Njuguna v Coast Raha Limited & another (Civil Appeal E027 of 2023) [2025] KEHC 13002 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13002 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CIVIL APPEAL E027 OF 2023

JN NJAGI, J

SEPTEMBER 18, 2025

BETWEEN

KASSIM OMAR NJUGUNA .... APPELLANT

AND

COAST RAHA LIMITED .... 1ST RESPONDENT

ABUBAKAR TAIB SALIM .... 2ND RESPONDENT

(Being an Appeal against the judgment and decree of Hon. T. A. Sitati, SPM, in Lamu PMCC No. E009 of 2022 delivered on 21/8/2023)

JUDGMENT

1. The appellant brought suit against the Respondent wherein he was seeking general and special damages after he was injured in a road traffic accident involving a motor vehicle bus belonging to the 1st Respondent and which at the time of the accident was being driven by the 2nd Respondent. It was the case for the Appellant that he was boarding the bus at Hindi bus stage when the driver of the bus drove off before he boarded as a result of which he fell off the bus and his leg was crushed by the wheel of the vehicle. The leg was later amputated. The Respondents denied the claim and blamed the Appellant for occasioning the accident. After a full trial, the trial court found the Appellant to have jumped onto a moving bus and tried to board the vehicle as a result of which he fell off and his leg was crushed by the wheel of the vehicle. The court blamed the Appellant to have majorly contributed to the accident and assessed his culpability at 70% while the Respondents were found 30% liable for the accident. The Appellant was aggrieved by the trial court`s finding on liability and filed the present appeal.

2. The grounds of appeal are that:

   1. That the learned trial magistrate erred in law and fact in finding that the Appellant ought to shoulder 70% liability as a result of the accident.

2. That the learned trial magistrate erred in law and fact in finding that the subject motor vehicle KCH 128Z was in motion when the Appellant was attempting to board the vehicle.

3. That the learned trial magistrate erred in law and in fact in failing to take into account that the Appellant fell as a result of the driver of the subject motor vehicle KCH 128Z engaging the gear to start moving.

4. That the learned trial magistrate erred in law and in fact in failing to take into account that the Respondent's driver ought to have allowed all passengers to board and have the door closed before engaging the gear.

5. That the learned trial magistrate erred in law and in fact in failing to take into account the authorities cited by the Appellant in relation to liability of the Respondents.

3. The Appellant sought to have the appeal allowed and the judgment entered in favour of the Respondent be set aside and substituted by finding the Respondents 100% liable for the accident.

Summary of the Evidence

4. The Appellant who was PW 1 in the case testified that he was at the material time at Hindi bus stage when he started to board motor vehicle registration No. KCH 128Z. That all of a sudden, the driver started the motor vehicle before he had fully boarded and he suddenly fell. The wheel of the motor vehicle ran over his left leg and as a result he was crushed on the said leg by the front left wheel of the motor vehicle. He was treated at Mpeketoni Sub County hospital and the leg was amputated. He later reported the accident at Hindi Police Station. He asserted that the driver was driving at a high, excessive and dangerous speed under the circumstances thereby failing to notice him in sufficient time so as to avoid the accident. He denied in cross-examination that he was hanging onto a moving bus at the time of the accident.

5. The Appellant called two witnesses in the case, Ali Awadh Said Changawa PW2 and a police traffic officer from Hindi police station, PC Abdikarim Aden, PW3. PW2 testified that he was at the time of the accident at Hindi bus stage when he saw the appellant boarding the subject bus. That the Appellant put his leg forward to board the bus when the driver drove off before the door was shut. That the Appellant fell as a result and was run over by the bus wheels and his lower leg crushed. He was rushed to hospital where his leg was amputated.

6. PC Aden PW3 on his part told the court that he received a report of the accident and he proceeded to the scene. He found the victim at the scene of the accident where he was receiving first aid from the Red Cross and members of the public. He found that the accident had taken place close to the stage and not at the stage. He drew a sketch plan and found that the point of impact was 8 meters from the bus stage. He investigated the case and recorded statements from some passengers and by standers. He found that the Appellant jumped and held onto a moving bus and his leg slipped and was run over by the wheel of the bus. He produced a P3 form dated 19/4/2022 and a Police Abstract dated 6/5/2022 as exhibits, P.Exh. 3 and 4 respectively. He found that the Appellant is the one who majorly contributed to the occurrence of the accident although no one was charged with any traffic offence over the incident.

7. The Respondents on their part called one witness in the case, Raymond Juma Kahindi, DW1 who was the driver of the accident motor vehicle. It was his evidence that he had stopped at Hindi stage to drop and pick passengers. That after picking passengers and the conductor closing the door, he left the stage. The conductor shortly alerted him that there was someone being dragged by the bus. He stopped and found a tout having been ran over by the front left tyre of the bus. Police from Hindi Police station visited the scene of the accident and ordered him to drive the motor vehicle to the station.

8. It was further evidence of DW1 that the Appellant was a person well known to him as he used to see him working as a tout at Hindi bus stage.

Submissions

9. The court gave directions for the appeal to be canvassed by way of written submissions. Counsel for the Appellant filed submissions while counsel for the Respondents did not file any despite him promising to file the same within 7 days of the day the judgment date was given in court.

10. Counsel for the Appellant identified one issue for determination: whether the trial magistrate applied the correct principles in finding the appellant 70% liable for the accident.

11. Counsel submitted that the Respondents` evidence was pegged on a false narrative that the Appellant was a tout and that he jumped onto a moving vehicle. He faulted the trial court for placing more weight on the testimony of DW1 rather than that of PW1 and PW2 yet DW1 told the court that he did not witness the accident and only stated what he was told by his conductor who did not testify in the case. Therefore, that the evidence of DW1 was hearsay.

12. Counsel submitted that no evidence was led to show that the Appellant was negligent in any manner. That no evidence was presented to prove that the Appellant jumped onto a moving motor vehicle. That all the evidence pointed to the fact that the vehicle was stationery at the stage with the door open and that when the appellant was in the process of boarding the vehicle the driver drove off thereby causing the Appellant to fall. Counsel submitted that the driver of the motor vehicle ought to have been wholly blamed for the accident as he was in control and management of the motor vehicle. Counsel relied on the case of Elizabeth Gathoni Thuku (Suing as the Legal Representative of the Estate of Charles Gitonga Wathuta) vs Peter Kamau Maina & another (2021) eKLR where the court held that:

> What I find makes distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine when Washington had none and all things being equal she was under an obligation to keep greater look out for other road users.

13. It was submitted that the there was no evidence that the Appellant contributed to the occurrence of the accident and therefore the trial court erred in finding him 70% liable. The Appellant urged the court to find the Respondents wholly liable for the accident.

Analysis and determination

14. I have considered the grounds of appeal, the judgment of the trial court and the submissions. I am alive to the fact that the appeal herein is a first appeal and that being so, it is the duty of this court to analyze and re-evaluate afresh the evidence adduced before the trial court and draw its own independent conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify and therefore give due allowance to that, see Selle & another v Associated Motor Boat Company Ltd (1968) EA 123. In Peter M. Kariuki -vs- Attorney General (2014) eKLR the court held inter alia as follows on the duty of a first appellate court:

> “ We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

15. The main issues for determination are;

1. Whether the trial court erred in finding that the appellant ought to shoulder 70% liability for the accident; and
2. Whether the Respondent ought to be held 100% liable for the accident.

16. The burden of proof in a civil case is on a balance of probabilities. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> 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.

17. The standard of proof in civil cases is on a balance of probabilities. In the case of William Kabogo Gitau v George Thuo & 2 others [2010] KEHC 4124 (KLR), Kimaru J. (as he then was) held the following on the subject:

> n ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case is more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%, as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

18. The trial magistrate in finding the appellant to have majorly contributed to the accident made a finding that the Appellant was chasing a moving bus and attempted to board it when his foot slipped and got caught up with the front wheel and his foot was crushed. That traffic policemen visited the scene and measured the point of the accident to have been 8 meters from the stage, meaning that the bus had already left the stage. That the driver contributed to the accident in that he failed to lock the door to the bus and failed to use his left side mirror to spot the pedestrian running alongside the bus.

19. The principle of contributory negligence dictates that a person who suffers damage partly due to his own fault is responsible for that fault. In the case of Moi's Bridge Quarry Limited v Martin Omuse Edoan [2022] eKLR, the court noted the following on subject:

> " The law on contributory negligence is to apportion proximate cause and blameworthiness where appropriate. In De Frias v Rodney 1998 BDA LR 15 it was held as follows: "Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety...."

20. It is clear from the judgment of the trial court that he magistrate relied on the evidence of the police officer PW3 and that of the defence witness, DW1 to find that the Appellant was injured while trying to board a moving bus. However, the defence witness, DW1 did not witness the accident and only relied on what he was told by his conductor who did not testify in the case. The police officer similarly did not present any witness who saw that the Appellant was injured while trying to board a moving bus. Consequently, the evidence of the two witnesses on how the Appellant was injured was based on hearsay. The trial magistrate erred in partly basing his finding on how the Appellant was injured on hearsay. There was thus no evidence as stated by the trial magistrate that the Appellant was chasing a moving bus or that he was running alongside it nor that he was dangling on the door of the bus.

20. The Appellant in his witness statement dated 31st October 2022 stated that the driver started the motor vehicle before he fully boarded as a result of which he fell down and the tyre of the motor vehicle ran over his left leg. In his evidence in court he stated the following in cross-examination:

> " I was crushed on the left leg. It was a bus. I was boarding it. The front left wheel was towards the front door. The bus was in motion. When I raised my leg, I slipped and got caught in the wheel. No sooner had I raised my leg to board than the driver engaged the gear to move forward but my left leg got caught".

21. The Appellant stated in re-examination that the door was open when he was boarding the vehicle.

22. According to the Appellant the bus took off when he was boarding it as a result of which he slipped and his left leg got caught by the front wheel of the bus. In view of the fact that the bus driver DW1 did not see how the accident took place and the conductor who was present at the bus door did not testify in the case, I find that the accident occurred as testified by the Appellant. The appellant however did not explain how the bus moved for about 8 meters before he fell down. It would mean that he was holding on to something on the bus so as to have moved for that distance before he fell down. He also did not explain how and why his leg got entangled with the front tyre when he was supposed to have been stepping on the steps at the entrance to the bus. He was partly to blame for entangling his leg with the front tyre and falling down.

23. The driver was supposed to wait for a signal from his conductor to drive off after the conductor ensured that passengers had fully boarded the bus and the door shut. Though the driver DW1 said that the conductor had shut the door when he drove off, he did not say how he knew that the conductor had closed the door. He did not say whether he saw the conductor closing the door or it is the conductor told him that he had done so. In view of this, there is no basis of holding that the door was shut when the bus took off. The evidence of the Appellant that the door was open when he was boarding the bus is more believable than that of the bus driver. I thereby find that the door to the bus was open when the Appellant was boarding the bus. That the driver of the bus took off before the Appellant had fully boarded the bus invites the conclusion that the driver of the bus was more to blame for occasioning the accident. The Appellant on the other hand was partly to blame for entangling his leg with the front tyre and falling down. He thus contributed to his own injury. I assess the driver`s culpability at 70% while the contributory negligence on the part of the Appellant is assessed at 30%.

24. The upshot is that the finding of the trial court that the Appellant was 70% liable for the accident and that the Respondents were 30% liable is set aside and substituted with a finding that the Respondents are 70% liable while the Appellant bears 30% liability.

25. Each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 18TH DAY OF SEPTEMBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Miss Nyambuto for Appellant

Mr. Ndolo for Respondents

Court Assistant - Rahma