**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CIVIL APPEAL NO. 1 OF 2019**

**EASY COACH LTD.....APPELLANT**

**VERSUS**

**JACOB JUMA SHAMALA.....1ST RESPONDENT**

**BLACK BOX KENYA LTD.....2ND RESPONDENT**

**PAK MUMTAZ MOTOR LTD.....3RD RESPONDENT**

**PAK MUMTAZ.....4TH RESPONDENT**

*(Being an appeal from the judgement and decree of Hon. J. Nthuku, SRM, delivered on 11/12/2018, in the Principal Magistrate's Court at Eldama Ravine in Civil Case No. 52 of 2016, Jacob Juma Shamala v Easy Coach Ltd, and Third Party (Black Box Kenya Ltd & Pak Mumtaz Motor Ltd)*

**JUDGMENT**

1. The appellant has appealed against the judgement and decree of the lower court in respect of the both liability and quantum of damages in respect of bodily injuries sustained as a result of a motor vehicular accident.

2. In this court the appellant raised thirteen (13) grounds of appeal in his memorandum of appeal. I will determine the issue of liability first.

**On the issue of the Appeal on liability**

3. In ground 1 the appellant has faulted the trial court in law and fact in holding the appellant 100% liable in damages without considering the evidence on record.

4. In ground 2 the appellant has also faulted the trial court both in law and fact in failing to make a finding whether the issue of liability was proved.

5. I will consider grounds 1 and 2 together as they both relate to the issue of liability.

6. It is important to point out that the appellant did not give any evidence on his behalf. The appellant also did not call any witnesses in support of its case.

7. As a result, the only evidence produced at trial was that of the respondent and his three witnesses.

8. The evidence of the 1st respondent (Pw 1) was that he was a fare paying passenger in the Easy Coach bus registration No. KBY 401V that had left Kakamega for Nairobi on 12/10/2015. While en route to Nairobi an accident occurred near Harun's area past Timboroa. As a result of the accident the respondent sustained injuries on the back, head, hip joint and the lower limbs.

9. Pw 1 continued to testify that he was treated in Nakuru Provincial General Hospital and was discharged. He paid shs. 140/-for his treatment, in respect of, which he produced a copy of his receipt as exhibit Plf exh 2. Pw 1 also produced a treatment chit from Nakuru Provincial General Hospital as exhibit Plf exh 4. Additionally, Pw 1 further produced a treatment attendance card from the Provincial General Hospital Kakamega and a case summary treatment as exhibit 3 (a), (b) and (c).

10. Furthermore, Pw 1 testified that he made a report at Timboroa police station, where he was issue with a P3 form and a police abstract;

both of which were marked for identification as PMF1 5 and PMF1 6, respectively.

11. PW 1 further testified that he used shs 40,970/- for his treatment, in respect of which he produced the treatment receipts as exhibit Pexh 9 (a), (b), (c), (d), (e), (f), (g), (h) and (i).

12. The respondent blamed the appellant for the occurrence of the accident. Pw 1 blamed the driver for driving at high speed.

13. Pw 1 also testified that the accident occurred at 1.00 pm and he was able to see the road clearly from where he was seated. He was treated and discharged the same day.

14. Pw 1 also testified that he has not fully recovered as he still goes for check- ups.

15. Based on the foregoing evidence, the appellant has submitted that the respondent has not proved his case on a balance of probabilities. Counsel for the appellant has submitted that no fault was proved and therefore the trial court erred in finding that the appellant was 100% liable in negligence.

16. In this regard, the respondent in his amended plaint in paragraph 4 has pleaded that:

> *"On or about the 12th October, 2015 the plaintiff was lawfully travelling in motor vehicle registration number KBY 401V along Eldoret Nakuru road when the Defendant's driver, servant and/or agent so negligently drove motor vehicle registration number KBY 401V that he caused it to collide with an unregistered Motor Vehicle NRR 32C 300317Z Mitstubishi Canter and as a result the Plaintiff sustained serious injuries and he holds the Defendant wholly liable for the accident."*

17. Furthermore, in paragraph 5 of the amended plaint the respondent has pleaded that:

> *"The Plaintiff avers that the said accident was solely occasioned by the negligence on the part of the Defendant agent and/or authorized drive in the way he managed and/or controlled the said motor vehicle registration number KBY 401V thus causing the accident."*
>
> *PARTICULARS OF NEGLIGENCE OF THE DEFENDANTS AGENTS/AUTHORIZED DRIVER/SERVANT OF THE BUS REGISTRATION NO. KBY 401V*
>
> *a) Driving motor vehicle registration number KBY 401V without due care and attention to other road users.*
>
> *b) Driving motor vehicle registration number KBY 401V carelessly and recklessly*
>
> *c) Failing to take any sufficient control of the motor vehicle registration number KBY 401V so as to avoid the accident.*
>
> *d) Driving at an excessive speed in the circumstance.*
>
> *e) Failing to heed warning of the passengers*
>
> *f) Causing the accident."*

18. I find that the respondent produced uncontroverted evidence to support his pleadings that the motor vehicle registration number KBY 401V (herein after referred to as the offending bus) that the offending bus was driven at high speed and that it caused the accident.

19. In respect of liability the respondent submitted that he proved his case on a balance of probabilities. Counsel for the respondent submitted that the evidence of the respondent that the bus was driven at high speed was not controverted, since the appellant choose not to call any evidence in rebuttal. Counsel cited the case of **Pius Kipkarere K. Mitei v Leonard Kissongochi & Another [2008] e-KLR**, in which that court observed that the defendants therein did not call any evidence in rebuttal that the vehicle was driven at high speed. As a result, the court accepted that the vehicle was driven at high speed.

20. I find that in this case the respondent pleaded that the accident was caused by the offending vehicle which was driven in high speed; and this is what caused the accident. The law in respect pleadings is that a party is bound by his pleadings with the result that he has to produce evidence in support of those pleadings. The respondent himself did not testify that the driver was warned by the passengers. None of the passengers was called to give evidence in that regard. Counsel has pointed out that the witness statement of the respondent is the basis of his submission. I find that the said statement was not adopted as evidence by the respondent at trial. And for that reason it cannot now be relied upon as evidence. The statement was and remains an allegation that had to be proved by evidence on oath. I therefore find that the submission is not supported by evidence and I therefore reject it for lacking evidentiary basis.

21. I agree with counsel for the respondent that the non-production of a police abstract report does not negate the evidence produced at trial. I find as persuasive the decision of the Court of Appeal in Robinson Ochola Awuonda v House of Manji [2015] e-KLR, in which that court observed that a police abstract does not prove the occurrence of an accident; as it is only a proof that a report was made to the police station.

22. Furthermore, I find as lacking in merit the ground and submission of counsel for the appellant that the trial court should have given directions as to the liability of the third parties in view of the provisions of Order 1 Rule 22 of the Civil Procedure Rules of 2010; which read

as follows:

> "*If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions…"*

23. In the instant appeal the third parties did not enter appearance. It therefore follows that there was no basis for the trial court to give directions in respect of the third party. The submission of counsel for the appellant that the trial court erred in failing to give directions in respect of the third party is without basis and I hereby reject it for lacking in merit.

24. I have re-evaluated the entire evidence as a first appeal court. I find as persuasive Pius Kipkarere K. Mitei v Leonard Kissongochi & Another, supra, that where the opposite party does not call evidence in rebuttal, the court is entitled to act on the uncontroverted evidence and find that it is credible.

25. As a result, I find that the magisterial lower court finding that the appellant was 100% liable in negligence is supported by evidence. I am therefore not entitled to interfere with the said finding which I hereby confirm.

**On the issue of the appeal on quantum of damages.**

26. The appellant has faulted the trial court in awarding damages to the respondent without any basis and which were inordinately high as to amount to erroneous overstatement of the loss suffered considering the injuries sustained and the authorities cited for comparable injuries.

27. The respondent called Dr. Sokobe (Pw 2), who examined him on 14/04/2016. Upon his examination Pw 2 found that the respondent suffered the following injuries. A blunt injury to the head. Bruises on the face. Blunt injury to the back with disc prolapsed. Blunt injury to the hip. Blunt injuries to both knees and weakness of the legs.

28. In his opinion Pw 2 concluded that Pw 1 suffered severe soft injuries and that there was need for further investigations and treatment at a cost of Shs 500,000/- Pw 2 was paid shs 6,000/- by Pw 1 as his charges for preparing the medical report. Pw 2 then produced the medical report and receipts as exhibits No. 7 (a) and (b).

29. In cross examination Pw 2 testified that the cost of treatment was shs 500,000/-.

30. In this regard, the appellant submitted that the foregoing injuries sustained by the respondent would have only attracted shs. 150,000/- as general damages.

31. Counsel for the appellant submitted that the trial court applied the wrong principles in assessing damages. Counsel cited Bashir Ahmed Butt v Uwais Ahmed Khan [1982- 88] KAR 5, in which the Court of Appeal observed that an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. That court further observed that it must be shown that the trial court proceeded on the wrong principles or misapprehended the evidence in some material respect and as a result arrived at a figure which was either inordinately high or low. In addition, counsel cited Kemro Africa Ltd T/A Meru Express Service & Another v Lubia & Another [1976] e-KLR, which also restates the same principles as Bashir Ahmed Butt v Uwais Ahmed Khan, supra.

32. Counsel for the appellant has submitted that the trial court failed to take into account the relevant facts, for instance the injuries sustained as to the extent and magnitude in assessing damages. Counsel for the appellant further submitted that Dr. Sokobe testified that the respondent suffered injuries but failed to assess whether there were permanent disabilities.

33. Counsel for the appellant further submitted that the trial court erred in law and fact for relying on the authorities cited by the respondent, which were not relevant and which were not comparable at all to the instant case. Additionally, counsel for appellant has submitted that the award was erroneous, which resulted in a very high and excessive award.

34. Furthermore, counsel submitted that the court ought to have been guided by the economic situation in the country citing Ossuman Mohamed & Another v Saluro Bundit Mohamed, Civil Appeal No. 30 of 1997 (unreported), which in turn cited Kigaraari v Aya [1982-88] 1 KAR 768. The court in that case observed that damages must be within limits set by precedents and also within the limits which the Kenyan economy can afford. That court went further and observed that large awards will be passed to members of the public in the form of increased insurance or increased fees.

35. Counsel for the appellant also cited Channan Agricultural Contractors Ltd v Fred Barasa Mutayo [2013] e-KLR, in which the High Court reviewed downwards an award of shs 250,000/- to shs 150,000/- for moderate soft tissue injuries that were expected to heal in eight months. Similarly, counsel cited George Kinyanjui t/a Climax Coaches & Another (2016) e-KLR, in which the High Court reviewed downwards an award of shs 650,000/- to shs.109,890/- for soft tissue injuries.

36. On general damages, counsel submitted that had the respondent proved his claim, he would have proposed an award of 120,000/-.

37. In response to the foregoing submissions of the appellant, the respondent cited the decision of this court (Njagi, J) in Mumias Sugar Co. Ltd v Mohamed Kweyu Shaban [2018] e-KLR, in which that court upheld an award of shs 800,000/- damages which were classified as serious soft tissue injuries.

38. Counsel for the respondent submitted that the award of shs 600,000/- as general damages by the magisterial court was merited and has urged the court to uphold it.

39. I have considered the authorities cited by both counsel in respect of general damages.

40. It is settled law that the assessment of damages is a matter within the discretion of the trial court. It may be disturbed by an appeal court if the lower court took into account irrelevant factors or failed to take into account relevant factors. See Kemro Africa Ltd T/A Meru Express Service & Another v Lubia & Another, supra. An appeal court may also interfere if the awards are not supported by the evidence produced at trial.

41. It may also be disturbed if the impugned award is inconsistent with previous awards in respect of similar injuries. Finally an appeal court may interfere if the award is so low or so high as to represent an erroneous estimate of damages as set out in Bashir Ahmed Butt v Uwais Ahmed Khan,supra.

42. I have borne in mind the foregoing principles as a first appeal court in re-evaluating the damages awarded by the trial court. As a result of evaluating the damages awarded, I find as follows. First, the evidence of Dr. Sokobe (Pw 2) does not show that the respondent suffered residual disabilities. The evidence of Pw 2 is that further investigations and treatment is needed whose cost is Shs 500,000/-. Pw 2 does not show what is it that needs to be investigated in respect of the soft tissue injuries sustained by the respondent. Pw 2 also has not specifically indicated the basis of the cost of shs 500,000/-. It is not clear whether this amount is required for drugs or supporting equipment such as crutches. Furthermore, the evidence of the respondent is that he has not fully recovered as he still goes for check- ups. I therefore find that shs 500,000/- as an estimate for future treatment is not warranted. I hereby set it aside. In its place I substitute a sum of shs 50,000/- for future treatment including consultation charges.

43. Furthermore, I find that the award of shs 600,000/- as general damages awarded by the trial court is manifestly excessive in view of the fact that the respondent suffered soft tissue injuries with no resulting residual disabilities. I also find the authorities cited by the appellant namely *Channan Agricultural Contractors Ltd v Fred Barasa Mutayo*, supra, and *George Kinyanjui t/a Climax Coaches & Another*, supra, are old cases and the injuries suffered by the victims therein were less serious compared with the ones suffered by the respondent.

44. I further find that the injuries suffered by the victim in Mumias Sugar Co. Ltd v Mohamed Kweyu Shaban, supra, were more serious than the ones suffered by the respondent.

45. After taking into account the authorities cited by the parties, the incidence of inflation and the adverse effect of large awards in the form of increased cost of insurance and fees, I find that an award of shs 300,000/- as general damages is reasonable compensation.

**The issue of proof of special damages.**

46. The law is in this regard that special damages must be pleaded and proved. The evidence of the respondent in this regard is that he paid shs 140/-in respect of his treatment in Nakuru Provincial General Hospital, in regard to which he was issued with a receipt, exhibit plf exh 2. He also used shs 40,970/- for his treatment, a matter in respect of which he produced receipts as exhibits 9 (a), (b), (c) (d), (e), (f), (g), (h) and (i).

47. In view of the foregoing uncontroverted evidence of the respondent, I find that the respondent spent shs 40,970/- plus shs 140/- which comes to a total sum of shs 41,110/-, which special damages, I find were pleaded and proved.

**Final orders.**

48. I find that the appellant's appeal fails with the result that the respondent is hereby awarded damages as follows.

1. *General damages for pain and suffering shs 300,000/-*

2. *Special damages shs 41,110/-*

3. *Award for future treatment shs 50,000/-*

4. *Total award shs 341,110/-*

49. Judgement is hereby entered for the respondent in the sum of shs 341,110/- together with costs and interest at court rates. The magisterial judgement and decree are hereby set aside.

50. In the premises, I find that the appellant's appeal fails and is hereby dismissed with half of the costs of this appeal and in the court below being awarded to the respondent; since the appellant has succeeded in some grounds of appeal and failed in others.

**Judgment dated, signed and delivered in open court at Kabarnet this 28th day of May 2021.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of:**

Mr. Sitienei Court Assistant.

Mr. Mukhabani for the appellant.

Mr. Kinyanjui for the respondent.