Gakuru v Ndunda & 3 others (Civil Appeal E302 of 2021)
[2024] KEHC 5795 (KLR) (Civ) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5795 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E302 OF 2021

CW MEOLI, J

MAY 13, 2024

BETWEEN

STEPHEN KANYORI GAKURU .... APPELLANT

AND

PETER NZUKI NDUNDA .... 1ST RESPONDENT

IRENE MUTHUKA MZAMA .... 2ND RESPONDENT

CAR & GENERAL (TRADING) LIMITED .... 3RD RESPONDENT

EVANS SIMBA MOGAKA .... 4TH RESPONDENT

(Being an appeal from the judgment of Kagoni. E.M. (Mr.) PM. delivered on 5th May 2021 in Nairobi Milimani CMCC No. 5119 of 2019)

JUDGMENT

1. This appeal emanates from the judgment delivered on 05.05.2021 in Nairobi Milimani CMCC No. 5119 of 2019. The suit had been commenced by Stephen Kanyori Gakuru, the plaintiff in the lower court (hereafter the Appellant) by way of a plaint filed on 15.07.2019. Peter Nzuki Ndunda, Irene Muthuka Mzama, Car & General (Trading) Ltd and Evans Simba Mgaka were named therein as the 1st, 2nd, 3rd and 4th defendant/defendants (hereafter the 1st, 2nd, 3rd and 4th Respondent/Respondents respectively).

2. The Appellant's claim arose from a road traffic accident involving motor vehicle registration No. KBR 317R (hereafter suit motor vehicle) and motor cycle registration No. KMEP 474J (hereafter suit motor cycle) that occurred on 02.03.2019. It was averred that at all material times the 1st Respondent was the registered, insured and or beneficial owner of the suit motor vehicle, the 2nd Respondent the insured,

driver, and or beneficial owner of the suit motor vehicle while the 3rd Respondent was the registered, insured and or beneficial owner of the suit motor cycle and the 4th Respondent the registered, insured, rider and or beneficial owner of the suit motor cycle.

3. The Appellant averred that on the material date, along Ngong Road near Coptic Hospital, the 2nd Respondent being the driver, servant and or agent of the 1st Respondent, negligently managed, controlled and or drove the suit motor vehicle and caused it to knock down the Appellant who was a pillion passenger aboard the suit motorcycle which was also recklessly controlled and or managed by the 4th Respondent. Resulting in a road traffic accident in which the Appellant sustained injuries. Hence his claims against the all the Respondents for general and special damages. Particulars of the negligence were pleaded against the 2nd and 4th Respondent , which negligence the 1st and 3rd Respondent were allegedly vicariously liable.

4. On 12.09.2019, the 1st and 2nd Respondent filed a statement of defence denying the key averments in the plaint and pleaded in the alternative and without prejudice to the averments in the statement of defence that if the Appellant was involved in an accident, which was denied, the accident was solely caused and or substantially contributed to by the negligence of the Appellant and the rider of the suit motor cycle for which the 1st and 2nd Respondent could not be liable. Negligence was pleaded against the Appellant and rider of the suit motorcycle.

5. On 17.09.2019, the 3rd Respondent filed a statement of defence denying the key averments in the plaint meanwhile pleaded that it has sold the suit motor cycle to the 4th Respondent on 05.10.2018. And that the 3rd Respondent is in the business of selling of motorcycles and any registration of the suit motor cycle, which is denied, was only for the purpose of compliance with statutory requirements to enable the 3rd Respondent transact its business of assembling and selling motor cycles. Hence it was not the owner and had no control over the suit motor cycle on the material date.

6. On 01.10.2019, the 4th Respondent filed a statement of defence denying the key averments in the plaint meanwhile pleaded in the alternative and without prejudice to the averments in the statement of defence that if any accident occurred on the material date, which allegation was denied, the same was not in any way due to the negligence of the 4th Respondent or due to any actions attributable to the 4th Respondent, his servant, driver , employee and or agent as alleged in the Plaint. That the accident was caused by and or substantially due to the negligence of the Appellant and or driver of the suit motor vehicle. Negligence was pleaded against the Appellant and driver of the suit motor vehicle.

7. The suit proceeded to full hearing during which the Appellant, 1st & 2nd Respondent and 3rd Respondent called evidence. In its judgment, the trial court found that the Appellant had failed to prove causation or attach blame on any of the parties sued, however, observing that had the Appellant been successful, the Court would have awarded Kshs. 700,000/- as general damages and Kshs. 268,060/- in special damages.

8. Aggrieved with the outcome, the Appellant preferred the instant appeal on both liability and quantum on the following grounds: -

> " 1. That the learned Magistrate erred both in law and in fact in finding that the Appellant had not proven his case on a balance of probabilities.
>
> 2. That the learned Magistrate erred in both law and in fact in finding that the Appellant had not established liability against the Respondents.

3. That the learned Magistrate erred in both law and fact in finding that the Appellant had relinquished his claim when there was no amendment of the pleadings.

4. That the learned Magistrate erred in both in law and fact in contradicting himself on uncontroverted evidence thus arriving at an erroneous decision.

5. That the learned Magistrate erred in both law and fact in considering extraneous matters while ignoring relevant matters.

6. That the learned Magistrate erred in both law and in fact in awarding an extremely low quantum of Kshs. 700,000.00 when no basis was given for that amount" (sic)

9. The appeal was canvassed by way of written submissions. As earlier noted, the Appellant's grounds of appeal were centered on the twin issues of liability and quantum. Counsel for the Appellant anchored his submissions on the decision in Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278, Mwanasokoni v Kenya Bus Services Ltd [1985] eKLR and Silverio Mbiti Njiru & 2 Others v Elizabeth Syombua Munyoki [2018] eKLR concerning the duty of an appellate court on a first appeal.

10. Addressing the issue of liability, counsel after restating the respective parties' pleadings and evidence before the trial Court contended that the learned Magistrate placed an overly high premium on the assertion that the 4th Respondent could not have done anything to avoid the accident and held it against the Appellant. That the trial Court took the Appellant's statement at face value, instead of analyzing the undisputed evidence that the rider did not keep proper distance from the suit motor vehicle.

11. Counsel went on to argue that the trial Court contradicted itself on uncontroverted evidence thus arriving at an erroneous finding and or misconstruing the evidence that was place before it. The decision in John Wainaina Kagwe v Hussein Dairy Ltd [2013] eKLR and Section 153 of the *Evidence Act* were called to aid in that regard. Further placing reliance on the decisions in PAS v George Onyango Orodi [2020] eKLR and North End Trading Company Limited v City Council of Nairobi [2017] eKLR, counsel argued that a pillion passenger bears no liability in an accident and that the Appellant proved his case through uncontroverted evidence against the owners of both the suit motor vehicle and motorcycle on a balance of probabilities. Counsel closed his submission on liability by stating that, the trial Court ought to have apportioned liability against the Respondents and at the very least found that the Appellant established his case as against the 4th Respondent.

12. Concerning the challenge on damages, counsel began by restating the applicable principles as enunciated in Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini v A.M.M Lubia & Another (1982-88) 1 KAR 777, Gicheru v Morton & Anor [2005] 2 KLR 333 and Shreeji Enterprises Limited v John Mungai Chai [2020] eKLR inter alia. In urging the Court to interfere with the potential assessed award by the trial Court and substitute the same with an award of Kshs. 1,200,000/- counsel reiterated the medical reports by Dr. Wokabi and Dr. Wambugu. And called to aid the decisions in Francis Ndungu Wambui & 2 Others v VK (Minor suing through next friend and mother of MCWK [2019] eKLR, Isaac Mworia M'Nabea v David Gikunda [2017] eKLR, Savco Stores Ltd v David Mwangi Kamotho [2008] eKLR, Joseph Musee Mua v Julius Mbogo Mugi & 3 Others [2013] eKLR to submit that the Appellant sustained major compound open fracture of the left tibia and fibula. As such endured severe pain, suffering and was yet to completely heal from the injuries. That the trial Court's proposal on the head was inordinately low. On special damages and future medical expenses, the Court was urged to award Kshs. 268,060/-. In conclusion, the Court was implored to

make a finding that the trial Court erred in both facts and law in dismissing the Appellant's suit as such ought to set aside the said finding and allow the appeal.

13. The 1st and 2nd Respondent naturally defended the trial court's findings and meanwhile anchored their submissions on the decision in Selle & Anor v Associated Motor Boat Co. Ltd & Others (1968) 1 EA 123 on the principles to be observed by the first appellate Court. Addressing the issue of liability, counsel restated the material canvassed before the trial Court and relied Section 107, 109 & 112 of the *Evidence Act* to contend that the evidence tendered by the Appellant did not prove that the driver of the suit motor vehicle was negligent. It was further argued that the Appellant's evidence essentially exonerated the 1st and 2nd Respondent from liability. Moreover, that the 2nd Respondent having been hit from the rear could not be blamed for an accident that occurred without fault on her part. The Court of Appeal decision in Eastern Produce (K) Limited v Christopher Atiado Osiro [2006] eKLR was called to aid in the latter regard. Counsel contending that the Appellant failed to prove negligence on the part of 1st and 2nd Respondent, hence the trial Court did not err in its finding on the issue and by dismissing the suit before it.

14. Concerning damages, it was submitted that the proposed award by the trial Court did not constitute a misdirection, was not inordinately low or erroneous but comparable with other decisions relating to injuries similar to those suffered by the Appellant. The decisions in Daniel Otieno Owino & Another v Elizabeth Atieno Owuor [2020] eKLR, Aloise Mwangi Kahari v Martin Muitya & Another [2020] eKLR, Ndwiga & Another v Mukimba (Civil Appeal E006 of 2022) [2022] KEHC 11793 (KLR) and Pascal Iha Garama v Jackson Njeru Njoka [2019] eKLR were called to aid in urging the court to maintain the trial Court's proposed award under the said head. The trial Court's proposed award on special damages was not challenged. In summation, it was submitted that the Appellant failed to discharge the burden of proof of negligence against the 1st and 2nd Respondent. The Court was therefore urged to dismiss the appeal with costs.

15. Similarly, the 3rd Respondent defended the trial court's findings. On liability, counsel began by restating the pleadings and evidence before the trial Court to summarily submit that the Appellant failed to prove his case against the 3rd Respondent. Addressing the issue of ownership of the suit motorcycle, it was contended that the 3rd Respondent on the basis of the official search from the National Transport and Safety Authority (NTSA). However, the 3rd Respondent had sold the suit motorcycle on 05.10.2018 to the 4th Respondent which fact was not disputed by either the Appellant or the Respondents in the suit.

16. That the Police Abstract further indicated that the suit motor cycle was insured by Xplico Insurance via a cover taken out by the 4th Respondent. Proving that ownership vested in the latter by dint of an insurable interest and possessory ownership. In support of the foregoing, counsel relied on the provisions of Section 8 & 9(1) of the *Traffic Act*, Section 116 of the *Evidence Act*, the decisions in Ramesh V. Hiran v Justus Murianki & Another [2017] eKLR, Benard Muia Kilovoo v Kenya Fresh Produce Exporters [2020] eKLR, Muhambi Koja Said v Mbwana Abdi [2015] eKLR, Abson Motors Limited v Tabitha Syombua Mutua & Another [2019] eKLR, Nancy Ayemba Ngaira v Abdi [2010] eKLR, Samuel Mukunya Kamunge v John Mwangi Kamuru [2005] eKLR, John Murigi v Josphat Muiruri & 2 Others [2015] eKLR, Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge [2018] eKLR and Securicor Kenya Limited v Kyumba Holdings Limited [2005] eKLR.

17. On whether the 3rd Respondent could be held vicariously liable for the accident, it was contended that the latter produced a list of its employees which did not include the 4th Respondent's name . Therefore the 3rd Respondent could not be held vicariously liable for the actions of the latter as he was neither its servant, employee and or its agent. It was further argued that there was no nexus between the 3rd and 4th

Respondent save for the search from NTSA indicating the name of the 3rd Respondent as the registered owner of suit motor cycle despite the same having been sold on 05.10.2018 to the 4th Respondent. The decisions in John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 Others [2015] eKLR, Morgan v Launchbury (1972) 2 ALL ER 606 as cited in Joseph Wabukho Mbayi v Frida Onyango [2019] eKLR, Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR and Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR as cited in Robert Ouma Njoga v Benjamin Osano Ondoro [2016] eKLR were relied on.

18. Concerning damages, it was summarily submitted that the Appellant having failed to prove liability against the 3rd Respondent no award of damage could issue and therefore the case against it and by extension the appeal ought to be dismissed with costs. In conclusion, counsel relied on Section 27 of the *Civil Procedure Act*, the decisions in Cecilia Karuru Ngaya v Barclays Bank of Kenya & Another [2016] eKLR, Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR to posit that the appeal ought to be dismissed with the attendant costs.

19. The 4th Respondent failed and or opted not to participate in the instant proceedings despite service.

20. The Court has considered the record of appeal, the original record of proceedings as well as the submissions by the respective parties. It is apparent from the memorandum of appeal and submissions that the appeal turns on the twin issues of liability and quantum damages. As rightly, observed 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 the decision Selle (supra), 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.
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> 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."

21. As accurately submitted by counsel for the Appellant and 1st & 2nd Respondent, the 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 (supra). Pertinent to the parties' respective cases are their respective pleadings, highlighted in part earlier in this judgment. To the forestated end and the burden of proof, the Court of Appeal in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, observed as follows in respect of the issue: -

> " 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).

22. The trial Court after restating the evidence tendered before it addressed itself as follows concerning liability in its judgment; -

> "I have considered the pleadings in this matter, the testimonies and the parties' submissions.......
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> ....
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> In as much as the 4th Defendant never called any witness the Plaintiff exonerated him by his testimony when he testified while being cross-examined by Ms. Acholla......In light of this, this court cannot lay blame where the Plaintiff himself didn't see none at the time of hearing of the suit. To do so would be to swim against the tide and disregard uncontroverted sworn testimony which this Court is not prepared to do. The case against the 3rd Defendant also fails on the above rationale.
>
> ....Therefore, in as much as the Plaintiff's testimony was not rebutted by the 4th and 3rd Defendants, what was before this Court as unchallenged did not evidence their culpability as the Plaintiff negated any blame that could be laid by admitting that the 3rd and 4th Defendant are not to blame. The Plaintiff after relinquishing the claim during trial cannot be held in submissions seeking culpability again. Such conduct of approbating and reprobating highlights the quality or lack of in the Plaintiff's prosecution of this suit.
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> ....
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> The Plaintiff's evidence before Court is one that contradicts itself. On one hand the Plaintiff's evidence is seen to cast blame on one hand on the other it seems to rebut itself. How can this court find on a balance of probability any of the Defendants liable when the Plaintiff and his witness keep recanting? In the end I find the Plaintiff's case was poorly prosecuted and in this regard the Plaintiff failed to prove causation and attach blame on any of the parties he sued." (sic)

23. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. See: - The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR. The duty of proving the averments contained in the plaint lay squarely on the Appellant. 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)

24. It is undisputed that the case before the trial Court related to a road traffic accident involving the Appellant, the suit motor vehicle and the suit motor cycle. As held by the Court of Appeal in Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the "determination of liability in a road traffic case is not a scientific affair". The Court 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 ...
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> 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."

25. The occurrence of the accident on 02.03.2019 is not disputed. What was disputed was the circumstance leadings to the same and ownership of the suit motor cycle. The Appellant averred in its pleadings that at all material times that the 3rd Respondent was the registered, insured and or beneficial owner of the suit motor cycle and the 4th Respondent the registered, insured, rider and or beneficial owner of the suit motor cycle. And that the 2nd Respondent being the driver, servant and or agent of the 1st Respondent, negligently managed, controlled and or drove the suit motor vehicle and caused it to knock down the Appellant who was a pillion passenger aboard the suit motor cycle which was also recklessly controlled and or managed by the 4th Respondent causing a road traffic accident. During the trial, relevant to the occurrence of the accident No. 86098 PC Lucas Esokon testified as PW1, the Appellant as PW3, while the 2nd Respondent testified as DW1. Regarding the disputed ownership of the suit motorcycle was evidence through PW3 and Joseph Mulwa Mwambi who testified as DW2.

26. The Court proposes to contemporaneously deal with the twin issues of negligence in respect of the accident and ownership of the suit motor cycle. PW1 in his evidence stated that the accident involved the suit motor vehicle and suit motorcycle, and that rider of the latter was the 4th Respondent. Describing the circumstances of the accident, he said that the suit motor vehicle was ahead of the suit motorcycle when it was hit by the latter and that the motorcycle was to blame for failing to keep a safe distance. He produced as exhibits the P3 Form (PExh.1), the Police Abstract (P.Exh.2) and Extract of the Occurrence Book (OB) as P.Exh.3. Under cross-examination he admitted he was not the investigating officer and that the scene of the accident was attended to by officers on accident standby and their report recorded in the OB. That the 4th Respondent was described as the owner of the suit motor cycle in the police abstract and that he had no other evidence before Court in respect of ownership of the suit motor cycle.

27. On the part of the Appellant, he began by adopting his witness statement as his evidence -in- chief and adduced into evidence the documents appearing in his list of documents filed in court on 10.07.2019 and 08.10.2019 as PExh.5 to PExh.13. Under cross examination he stated that the motor cycle on

which he was a pillion passenger was on the inner lane while the suit motor vehicle was driving "a few meters ahead" of them in the "outer" left "lane". That when a third vehicle ahead turned left , the suit motor vehicle instead of braking to allow the third motor vehicle to exit, swerved into the motor cyclist's lane, and hit the motorcycle by the rear right hand side. He admitted that the police blamed the rider for the accident but on his part, he blamed the suit motor vehicle for the accident on account of swerving from its lane. Asserting that the rider of the suit motorcycle could not do anything to avoid the accident. Concerning ownership of the suit motorcycle, he stated that the rider was not an employee of the 3rd Respondent and that he sued the latter as the registered owner of the suit motorcycle. He went on to state that he was aware that the suit motorcycle was sold to the 4th Respondent, but he had not registered it in his name. That he therefore had no claim against the 3rd Respondent.

28. On behalf of the 1st and 2nd Respondent, DW1 began her evidence by adopting her witness statement as her evidence -in- chief. She stated that she was the driver of the suit motor vehicle on the date in question. She however asserted that she was driving on the extreme left behind a third motor vehicle which indicated intention to exit near Coptic Hospital, and she therefore slowed down. While so doing, she heard a loud bang, whereupon she stopped and alighted to observe that her vehicle had been hit on the rear. She maintained that she did not serve as stated by the Appellant because there were other vehicles on other adjacent lanes but allowed for the vehicle ahead of her to exit Ngong Road. Under cross examination, she reiterated that she was on her lane on the extreme left when she slowed down and allowed for the vehicle ahead of her to exit Ngong Road. That she could have done nothing to avoid the accident given the fact that she was hit from rear.

29. DW2, who testified on behalf of 3rd Respondent, equally began by adopting his witness statement and producing the documents appearing in his list of documents and supplementary list of documents as DExh1 to DExh3. It was his evidence that the suit motorcycle was sold to the 4th Respondent and that he was to transfer to himself within fourteen (14) days. He thus urged the Court to dismiss the suit against the 3rd Respondent. In cross examination, he confirmed that at the time of the accident, NTSA records showed that the 3rd Respondent was still the registered owner of the suit motor cycle. The 4th Respondent did not call any evidence.

30. According to the evidence by PW1 (PExh.3), the testimony of the Appellant and DW1, it appears that the accident occurred along Ngong Road at the intersection with Kindaruma Lane, next to Coptic Hospital. Further both DW1 and rider of the suit motorcycle were heading in the same direction towards the city center. PW1 neither witnessed the accident nor was investigated the accident while the entries in both the Police Abstract and OB Extract (PExh.2 & PExh.3), upon which his evidence was based were made after the fact by the reporting party and or officer who visited the scene. Both the Appellant and DW1 gave different accounts from their respective witness statements concerning the third vehicle which was exiting or joining Ngong Road at the intersection next to Coptic Hospital, just prior to the accident.

31. That said, the third vehicle, the suit motor vehicle and the suit motorcycle were all heading in the same direction along Ngong Road in the same order herein stated, and the suit motorcycle being a few meters behind of the suit motor vehicle, but on the inner lane. The Appellant's contention has been that DW1 without warning switched lanes and encroached onto the motorcycle's lane thus occasioning the accident whereas DW1 contends that she was on her rightful lane on the extreme left, did not swerve, allowed the third vehicle ahead of her exit and had no control over the accident as she was hit from rear.

32. The Appellant by his adopted witness statement and his oral testimony appears to have been asserting that the suit motor vehicle and or motorcycle were the cause of the accident that caused his injuries. The Court of Appeal in Timsales Limited v Stanley Njihia Macharia [2016] eKLR while discussing

the principle 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 Mbithi 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."

33. It is evident that the collision between the suit motor vehicle and motorcycle occurred when the third motor vehicle exited Ngong Road at the intersection of Kindaruma Lane. Further both the Appellant and DW1 agree that the suit motor vehicle was ahead of the suit motorcycle. Therefore, the 4th Respondent at all material times had the suit motor vehicle in his view. The sticking point is whether the DW1 suddenly swerved into the adjacent lane on which the motorcycle was travelling thereby occasioning the accident. Based on the narration of all the parties, if indeed the rider was in his rightful lane and DW1 swerved onto their lane, the point of impact on the suit motor vehicle would have been on its right side. The said rider did not testify at the trial to give his version of events.

34. However, oral evidence before the trial court suggests that damage to the suit motor vehicle was to the rear, making plausible the assertion that the motorcycle was on the same lane as the suit motor vehicle, failed to keep a safe distance, and rammed into the former as it slowed down to allow exit by the third vehicle. Unfortunately, no sketch of the scene or assessment report or photographs of the motor vehicle and motorcycle were produced to clarify the matter. Be that as it may, on the available evidence, it seems unlikely that the suit motor vehicle swerved into the motorcycle lane as asserted by the Appellant.

35. The Appellant's submission that he was a pillion passenger aboard the suit motorcycle is reasonable; he had no effective control over the motorcycle. However, the rider had a duty to keep a safe distance from the vehicle ahead of him while paying due regard to the Kindaruma Lane intersection and anticipating any joining or exiting motor vehicles. The net result being that while the Appellant's account on the accident is of relative certainty, it seems that 4th Respondent who eschewed calling evidence thereon, did not observe a safe distance with the suit motor vehicle that was ahead of him. Had he done so, he would have averted the accident in question. Further, given that the collision/point of contact was to the rear of the suit motor vehicle, it is difficult to see how DW1, could have averted the accident.

36. The Appellant's own witness statement appears to put to doubt his case against the other Respondents by suggesting that prior to the accident, the suit motor cycle was being ridden on the road shoulder (".....as we were about to pass the shoulder...") meaning that the rider of the suit motor cycle was probably riding and intent on overtaking from on DW1's nearside hence the collision. This Respondent must bear full liability.

37. Looking at the particulars of negligence pleaded as against the 2nd Respondent and 4th Respondent who did not testify, it seems that the Appellant while failing in his duty to demonstrate his pleaded case against the 2nd Respondent, established a case on balance of probabilities against the 4th Respondent.

38. On whether negligence and or vicarious liability can attach as against the 3rd Respondent on account of ownership of the suit motorcycle, Section 8 of the *Traffic Act* provides that; - "The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle." It is settled that although a copy of record is prima facie proof of ownership, the presumption is rebuttable. The Court of Appeal in Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR, emphasized this fact when it observed that "Section 8 of the *Traffic Act* .... has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of

ownership." Therefore, the mere production of the copy of record in respect of the suit motorcycle (PExh.12(a)&(b)), by the Appellant, was not conclusive proof of ownership.

39. And regarding vicarious liability, the Court of Appeal observed in the case of John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] eKLR that;-

> " 14. The main issue that fell for determination by the first appellate court was whether, in the aforesaid circumstances, the appellant was vicariously liable for the negligent acts of the 2nd respondent, the lawful driver of the motor vehicle. BLACK'S LAW DICTIONARY, 9th edition at page 998 defines vicarious liability in the following words:
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> > "Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."
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> 15. In HCM Anyanzwa & 2 Others v Luigi De Casper & Another [1981] KLR 10, this Court held that "vicarious liability depends not on ownership but on the delegation of tasks or duty."
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> We believe the learned judge misdirected himself when he addressed himself to the issue of legal ownership of the motor vehicle in determining whether the appellant was vicariously liable for the tort of negligence committed by the second respondent, who was an employee of the third respondent. It is the third respondent who had supervisory power over his driver and not the appellant. The appellant cannot therefore be held to be vicariously liable.
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> 16. The reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on legal ownership of a motor vehicle in a case of this nature, to the total exclusion of employer/employee relationship, would amount to grave injustice to the appellant." (sic)

40. While applying the above dicta to the evidence presented before the lower Court, the Court will take guidance from the Supreme Court decision in Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR on the pertinent question of legal and evidential burden held wherein it was held inter alia, that the "evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue". Given the Appellant's averments in his pleadings and evidence in respect of the 3rd Respondent's liability for the accident, the onus was the latter to rebut the same. DW2, produced DExh.1, being a copy of Cash Sale/ Delivery Note No. TRD110130434 in respect of the 4th Respondent and as DExh.2, the List of the 3rd Respondent's employees as at 31.03.2019 in support of the averment that it was neither the actual nor beneficial owner of the suit motorcycle as at the time of the accident.

41. DExh.1 was dated 05.10.2018, the purported date of sale whereas the DExh.2 did not contain the 4th Respondent's name. That said, DExh.1 was not itself conclusive proof that the legal, actual, beneficial and or possessory ownership had transferred to the 4th Defendant on account of the fact it was not a sale agreement to transfer title but lent credence to DW2's evidence. It is thus the Court's reasoned deduction that the 3rd Respondent was exonerated by the Appellant when he categorically sated during cross-examination by counsel for the 3rd Respondent that "now that I am aware that the motorcycle had been sold, I have no claim against Car and General Ltd". Based on this pronouncement and uncontroverted evidence by the 3rd Respondent that the 4th Respondent was neither its agent or

employee, no finding of negligence and or vicarious liability could attach against the 3rd Respondent in respect of suit motorcycle. The suit against the 3rd Respondent ought to have been dismissed by the trial Court on this account as well.

42. The Appellant having failed to establish a causal link between the DW1's negligence and his injury no finding of negligence and vicarious liability could be made against the 2nd Respondent and 1st Respondent respectively. Equally, no liability could attach against the 3rd Respondent. Therefore, as against the 1st, 2nd, and 3rd Respondents, the suit was properly dismissed. Nevertheless, on a balance of probabilities, a case of negligence had been made against the 4th Respondent.

43. Regarding quantum, it was held in Bashir 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".

44. 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."

45. 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". That said, as earlier captured herein, apposite to the issue, are the pleadings. The Appellant particularized his injuries in the plaint as follows; -

> " 4 ....
>
> Particulars of injuries sustained by the Plaintiff
>
> a. Compound (open) fracture of the left tibia and fibula.
>
> b. Pain and blood loss from left tibia and fibula.
>
> c. Trauma and surgical scars of the left lower shin."
>
> 5 ....
>
> 6 ....
>
> 7. The Plaintiff underwent surgery where metal implants were fixed in his left tibia and fibula. The said metal implants require to be surgically removed at a combined estimated medical cost of Kshs. 100,000.00.

8. The Plaintiff avers that his prior to the accident his right leg had been amputated; he mostly relied on his left leg. As a result of the said accident, he has suffered pain, loss, mental anguish, damage and continues to suffer future medical expenses and therefore claims against all the Defendants special and general damages." (sic)

46. In its judgment, despite dismissing the Appellant's suit, the trial Court went on to express itself on the issues of damages as follows: -

> " Since the Plaintiff failed to establish culpability on any of the Defendants, it follows that he has no remedy available before this court. His suit is accordingly dismissed with costs. However, had the Plaintiff been successful, the 700,000 as general damages and Kshs. 268,060 as special damages." (sic)

47. Dr. Wokabi testified as PW2 and identified himself as surgeon by profession. This gist of his evidence was that he examined the Appellant on 30.04.2019. He confirmed that the latter sustained an open fracture of the left tibia and underwent surgery at Bellevue Hospital during which the metal implant was fixed. Producing the medical report dated 07.05.2019 that as PExh.4(a), receipt thereof as PExh.4(b) and receipt for his attendance PExh.4(c), he maintained that it would take up to 12 months for the Appellant to fully recover and required at least Kshs. 100,000/- towards removal of the metal implant. He however assessed his permanent disability at 10%. In cross examination, he reiterated that upon removal of the metal implant the Appellant's mobility would improve and that the removal procedure would not exceed Kshs. 100,000/-.

48. The Appellant on his part stated that he had recovered although he felt pain during cold seasons. That the metal implant was yet to be removed. He thus proceeded to produce among other documents, his Discharge Summary from Bellevue Hospital as PExh.5. During cross-examination, he further confirmed that prior to the accident he had an artificial leg and that as a result of the accident he can no longer walk long distances.

49. The earliest documentation of the Appellant's injuries was PExh.10 being a treatment note from Coptic Hospital which recorded the interventions in respect of the Appellant's injuries including DynaCast management. PExh.5 was prepared roughly three (3) days after the accident and captured the Appellant's injuries as "….fracture of the left fibula and distal tibia…".

50. The Appellant was subjected to a second medical examination, at the behest of the 1st and 2nd Respondent. The medical report was tendered through DW1 by consent of the parties. This was the most recent medical report on the Appellant and was prepared by Dr. Wambugu. It was dated 20.05.2020. It confirmed the Appellant's injury as a fracture left tibia and stated in part that:

> " General condition is good. Is predominantly right-handed………. Walks with a left sided limping gait though unaided. Has healed surgical scars anterior aspect of the knee joint and on the shin. No discharging sinuses. Ankle joint movements are mildly restricted whilst knee joint movements are within normal range. No wasting of the quadriceps…Kanyori's has features of fracture left tibia which has now united. The metal implants are still in situ and will be due for removal after one year at an estimated all-inclusive cost of Kshs.75,000/ = at Kenyatta National Hospital. There is residual restriction of full range of movements across the left ankle joint. I do not hesitate to award him 2% as the degree of permanent incapacitation. The amputation right leg is unrelated" (sic)

51. The report marked PExh.4(a) was prepared almost a two (2) months after the accident. The report set out in detail the Appellant's injuries as captured in the plaint and their attendant sequela. The prognosis on the Appellant was captured in extenso therein as follows; -

> " He suffered pain and blood loss from the compound fractures of the left tibia and fibula. He also suffered pain after the surgical procedures that he underwent. He is still healing and rehabilitating well on the left leg. Expectation is that in the next 8 to 12 months' time he will achieve optimum rehabilitation.
>
> At optimum rehabilitation permanent disability will have settled at 10% (ten percent). Elective removal of the metal implants will costs Kshs. 100,000/= (one hundred thousand shillings) if surgery will be done in a medium cost hospital or nursing home.
>
> Hospital and theatre charges Sh. 35,000
>
> Surgeon Fees Sh. 35,000
>
> Anesthetics Fees Sh. 20,000
>
> Incidentals Sh. 10,000
>
> Estimated Costs of Surgery Sh. 100,000" (sic)

52. Thus, from the foregoing, the most significant injury suffered by the Appellant was the fracture of the left fibula and distal tibia which must have caused him significant pain and discomfort. Further, both Dr. Wokabi's and Dr. Wambugu's reports appear to indicate that the Appellant would recover mobility. As observed by the English Court in Lim Poh Choo v Health Authority (1978)1 ALL ER 332 and echoed by Potter JA in Tayab v Kinany (1983) KLR 14, quoting dicta by Lord Morris Borth-y-Gest in West (H) v Shepard (1964) AC 326, at page 345:

> " But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional."
>
> See also Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR and Kigaraari v Aya (1982-88) 1 KAR 768.

53. As important as consistency in awards for similar injuries might be, this Court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the Court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. As earlier noted the trial Court despite proposing a potential award of damages did not address itself in any detail on the issue and or analyse the respective parties' submissions and authorities. Nevertheless, from the medical evidence presented before the trial Court, the Appellant's injuries seemed relatively severe with residual permanent incapacitation being occasioned as confirmed by the corresponding medical reports.

54. The Appellant's complaint before this Court is that the trial Court's proposal on damages that it would have awarded was inordinately low and ought to be substituted. In proposing an award of Kshs. 1,200,000/- before the lower Court counsel relied on the decisions in Francis Ndungu Wambui & 2

Others v VK (Minor suing through next friend and mother of MCWK [2019] eKLR wherein the Claimant sustained soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more 30 minutes after the accident; Isaac Mworia M'Nabea v David Gikunda [2017] eKLR wherein the Claimant sustained mild head injury on the head and neck with decreased level of consciousness and a compound fracture of the right tibia fibula bones; Savco Stores Ltd v David Mwangi Kamotho [2008] eKLR wherein the Claimant sustained Fractured left tibia and left fibula, Fractured left elbow and Deep cut wound left forehead. However, he also included before this Court, the decision in Joseph Musee Mua v Julius Mbogo Mugi & 3 Others [2013] eKLR wherein the Claimant sustained fracture of the left tibia and fibula, infection, nerve injuries and foot deformity on the same leg.

55. These injuries though relating to fractures to the tibia and fibula were more severe in comparison and in addition to other skeletal injuries. The claimants therein were awarded Kshs. 1,000,000/-, Kshs. 1,000,000/-, Kshs. 800,000/- and Kshs. 1,300,000/- in general damages, respectively.

56. The 1st and 2nd Respondent urged this Court to maintain the trial Court's awarded having earlier proposed before the lower Court an award of Kshs. 500,000/-. In support of their submissions, counsel relied on the decisions Daniel Otieno Owino & Another v Elizabeth Atieno Owuor [2020] eKLR wherein the Claimant sustained compound fracture of the tibia/fibula bones of the right leg, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose and blunt chest injury and Aloise Mwangi Kahari v Martin Muitya & Another [2020] eKLR wherein the Claimant sustained compound fracture of right tibia and fibula, bleeding from left lower limb and swollen leg, before the lower Court. And in addition, the on this appeal for the first time, the decisions in *Ndwiga & Another v Mukimba (Civil Appeal E006 of 2022*) [2022] KEHC 11793 (KLR) wherein the Claimant sustained fracture of the tibia and fibula of left leg and Pascal Iha Garama v Jackson Njeru Njoka [2019] eKLR wherein the Claimant sustained displaced fracture of the mid-shaft of the right femur leading to deformity of the right thigh, shortening of the right leg, stiffness of the right knee and difficulties in walking. These injuries were more comparable to those sustained by the Appellant, and the claimants therein were awarded Kshs. 400,000/-, Kshs. 500,000/-, Kshs. 500,000/- and Kshs. 400,000/- in general damages respectively.

57. The 3rd Respondent did not address the question of damages both before lower Court and on appeal whereas the 4th Respondent though submitting on quantum in the lower Court did not participate in the instant appeal as earlier highlighted.

58. As observed both the Appellant and 1st & 2nd Respondents, have before this Court cited a raft of decisions that were not relied on before trial Court, conduct that this Court frowns upon. The Court entirely agreeing with the disapproval expressed towards such conduct by Ochieng J (as he then was) in his judgment in Silas Tiren & Another v Simon Ombati Omiambo [2014] eKLR. The learned Judge taking exception to the introduction of new authorities at the appeal stage, stating inter alia that:

> " None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to

otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal."

59. Despite the foregoing, there was no in-depth analysis and or consideration of the respective parties' submissions by the trial Court on the issue. It thus appears from my own review of the material presented before the trial Court and comparisons with authorities cited on this appeal, that the Appellant's complaint in regard of the awarded damages is slightly merited and the Court does feel justified to interfere given the nature of injuries disclosed in the medical evidence available. Reviewing the cases cited in the lower Court by the respective parties, the Court considers the case of Aloise Mwangi Kahari v Martin Muitya & Another [2020] eKLR cited by the 1st and 2nd Respondent, and Francis Ndungu Wambui & 2 Others v VK (Minor suing through next friend and mother of MCWK [2019] eKLR by the Appellant as the most relevant.

60. Although he must have endured much pain in the period of morbidity, the Appellant appears to have sufficiently recovered from his injuries with little attendant sequela. Comparing these injuries with those in the above cases, adjusting for severity and inflationary trends, the Court is persuaded to disturb the award by the trial Court and increasing it to the sum of Kshs. 900,000/- being general damages for pain and suffering.

61. The future medical expense and special damages were not specifically challenged in this appeal. Appeals are determined on the basis of issues or grounds raised in the Memorandum of Appeal. It was not open to the Appellant, having eschewed to include such challenge in his grounds of appeal, to surreptitiously canvass them through submissions. See North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others [2014] eKLR. Despite the forestated, the Court is inclined to allow the proposed award of Kshs. 268,060/- by the trial Court in any event.

62. In the result, the appeal succeeds, in terms that the judgement of the lower Court is varied so that judgment is entered for the Appellant against the 4th Respondent only as follows:

    a. General damages for pain and suffering- KShs. 900,000/-

    b. Special damages- Kshs. 268,060/-

    c. The costs of the appeal are awarded to Appellant as against the 4th Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Waithaka

For the 1st and 2nd Respondent: Ms. Njeri

For the 3rd Respondent: Ms. Muthee

For the4th Respondent:N/A

C/A: Erick