



**J&B Auto Agencies v Mwendia (Civil Suit 58 of 2019)
[2021] KEHC 441 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT 58 OF 2019
A MSHILA, J
NOVEMBER 19, 2021**

BETWEEN

J&B AUTO AGENCIES APPELLANT

AND

JOHN NDERITU MWENDIA RESPONDENT

*(Appeal from the judgment of Hon. D.M. Ireri Senior Resident Magistrate
delivered on 20th September, 2019 in Othaya SRMCC No.5 of 2016)*

JUDGMENT

1. This is an Appeal from the judgment of Hon. D.M. Ireri Senior Resident Magistrate delivered on 20th September, 2019 in Othaya SRMCC No.5 of 2016; the respondents' claim arose from a road traffic accident which occurred whilst he was walking home along Othaya, Kilome – Kagonye road from where motor cycle registration number KMDG 940Z coming from Kihome heading to Gacami collided into him thereby occasioning him with serious injuries; Good Samaritans at the scene rushed him to Othaya Sub-County Hospital where first aid was administered and thereafter he was transferred to Mathari Consolata Hospital and admitted for a period of 18 days; he sustained a fracture to right leg and had two metal plates inserted and paid a total of Kshs.180,000/- for the medical services; the respondent was examined by Dr.Francis Maina who prepared the medical report.
2. The respondent filed a suit against Ryce East Africa Limited, the 1st defendant and Stephen Migwi Ndegwa the 2nd defendant, vide an amended plaint dated 3/06/2016 and sought for general damages and special damages of Kshs.181,719/- plus costs of the suit and interest; the 2nd defendant failed to enter appearance upon being served with the summons and plaint prompting the entering of interlocutory judgment against him on 19/10/2018.



3. The 1st defendant's defence was that it had sold the motor cycle to J&B Auto Agencies (the appellant herein) but the appellant had failed and or neglected to transfer the motor vehicle to its name; the 1st defendant issued a Third Party Notice to the appellant and had it enjoined to the suit.
4. The appellant's defence was that it sold the subject motor cycle right away and that the 1st defendant had delivered it directly to Link Up Services Ltd; therefore, on the date of the accident the appellant was not in possession of the motor cycle and it produced an Invoice dated 3/01/06/2014 to support its claim.
5. Judgment was entered in favour of the respondent in the sum of Kshs.846,000/- together with interest at court rates; interest on the general damages was applicable from the date of judgment until payment in full whereas the interest on the special damages was from the date of filing suit until payment in full.
6. Being dissatisfied with the judgment in its entirety, the appellant filed this instant appeal and listed eight (8) grounds of appeal as are summarized hereunder;-
 - i. The learned magistrate erred in holding the Third Party to blame for the accident yet it was not in possession and control of the motor cycle that was involved in the accident with the plaintiff; there was evidence to show the motor cycle was owned by the 2nd defendant and there was no connection of the accident with the appellant;
 - ii. The trial court erred in raising the burden of proof on the appellant by placing the onus on it to remove the doubts as to the ownership of the motor cycle at the time of the accident; the trial court disregarded the submissions of the appellant on liability and erred in holding the appellant and the 2nd defendant liable jointly and severally, a fact not borne by the evidence and the pleadings;
 - iii. The trial court erred in failing to take into consideration the cases cited by the appellant's advocates and awarding a manifestly excessive amount for injuries sustained by the respondent;
 - iv. The trial court erred in relying on the case of Easy Coach Ltd vs Emily Nyangasi (2017) eKLR where the injuries were more serious and thereby reached a wrong decision.
7. When this Appeal came up for hearing, the parties were directed to file and exchange written submissions; hereunder is a summary of the parties respective submissions.

APPELLANT'S CASE

8. The appellant maintains that the 2nd defendant was the rider of the subject motor cycle on the material date when the accident occurred; and according to the police accident abstract the 2nd defendant owned the motor cycle; it was the appellants' contention that the 2nd defendant did not deny these facts nor produce evidence to the contrary and the trial court raised the burden of proof when it required the appellant to prove that it had sold the motor cycle to Link Up Services Ltd.
9. Case law relied on are the cases of; *Miller vs Minister of Pensions* [1947] 2 ALL 372 ER cited in *Ignatius Makau Mutisya, Joel Muga Opinja vs East Africa Sea Food Ltd* [2013] eKLR; [*Samuel Mukonya Kamunge vs John Mwangi Kamuru*](#) Civil Appeal No.34 of 2002, *Dorcas Wangithi Nderi vs Samuel Kiburu Mwaura & Another* [2015] eKLR, *Wellington Nganga Muthiora vs Akamba Public Road*



Services Ltd & Another Civil Appeal No.260 of 2004, *Stanley Maore vs Geoffrey Mwenda* [2004] eKLR.

10. The appellant prayed that the appeal be allowed and the judgment of the lower court be set aside and the suit be dismissed and costs be awarded on appeal and in the lower court.

RESPONDENT'S CASE

11. The appeal was opposed and the respondent submitted that the appellant failed to prove that it did not own the motor cycle; contending that it was the onus of the respondent to prove this, the respondent relied on Sections 107 and 108 of the *Evidence Act*; and also cited the case of *Francis Nzioka Ngao vs Silas Thiani Nkunga* Civil Appeal No.92 of 1998; he pointed out that at the trial the 1st defendant denied that it delivered the motor cycle to Link Up Services Ltd directly as claimed by the appellant; it was argued that the appellant ought to have sought leave of court to enjoin Link Up Services Ltd as provided by Order 1 Rule 15(4) of the *Civil Procedure Rules*; none-the-less there was sufficient evidence on record that demonstrated that the appellant was the owner of the motor cycle when the accident occurred; case law relied on *Mubambi vs Said Mbwana Abdi* [2015] eKLR.
12. With regard to the award for general damages the respondent asserted that the appellant had not demonstrated that in assessing the damages the trial court had taken into account an irrelevant factor as to make the general damages it awarded so inordinately high that it can be said to be erroneous so as to warrant this court's interference; for this proposition the respondent cited the following cases *Mwanasokoni vs Kenya Bus Services Ltd* [1982-88] 1 KAR 278; *Kiruga vs Kiruga & Anor* [1988] KLR 348 and *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini vs A.M. Lubia & Another* [1982-88] 1KAR 777.
13. The respondent urged the court to dismiss the appeal with costs.

ISSUES FOR DETERMINATION

14. After having read the written submissions filed by both parties and having perused the Record of Appeal and the pleadings this court has framed the following issues for determination; and the issues are as set out hereunder;
 - i. Whether the appellant is the registered owner of the subject motor cycle; whether it is liable for the accident.
 - ii. Whether to interfere with the damages awarded by the trial court.

ANALYSIS

15. The Court of Appeal case of *Farah Awad Gullet vs CMC Motors Group Limited* [2018] eKLR sets out the parameters under which an appellate court can interfere with a decision of a trial court; it held that:

‘This is a first appeal. Our mandate is to re-appraise, re-assess and re-analyze the evidence on record before us and arrive at our own conclusions on the matter and give reasons either way. (See the case of *CYifC Sumaria & Another vs Allied Industries Limited* [2007] 2KLR). We are also reminded that we should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, or based on a misapprehension of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did. (See also *Musera vs Mwechelesi & Anor* [2007]2KLR 159.’

Whether the appellant was the registered owner of the subject motor cycle; whether it is liable for the accident.



16. On the question of ownership of the subject motor cycle the appellant claims that the police accident abstract shows that the 2nd defendant as the owner/rider of the motor cycle; it has been held that a police abstract may be proof of ownership of a motor vehicle but still the best evidence of ownership is through a document from the Registrar of Motor Vehicles; hence in determining the issue of ownership of a motor vehicle the court considers the facts of each individual case; in this instance the trial court considered the documentary evidence provided by the 1st defendant and in its judgment observed as follows.

‘The 1st defendant herein has adduced contrary cogent and compelling evidence showing that the motor cycle was not in actual possession or control of the 1st defendant at the time of the accident.’

17. Whereas on the appellant’s evidence on possession, the trial court made the observation that;

‘And if it is true that the third party had sold the motor cycle to Link Up Services Limited as alleged and in order to remove any doubts, the third party ought to have sought leave of this court to enjoin the said Link Up Services Limited in this case for purposes of seeking indemnity against them

18. It is clear from the record that in effect the respondent proved on a balance of probability that the appellant owned the subject motor cycle whereas the appellant failed to prove on a balance of probabilities that it had transferred the subject motor cycle to another party as it did not bring forth any ‘compelling evidence to demonstrate that it had sold and delivered the subject motor to Link Up Services Limited as alleged and having failed to enjoin them to this suit...’

19. This court finds no reason to interfere with the trial courts finding on ownership by the appellant and reiterates what the trial court clearly stated in the judgment that ‘....there is no iota of evidence from either party in these proceedings showing that Link Up Services Limited was in possession, control and/or the owners of the subject motor cycle as at 31/01/2012 when the accident occurred.’

20. On liability there was no dispute that an accident occurred on 31/01/2015 involving the respondent and the subject motor cycle; what was in contention was who was liable for the accident; the trial court in its judgment noted that neither the appellant or the other parties presented any evidence to challenge the particulars of negligence complained against or to show that the respondent was liable for the accident or had contributed in any way to the its occurrence; for those reasons the trial court made a finding that the respondent was not to blame for the accident.

21. The police accident abstract produced as ‘PEX.2’ showed ‘the 2nd defendant’ as the driver of the subject motor cycle and he was recommended to be charged with careless driving; based on the finding that the appellant was the owner of the motor cycle and the 2nd defendant the rider the trial court made a finding that both the appellant and the 2nd defendant were wholly liable for the accident and entered judgment accordingly.

22. On this issue of vicarious liability this court makes reference to the Court of Appeal case of *Kenya Bus Services Ltd vs Dina Kawira Humphrey* [2003] eKLR in which the Court of Appeal cited with approval the statement made by its predecessor in *Karisa vs Solanki* [1969]EA 318; the court stated as follows;

‘Where it is proved that a car has caused damage by negligence then in the absence of evidence to the contrary a presumption arises that it was driven by a person for whose negligence the owner is responsible (see *Bernard vs Sally* (1931) 47 TLR 557). This



presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.’

23. For those reasons this court finds no good reason to fault the finding of the trial court on the ownership of the subject motor cycle by the appellant; and also on its finding that the appellant was vicariously liable and together with the 2nd defendant both were properly found to be jointly and severally liable at 100% for the accident.
24. This ground of appeal is found to be lacking in merit and it is hereby disallowed.

Whether to interfere with the damages awarded by the trial court.

25. The principles to be considered when reviewing an Appeal on general damages are laid out in the Court of Appeal case of *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR; this decision sets out the parameters under which an appellate court will interfere with an award in general damages; it held that: -

‘An appellate court will not disturb an award for general 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..’

26. In the case of *Sofia Yusuf Kanyare vs Ali Badi Sabre & Another* NBI HCCC No.478 of 2007 the principles to be taken into consideration by the court when assessing damages were clearly highlighted and set out as follows;

- ‘(1). An award of damages is a matter of discretion on the part of the court, seized of the matter.
- (2). The award should not be too high or too low.
- (3). It is not meant to enrich the victim, but to try as much as possible to restore him/her in the positing in which they were in, before the accident,
- (4). Awards in past decisions are meant to be mere guides and each case should depend on its circumstances.
- (5) Where awards in the past decisions are to be taken into consideration, their age, and the rate of inflation as well as the value and the purchasing power of the Kenyan Shilling should be taken into consideration.’

27. In applying the above principles to the instant appeal it is clear from the impugned judgment that the trial court considered the proposals made on quantum by the appellant and respondent respectively; the respondent proposed Kshs.1,200,000/- as damages for pain and suffering and he relied on the cases of *Zachariah Mwangi Njeru vs Joseph Wachira Kanonga* [2014]eKLR, *Josphat Mutembei vs James Mworira & Another* [2018] eKLR and *Clement Gitau vs GKK* [2016] eKLR. The appellant had proposed the sum of Kshs.500,000/- as general damages but did not cite any authorities to buttress its proposal; and the 1st defendant did not submit on quantum.
28. This court notes from the trial courts judgment that it considered the case of *Easy Coach Limited vs Emily Nyangasi* [2017] eKLR and noted that in this case an award of Kshs.700,000/- general damages was confirmed on appeal even though there was no fracture; the trial court considered the injuries



sustained by the respondent as set out in the Medical Report which were a fracture of the right tibia and fibula bones; additionally the trial court considered the period the respondent was admitted in hospital; the age of the decisions cited and the current rate of inflation; based on the above principles the trial court made an award of Kshs.800,000/- as general damages for pain, suffering and loss of amenities.

29. All in all, the appellant has not demonstrated that the trial court applied any wrong principles or took into account an irrelevant factor or failed to take into account a relevant one; this court finds that the appellant has not met the threshold to warrant interference of the award for damages as it is found to be reasonable and well substantiated.
30. This ground of appeal is found lacking in merit and it is hereby disallowed.

FINDINGS AND DETERMINATION

31. For the forgoing reasons this court makes the following findings and determinations;
- i. The trial court's finding that the appellant was the registered owner of the subject motor cycle is hereby upheld; the finding liability of the appellant and the 2nd defendant is hereby upheld;
 - ii. The trial court's award for general damages is hereby upheld;
 - iii. The appeal is found to be lacking in merit in its entirety and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 19TH DAY OF NOVEMBER, 2021

**HON.A.MSHILA
JUDGE**

