the lorry driver as the Appellant’s vehicle never collided with the matatu in which the 1st Respondent was a passenger in. Counsel further placed



reliance on the decision in *P.N.M & Anor (suing as legal representatives of the Estate of L.M.M) v Telkom Kenya Limited & 2 others* [2015] eKLR to submit that a conviction in traffic proceedings was not proof of negligence and therefore liability in civil proceedings. That the Appellants discharged their burden of proof by demonstrating that the 2nd and 6th Respondents were liable for contributing to the causation of the accident the latter being largely to blame for the accident with the others bearing minimal blame if at all.

6. Concerning the award on damages counsel relied on the decisions in *Mokaya Mochama v Julius Momanyi Nyokwoyo* [2013] eKLR and *Socfinaf Company Limited v Joshua Ngugi Mwaura* [2005] eKLR to argue that medical evidence tendered painted a good prognosis in respect the injuries sustained by the 1st Respondent and damages in the sum of Kshs. 70,000/- would have been sufficient compensation. The court was urged to allow the appeal.
7. The 1st Respondent naturally defended the trial court's findings. Counsel asserted that trial court's apportionment on liability was well reasoned. Addressing the court on damages while calling to aid the English case of *Ratnam v Cumarasamy & Another* (1964) ALL ELR 933, the decisions in *Samken Limited & Anor v Mercedes Sanchez Rau Tussel & Anor*. CA No. 21 of 1999 (UR), *Peter Mburu Echaria v Priscilla Njeri Echaria* [2001] eKLR, *Mbogo v Shab* (1968) EA 93 and *Butt v Khan* (1982-88) 1 KAR counsel argued that the Appellants have failed to not demonstrated the application of wrong principles or that it misapprehension of evidence or error on the part of the trial court and the court ought not disturb the award of damages. In concluding it was submitted that the appeal lacks merit and the court ought to dismiss the same with costs.
8. Counsel for the 6th Respondent submitted extensively on issue of liability and particularly urged the court to make a finding that the Appellants were 100% liable for the accident in view of the evidence tendered before the trial court. On quantum counsel cited *F.M (Minor suing through next friend M.W.M) v J.N.N & Anor* [2020] eKLR and *AAA Growers Ltd v Erick Mukhabi Juma* [2020] eKLR and date of the accident to urge the court to set aside trial court's award in damages and substitute it with an award of Kshs. 100,000/-. The court was urged to dismiss the appeal.
9. The 2nd, 3rd, 4th and 5th Respondent did not participate in the instant appeal proceedings.
10. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle -vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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.”

11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court’s view the appeal turns on two issues, namely, whether the finding of the trial court on liability was well founded, and secondly, whether the award on general damages was justified.
12. However, before delving into the substantive issues it would be imperative to address the following concern. As earlier indicated, the 2nd, 3rd, 4th and 5th Respondents did not participate in the instant appeal. Secondly, the present appeal was instigated by the Appellants who were aggrieved by the decision and finding of the trial court. On his part, the 6th Respondent in his submissions exhaustively and extensively challenged the trial court’s finding on liability and quantum despite the fact that he had opted not to challenge the trial court’s decision by either filing an appeal or cross-appeal on the matter. Accordingly the 6th Respondent’s submissions before this court challenging the finding of the trial court on both liability and quantum carry little weight if any in the instant appeal as the appellate court cannot make a finding in favour of the 6th Respondent per se without formal pleadings by him by way of either a memorandum of appeal or cross-appeal.
13. Moving on to the main appeal, pertinent to the determination of issues before this court are the pleadings, which form the basis of the parties’ respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

14. The 1st Respondent by his plaint averred at paragraphs 4, 5 and 6 that:

“ 4. On or about the 23rd day of September, 2010 along Kangundo Road, the Plaintiff was lawfully travelling in motor vehicle registration number KAS XXXZ as a fare paying passenger when the first and fourth defendants, with the authority and in the course of their employment to the second and third defendants, fifth and sixth Defendants respectively and the seventh defendant so negligently drove, managed and or controlled motor vehicle registration numbers KAS XXXZ, KAE XXXG and KAC XXXC respectively that they caused and or permitted the said motor vehicles to collide. As a result thereof



the Plaintiff sustained severe bodily injuries, endured and continues to endure pain and has suffered loss and damage.

Particulars of Negligence on the part of the first Defendant

- a. Drove motor vehicle registration number KAS XXXZ at a speed that was too fast in the circumstance.
- b. Failed to have any or any proper control of the motor vehicle registration number KAS XXXZ
- c. Drove without any due care and attention.
- d. Failed to have any or any sufficient regard for the safety of lawful passengers in the said motor vehicle and in particular the Plaintiff.
- e. Failed to have any or any sufficient regard for the safety of other road users.
- f. Failed to brake, stop, swerve, slow down or in any other manner manage or control the said motor vehicle registration number KAS XXXZ so as to avoid being hit by motor vehicle registration number KAE XXXG and KAC XXXC.
- g. Drove recklessly, carelessly and dangerously.

Particulars of Negligence on the part of the fourth Defendant

- a. Drove without due care and attention.
- b. Failed to stop, slow down, swerve or in any other manner control the said motor vehicle so as to avoid the accident subject-matter.
- c. Failed to have any or any sufficient regard for the safety of other road users.
- d. Failed to heed the presence of motor vehicle registration number KAS XXXZ and KAC XXXG on the said road.
- e. Failed to give way to motor vehicle registration numbers KAS XXXZ and KAC XXXC that were on the said road at the material time.
- f. Drove onto the wrong side of the road.
- g. Caused motor vehicle registration number KAE XXXG to hit motor vehicle registration number KAS XXXZ and KAC XXXC

Particulars of Negligence on the part of the seventh Defendant

- a. Drove without due care and attention.



- b. Failed to stop, slow down, swerve or in any other manner control the said motor vehicle so as to avoid the accident subject-matter.
- c. Failed to have any or any sufficient regard for the safety of other road users.
- d. Failed to heed the presence of motor vehicle registration number KAS XXXZ and KAC XXXC on the said road.
- e. Failed to give way to motor vehicles registration numbers KAE XXXG and KAS XXXZ that were on the said road at the material time.
- f. Drove onto the wrong side of the road.
- g. Caused motor vehicle registration number KAC XXXC to hit motor vehicle registration number KAS XXXZ and KAE XXXG.

10. By reason of the matters aforesaid the Plaintiff sustained severe bodily injuries endured and continues to endure pain and has suffered great loss and damage.” (sic)

15. The Appellants filed a statement of defence denying the key averments in the plaint and pleaded negligence as against the driver of the 2nd, 3rd 4th and 6th Respondent by stating paragraphs 6 and 8 that:

“

“6. Paragraph 9 and 10 of the Plaint and the particulars of negligence of the 4th Defendant and the particulars of injuries and the particulars of special damages set out under there are denied as if the same were all herein set out and specifically traversed seriatim.

7... ..

8. Without Prejudice to the foregoing denials, the 4th and 5th Defendant aver that if, which is denied, the accident occurred and or the Plaintiff was injured as alleged or at all then the same was entirely or substantially caused and or contributed to by the negligence of the drivers of motor vehicle registration number KAS XXXZ and KAC XXXC.

Particulars of Negligence of the driver of Motor Vehicle Registration Number KAS XXXZ

The driver of motor vehicle registration number KAS XXXZ was negligent in that;-



- a. He drove at a speed that was excessive in the circumstance.
- b. He drove without due care and attention.
- c. He drove without due regard to other users, particularly motor vehicle registration number KAE XXXG.
- d. He ignored and or otherwise failed to respond to the hooting, signals and other warning signs from motor vehicle registration number KAE XXXG.
- e. He failed to stop, brake, swerve or otherwise control motor vehicle registration no. KAS XXXZ to avoid ramming onto motor vehicle registration number KAE XXXG.
- f. He failed to keep proper look out that would otherwise have enabled him to see motor vehicle registration no. KAE XXXG in time to avoid the accident.
- g. He conducted himself contrary to the traffic rules and the Highway Code.
- h. He caused the accident.

Particulars of Negligence of the driver of Motor Vehicle Registration Number KAC XXXC

The driver of motor vehicle registration number KAS 064Z was negligent in that;-

- a. He drove at a speed that was excessive in the circumstance.
- b. He drove without due care and attention.
- c. He drove without due regard to other users, particularly motor vehicle registration number KAE XXXG.
- d. He ignored and or otherwise failed to respond to the hooting, signals and other warning signs from motor vehicle registration number KAE XXXG.
- e. He failed to stop, brake, swerve or otherwise control motor vehicle registration no. KAC XXXC to avoid ramming onto motor vehicle registration number KAE XXXG.
- f. He failed to keep proper look out that would otherwise have enabled him to see motor vehicle registration no. KAE XXXG in time to avoid the accident.
- g. He conducted himself contrary to the traffic rules and the Highway Code.
- h. He caused the accident.

16. The trial court after restating the trial evidence stated as follows in its judgment concerning liability;-

“30.I have carefully considered the evidence on record and the written submissions availed. Two main issues arise for consideration liability and quantum. I shall consider them as follows;

31. As correctly submitted by the 4th and 5th Defendants, only PW1, PW2, DW1 and DW3 adduced evidence in relation to the circumstances of the accident.

32.

33.



34. I am also persuaded that the school van could not have pushed a 6 wheeler heavily loaded lorry that was descending a hill to the opposite side of the road. It seems impractical. My view is that the lorry driver lost control of his vehicle after colliding with the matatus and thereby hit the matatus on impact. There was evidence from PW1 and DW3 that the matatu was not speeding. He only failed to avert the accident. The matatus driver did not testify as to the circumstances of the accident and what steps he could have taken to avert it.
35.
36. I am guided by the legal position that this court is not bound by the findings of the Traffic court. The court is duty bound to consider the evidence adduced before it and arrive at its own independent decision.
37.
38. I am of the considered opinion that the lorry driver cannot escape blame in the circumstances of this case. He contributed to the collision with the matatus in which the Plaintiff was travelling. Even though he was on his correct lane, there is evidence from PW1 and DW1 that he was speeding downhill. He could not clearly explain how he ended up on the Matatu's lane and hit the matatus. Had he been driving at moderate speed, he would have had an opportunity to brake or slowdown in sufficient time when the school van negligently veered on to his path. The ripple effect could have been avoided. I therefore blame the school van driver (DW1) and the lorry driver (DW3) for the accident. The 5th Defendant is vicariously liable for the negligence of the 4th Defendant. The 4th and 5th Defendant are substantially liable at 90% while the 7th Defendant shall shoulder 10% liability.
39. As for the matatus driver I am not persuaded that he contributed to the accident. He was ascending a hill at a moderate speed. The school van had just overtaken it. It is highly probable that there was no time to react to the outcome of the collusion between the lorry and school van. His failure to avert the accident cannot be deemed to have been negligent.” (sic)

17. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“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 exists.” The above provision provides for the legal burden of proof.



However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

““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.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

““Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

18. The duty of proving the averments contained in the plaint lay squarely on the 1st Respondent. In *Karugi & Another v. Kabiya & 3 others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he 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. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. 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.” (Emphasis added)

19. In *Gideon Ndungu Nguribu & Another v Michael Njagi Karimi* [2017] eKLR the Court of Appeal stated that “determination of liability in a road traffic case is not a scientific affair” and proceeded to quote Lord Reid in *Stapley vs Gypsum Mines Ltd* (2) [1953] A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”



20. During the trial court, the 1st Respondent testified as PW1 and adopting his witness statement as his evidence-in-chief, testified that he was aboard motor vehicle KAS XXXZ (matatu) which was ascending up a hill when motor vehicle KAE XXXG (school van) was carelessly trying to overtake the matatu having encountered a pothole, while there was oncoming traffic, a motor vehicle KAC XXXC (lorry), in the opposite lane descending downhill. During cross examination by respective counsel's stated that he was seated at the front of the matatu as such could see everything that happened. That the school van was hit and pushed by the lorry, and in turn the school van collided into the matatu followed by the lorry. He stated that the lorry was on its rightful lane when the accident occurred whereas the matatu driver could not avert the accident having been taken by surprise by the collision. He thus he blamed both the school van and the lorry for causing the accident.
21. PC Eluid Katwa testified as PW2 it was his evidence that the accident involved three motor vehicles. He produced as exhibits an extract of the Occurrence Book (OB) (P.Exh.6) and the Police Abstract (P.Exh.3), and stated that motor vehicle KAE XXXG (school van) was blamed for the accident while it's driver was subsequently charged with the offence of careless driving. Under cross-examination he confirmed that he was not involved with the investigations relating to the accident but that his evidence before the trial court was in respect of the Occurrence Book (OB) as (P.Exh.6) and Police Abstract (P.Exh.3).
22. The 1st Appellant testified as (DW1) and similarly adopted his witness statement. It was his evidence that the school van which he was driving and the matatu behind him were headed in the same direction from Ruai towards Nairobi while the lorry was travelling in the opposite direction. He testified that the lorry overtook a stationary vehicle and failed to return to its lane, that despite hooting and flashing his head lights it proceeded towards him and to avoid collision he swerved off the road to his left and only stopped to avoid hitting a tree. That the lorry hit the right side of his vehicle while similarly colliding with the matatu that was behind him. He asserted that his vehicle and the matatu did not collide at all. On cross-examination he denied the existence of a large pothole at the spot and asserted that the lorry veered onto his lane leading to the collision.
23. The 6th Respondent Stanley Ngaruiya Mburu testified as (DW3) he equally adopted his witness statement and stated that he was driving the lorry towards Ruai when the school van that was driving in the opposite direction tried to avoid a pothole but miscalculated and thus failed to return to its lane in time. That as a result the school van and matatu behind it hit his lorry on the side. On cross examination he denied that there was a stationary vehicle ahead of him but confirmed that the school van and matatu did not collide but rather it was his lorry that was hit by both the matatu and school van. That he swerved to avoid the school van and at that point the matatu also hit his vehicle which was still on its rightful lane
24. Evidently PW2 did not witness the material accident. His evidence was entirely with respect to the Occurrence Book (OB) - (P.Exh.6) and the Police Abstract - (P.Exh.3). He was not involved in the investigations concerning the accident. Further he did not disclose the author of or reportee in respect of the entries in Occurrence Book (OB) - (P.Exh.6). Thus, the contents therein merely comprise entries made after the fact and apparently, the version of events narrated therein are skewed in favour of the party making the report. In analysing the evidence on liability, the trial court correctly refused to place reliance on the testimony of PW2 whose key effect was mere confirmation of the occurrence of the accident, and did not contain admissible and credible evidence as to how the accident occurred. Equally the learned trial magistrate did not lay undue weight on the conviction of the 1st Appellant for the offence of careless driving, but instead properly elected, to judge the matter of negligence on the basis of evidence before her.



25. Concerning the 1st Appellant's (DW1), 1st Respondent's (PW1) and 6th Respondent's (DW3) evidence, their respective version of events concerning the accident vary save for the evidence by the 1st Respondent (PW1) and 6th Respondent's (DW3) which shared some similarities as to how the accident occurred and with respect to the 1st Appellant's (DW1) role in the accident. The 1st Appellant's (DW1) evidence was to the effect that the 6th Respondent (DW3) was wholly to blame for the accident having veered onto his rightful lane. The sum total of the evidence of the 1st Respondent (PW1) and the 6th Respondent (DW3) was that the 1st Appellant (DW1) was overtaking the matatu and on encountering a pothole veered onto the lane of the 6th Respondent (DW3) who was driving downhill in the opposite direction and in the process miscalculated and subsequently collided with the matatu and lorry. Beyond his oral account disputed by the other drivers, there was no material corroboration to the 1st Appellant's (DW1) version of events as to how the accident occurred
26. It was not disputed that the accident occurred while the 1st Appellant (DW1) was driving uphill while the 6th Respondent (DW3) was driving downhill. Logically, overtaking while driving uphill would be risky unless the road is all clear on the opposite lane. Ordinarily a properly marked road would have a continuous yellow line dividing the two lanes to signify that overtaking in the section of the road is not allowed. In the instant matter no sketch plan of the scene was produced. That notwithstanding, from the evidence of the respective witnesses, had the lorry driver been keeping a proper look out he would have seen the 1st Appellant's movements in good time and taken avoiding action to avert collision. Hence the trial court was right to arrive at the finding that the 6th Respondent (DW3) had the opportunity to brake or slowdown in sufficient time when the school van negligently veered on to his path.
27. The Appellants have further argued that applying the principle of causation and proximate cause the 1st Respondent (PW1) failed to prove that the 1st Appellant's (DW1) negligence caused or materially contributed to the injuries and subsequent damages he sustained. The Court of Appeal in *Timsales Limited v Stanley Njibia Macharia* [2016] eKLR while discussing the principles of 'causation' cited with approval the decision by Musinga J (as he then was) in *South Nyanza Sugar Co. Ltd vs. Wilson Ongumo Nyakwemba* [2008] eKLR quoting *Statpack Industries Limited vs. James Mbiti Munyao* HCCA No. 152 of 2003 (UR) where it was held that:
- “It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence.”
28. In this matter, the 1st Respondent was merely a fare paying passenger aboard the matatu as such he had not control over the matatu and or any other vehicle that was involved in the accident. Further based on the evidence of the respective witnesses, the accident was largely caused by commission or omission on the part the 1st Appellant (DW1) and to a limited extent by the 6th Respondent (DW3). As such it is the court's opinion the trial court did not misdirect itself when it made a finding that the 1st Appellant (DW1) and 6th Respondent (DW3) were liable for causing the accident and that the 2nd Appellant was vicariously liable for the actions of the 1st Appellant. Therefore the 1st Respondent did on a balance of probabilities establish a causal link between 1st Appellant's (DW1) and 6th Respondent 's (DW3) negligence and his injury. The trial court's finding on liability and apportionment thereof cannot be faulted in the circumstances.



29. Regarding quantum, the court stated in *Basbir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR 5 that:

“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”.

30. In *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30, it was held that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.” see also *Butt v Khan* (1981)KLR 349 and *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR.”

31. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that “an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance”.

32. Counsel for the Appellants went to great lengths to attack the 1st Respondent’s oral and documentary evidence regarding the injuries he sustained. In particular, he argued that from the evidence of the Dr. G. K Mwaura (PW3) no complications were envisaged from the injuries sustained by the 1st Respondent. The court has reviewed the medical report by Dr. G. K Mwaura - (P.Exh.8). It indicates that the 1st Respondent’s injuries were confined to soft tissue injuries including wounds, bruises, blunt injury and cut wounds. The 1st Respondent’s treatment notes (P.Exh.1) and P3 Form (P.Exh.2) being the earliest and therefore most reliable, equally documented the soft tissue injuries as captured in P.Exh.8. The court is satisfied that 1st Respondent’s evidence proved the pleaded injuries on a balance of probabilities. The most significant injury was blunt trauma and bruises. And although the 1st Respondent must have suffered a great deal of pain, P.Exh.8 was prepared about two years after the accident. By that time, complete healing had occurred, and the prognosis was good.

33. Keeping in mind the principles enunciated in *Kemfro Africa Limited t/a Meru Express Service and Gathogo Kanini v A. M. Lubia and Another* (*supra*), this court has considered the award of general damages assailed as excessive by the Appellants and defended by the 1st Respondent. In the court’s opinion, the authorities which the parties cited before the trial court were hardly on all fours with the instant case. However, this court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and a court’s duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. Although wounds, bruises, blunt injury and cut wounds as sustained by the 1st Respondent constitute are minor injury, the Appellants’ proposal to reduce the award of general damages to Kshs 70,000/-, if accepted, would result in an erroneous estimate the proposed sum being too low. Similarly, the 1st Respondent’s proposal of Kshs. 400,000/- in the lower court was slightly on the high end.



34. The trial court may not have recorded its entire reasoning in arriving at the award on damages, but given inflationary trends, it appears that the award was fair compensation for the proven injuries at the time of judgment. In the result, the appeal must fail in its entirety and is dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF OCTOBER, 2022.

C.MEOLI

JUDGE

In the presence of:

For the 1st & 2nd Appellants: N/A

For the 1st Respondent: N/A

For the 6th Respondent: N/A

C/A: Carol

