Vatican Traders Limited v Simba & 2 others (Civil Appeal E015, E016 & E017 of 2021 (Consolidated)) [2025] KEHC 7261 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7261 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E015, E016 & E017 OF 2021 (CONSOLIDATED)

GL NZIOKA, J

MAY 5, 2025

BETWEEN

VATICAN TRADERS LIMITED ..... APPELLANT

AND

DAVID OBONDO SIMBA ..... 1ST RESPONDENT

PAMELA MUKULA KANINI ..... 2ND RESPONDENT

ABSALOM KAZIERA ..... 3RD RESPONDENT

JUDGMENT

1. The plaintiffs (herein "the respondents") commenced their respective suits in the lower court vide Chief Magistrate Civil Case No(s) 53, 51 and 52 of 2015 respectively. By a plaint dated 9th February 2015, each respondent was seeking for judgment against the appellant for: -
    a. Special damages,
    b. General damages for pain and suffering and loss of amenities,
    c. Costs and interest of the suit and
    d. Any other relief the court would deem fit and just to grant.
2. The background facts of this matter are that on or about 4th September 2013, the respondents were travelling as lawful passenger on board motor vehicle registration No. KAW 733X Scania Bus. That the vehicle was being driven along Nairobi-Naivasha road and when it reached Kayole area, the vehicle was involved in a collision with motor vehicle registration No. KAW 346U Toyota saloon.
3. The respondents blame the driver of their motor vehicle No. KAW 755W, for driving the vehicle in a negligent manner. The particulars of negligence attributed to that driver are tabulated at paragraph 4

of the plaint. However, in a nutshell, it is alleged that, he drove the motor vehicle at an excessive speed, failed to stop, serve, brake or control the motor vehicle thus causing the accident.

4. The respondents further aver that as a result of the accident each respondent sustained injuries as stated under paragraph 4 of the respective plaints but include; soft tissue injuries, blunt injuries, deep cuts on the face and dislocation of the mandible.

5. However, the appellant filed a statement of defence dated 7th July 2015 denying each and every allegation including the particulars of negligence attributed to its agent and/or driver and attributing negligent on the part of the respondents, as tabulated under paragraph 5 of the statement of defence.

6. In addition to the afore the appellant also filed and sought for leave to enjoin the owner and/or driver of the motor vehicle KAW 346U on the argument that, the driver of that KAW 346U solely caused and/or substantially contributed to the occurrence of the alleged road traffic accident.

7. Subsequently the matter proceeded to full hearing whereupon judgment was entered against the appellant on liability at 50% and quantum being awarded in favour of each respondent as follows:

   1st Respondent

   General damages----------Kshs 300,000

   Special damages----------Kshs 3.500

   Sub-total----------Kshs 303,350

   Less 50 contributions--------(Kshs 151,750)

   Total sum---------- Kshs 151,750

   2nd Respondent

   General damages----------Kshs 400,000

   Special damages----------Kshs 3,5000

   Sub-total----------Kshs 403,500

   Less 50% contribution--------(Kshs 201, 750)

   Total sum----------Kshs 201,750

   3rd respondent

   General damages----------Kshs 300,000

   Special damages----------Kshs 3500

   Sub total----------Kshs 303,500

   Less 50% contribution--------(Kshs 151,750)

   Total----------Kshs 151,750

8. However, the appellant is aggrieved by the decision both on liability and quantum in each case on the following grounds: -

   a. The learned trial Magistrate erred in law and in fact in not finding that the respondent had failed to attribute and did not prove any of the pleaded particulars of negligence to the appellant.

b. That the learned trial Magistrate erred in law and in fact by apportioning liability at 50:50 between the appellant and respondent.

c. The learned trial Magistrate erred in law in fact by apportioning liability of 50% against the appellant despite the police testimony that the appellant was not to blame for the accident.

d. The learned trial Magistrate erred in law and in fact in finding that the appellant was liable when the evidence on record was that the unknown Third party was solely caused the accident by overtaking on the wrong side of the road.

e. The learned Magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to damages of KShs. 300,000/- and Kshs. 400,000/- without any tangible proof of the same;

f. That the learned Magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of KShs. 3,550/= allegedly spent in what the plaintiff turned to be a merry celebration without concrete documentary evidence;

g. That the learned Magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendants to excess Quantum and special damages without concrete documentary evidence.

h. The learned Magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/ conclusion, in particular relating to damages;

i. The learned Magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages;

j. That the learned Magistrate erred in law and fact in entering judgment in favour of the plaintiffs against the defendant inspite of the plaintiff's miserable failure to establish her case more especially on liability and quantum;

k. That 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;

l. That the learned trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities cited in the written submissions presented filed by the appellant;

m. That the learned trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable;

9. Consequently, the appellant pray that the court grant the following orders;

a. That the appeal be allowed;

b. The judgment of the Resident Magistrate Hon, Joseph Karanja in Naivasha CMCC No. 51, 52 and 53 of 2015 be set aside both on quantum and liability be assessed afresh

c. That the costs of the appeal be awarded to the appellants

d. That such further orders may be made by this Honourable court may deem fit to grant.

10. Taking into account that the subject claims herein arose from the same accident necessitating the consolidation thereof to enable one judgment be rendered on liability and independent findings on quantum.

11. The appeal was disposed of vide filing of submissions. The appellant in submissions dated 21st November 2022, urged the court to uphold the trial court's finding on liability at 50:50% arguing that the respondents failed to prove that the appellant was wholly to blame for occurrence of the accident.

12. The appellant relied on the case of Hussein Omar Farah v Lento Agencies [2006] eKLR where the court stated that; "...if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

13. The appellant relied on the case of; Jennifer Mathenge v Patrick Muiruki Maina [2020] eKLR citing Kenya Power Lighting Company Limited & another v Zakayo Saitoti Naingola & another [2008] eKLR where the Court of Appeal considered the factors to take into account before the appellate court can interfere with assessment of damages by the trial court. These factors are that; damages should not be inordinately too high or too low; damages are meant to compensate a party for the loss suffered not to enrich that party and should be commensurate to the injuries suffered. Further, past decision are a mere guide as each case depends on its own facts and inflation should also be taken into account as well as the purchasing power of the Kenya shilling at the time of judgment.

14. The appellant further submitted that the amount of Kshs 300,000 awarded to the 1st and 3rd respondent and Kshs. 400,000 to the 2nd respondent respectively as general damages are inordinately too high considering the injuries the respondents sustained.

15. With regards to the 1st and 3rd respondent, the appellant proposed an award of Kshs. 60,000 as general damages stating that it would be adequate and sufficient compensation and relied on the case of Ndungu Dennis v Ann Wangari Nderitu & another [2018] eKLR where the respondent suffered soft tissue injuries to the lower right leg and back and the High Court set aside the amount of Kshs. 300,000 awarded by the trial court and substituted it with an award of Kshs. 100,000.

16. The appellant submitted that in the case of Eva Karimi & 5 others v Koskei Kieng & another [2020] eKLR the High Court awarded Kshs. 70,000 to the 1st appellant who had sustained injuries to her right thigh and bruises to her lower and upper limbs; Kshs. 40,000 to the 2nd appellant who sustained injuries on the right shoulder, pain and cut wound on the mouth; Kshs. 45,000 to the 3rd appellant for injuries and pain on the back and right shoulder; Kshs. 40,000 to the 4th appellant who suffered cuts to the chin and right shoulder with tenderness and Kshs. 60,000 to the 5th appellant who sustained a 2cm cut on the forehead, cut wound on the right elbow and right limb (leg and ankle joint); and Kshs. 65,000 to the 6th appellant who suffered bruising on the forehead, hip and left ankle.

17. Furthermore, that the High Court in the case of Kenya Nut Co. Ltd v David WAfula Wechili [2020] eKLR, awarded the plaintiff general damages of Kshs. 80,000 for a deep cut on the index finger left upper limb measuring 2cm x 1cm.

18. As regards the 2nd respondent, the appellant proposed an award of Kshs. 250,000 as adequate and sufficient general damages and relied on the case of; Mara Tea Factory Limited v Lilian Bosibori Nyandika [2021] eKLR where the High Court set aside the trial court award of Kshs. 400,000 and substituted it with an award of Ksh. 300,000 where the respondent sustained a head injury, deep cut wound on the head, bruises on the frontal part of the head, tenderness on the chest, dislocation of the left wrist joint, and multiple cut wounds on the upper and lower limbs.

19. Similarly, the appellant cited the case of; Veronicah Mkanjala Mnyapara v Patrick Nyasinga Amenya [2021] eKLR where the respondent suffered multiple soft tissue injuries and a dislocation of the left hip joint and complained that he was not able to stand for long or do heavy lifting due to the dislocation and the High Court upheld an award of Kshs. 300,000 as general damages.

20. That in addition in the case of; Veronicah Mkanjala Mnyapara v Charles Kinanga Babu [2020] eKLR, the respondent suffered multiple dislocations in addition to soft tissue injuries which were classified as grievous harm and the High Court upheld award of Kshs. 300,000 as general damages.

21. Lastly, the appellant submitted that under section 27 of the *Civil Procedure Act* costs follow the event and urged the court to allow the appeal as prayed and award it the costs of the appeal.

22. However, the respondents opposed the appeal vide the submissions dated 11th January 2023 and argued that the court had an opportunity to hear the evidence of the witnesses and examine the documents produced and arrived at a sound judgment which this court should not interfere with.

23. That in the case of Peters v Sunday Post Limited [1985] EA 424 the court held that the jurisdiction to review evidence on appeal should be exercised with caution, that it is not enough that the court might have come to a different conclusion but where a finding of facts is based on no evidence or the court acted on wrong principles to reach its findings the appellant court can interfere with the finding.

24. The respondents relied on section 107 (1) of the *Evidence Act* (Cap 80), and the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR to argue that the burden of proof lies on the party that invokes the aid of the law. That, in the respondents adduced evidence that the appellant was negligent.

25. Further, the respondents gave evidence in the trial court that they were seated behind the appellant's driver and noted that he was driving at high speed and was negligent as per the particulars in the plaint. That in the case of; Butt v Khan [1982] 1 KAR the court held that high speed can be prima facie proof of negligence.

26. The respondents further submitted that they had discharged their burden of proof by proving that the appellant was negligent, and therefore the burden shifted to the appellant to bring evidence to prove otherwise.

27. The respondents cited the case of; Embu Public Road Services Ltd v Riimi [1968] EA 22 where the Court of Appeal stated that, where circumstance give rise to inference of negligence, in order for the defendant to escape liability he or she has to show there was a probable cause of the accident that does not connote negligence, or give an explanation that is consistent with the absence of negligence.

28. That the appellant failed to call the driver and/or their conductor of the subject vehicle to testify. The case of Regina Wangeci v Eldoret Express Co. Ltd [2018] eKLR was cited where the High Court stated that where there is a proved set of facts raising a prima facie inference that the accident was caused by negligence on the part of the defendant, the suit will be decided in favour of the plaintiff unless the defendant provides adequate answers to displace the inference.

29. The respondents argued that the issue of liability does not arise as the appellant has paid the judgment amount in Naivasha civil case No. 50 of 2015 Godfrey Ababu Kasiera v Vatican Traders Limited, which was one among the series with the present files in the trial court.

30. On quantum, the respondents submitted that the trial court applied the correct principles and arrived at a fair and reasonable amount which is not manifestly too high so as to warrant interference by this Court. Further, that the trial court considered submissions of both parties to arrive at the awards.

31. At the outset I note that, the role of the 1st appellant court, as held by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

32. The Court of Appeal thus observed: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

33. Having considered the arguments by all the parties I find that, as regard liability the evidence adduced in the trial court was led by the respective respondents whereas the appellant called a police officer who produced a police abstract.

34. The evidence reveals that the respondents were passengers in the in the appellant's vehicle and therefore they were not in control of any of the motor vehicles. In that case, they could not have contributed to the cause of the accident.

35. Similarly by virtue of taking out third party proceedings, it became evident that, it can only have been either or both of the drivers to blame. The trial court found both drivers and held each of them liable at 50%. Furthermore, the police abstract produced did not hold any of the drivers 100% liable.

36. It is therefore the finding of this court that, the trial court was well guided in finding each driver 50% liable. In the given circumstances, I decline to interfere with the finding on liability.

37. As regards quantum I note from the record of appeal filed in relation to appeal No. E015 of 2021 and E016 of 2021 does not contain the plaintiffs cum respondents' submissions filed in the trial court. Consequently, that record is incomplete and without the benefit of the respondents' submissions it is extremely difficult to deal with the issue of quantum. I say so, because, this court will not have the benefit of what amount the respondents proposed as general and special damages and/or the authorities relied on.

38. The record of this court indicates that, on 19th October 2023 the parties were directed to go before the Hon. Deputy Registrar to confirm if the record of appeal was complete.

39. That upon return of the matter to this court, it was noted that respondents' submissions filed in the trial court were missing. The appellant was accorded an opportunity to file a supplementary record of appeal. That was not done. Subsequently on the 16th and 28th November 2023, when the matter was in court it was observed that the appellant had not filed the supplementary record of appeal. That despite indicating the same was done by 19th January 2024, there is no such record availed.

40. Similarly in HCCA No. E017 of 2021, the appellant indicated that, the record of appeal was complete as per the order of the Hon. Deputy Registrar dated; 3rd August 2023. However, just as HCCA No.

E015 and E016 of 2021, the respondent's submissions filed in the trial court are missing. Consequently, the court has no basis to interfere with the award on quantum.

41. Even then, it is the respondents' submissions that the appellant has already settled one of the claims that arose in the same matter and therefore cannot deny liability in this other matter.

42. Even if the court were to consider each of the appeals on evidence on record. It is clear that, the amount of award in each case is not extraordinarily too high. I arrive at that conclusion taking into account that, the medical reports confirmed the injuries the respondents suffered and with inflation, the amount is reasonable and adequate.

43. The upshot of the aforesaid is that I therefore dismiss the Appeal(s) in the matters herein being; High Court Civil Appeals No(s) E015, E016 and E017 of 2021 in their entity with costs to the respondent(s).

44. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 5TH DAY OF MAY 2025.

GRACE L. NZIOKA

JUDGE

In attendance

Mr. Njuguna for the appellant

Mr. Onyancha for the respondents

Ms. Hannah – court assistant