



REPUBLIC OF KENYA



**Great Rift Express Shuttle Services Limited v Omusugu (Civil Appeal E040 of 2023) [2024] KEHC 8704 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E040 OF 2023**

**JM NANG'EA, J  
JULY 16, 2024**

**BETWEEN**

**GREAT RIFT EXPRESS SHUTTLE SERVICES LIMITED ..... APPELLANT**

**AND**

**JOSEPH PANYAKO OMUSUGU ..... RESPONDENT**

*(Being an appeal from the judgement of the Senior Principal Magistrate's court at Limuru (Hon. I. F Koome (SRM) delivered on 18/01/2023)*

**JUDGMENT**

**Grounds of Appeal and reliefs sought.**

1. By a Memorandum of Appeal filed on 13/02/2023, the appellant faults the said trial court's judgment on grounds that may be summarized as hereunder:
  1. That the Learned Magistrate erred in law and fact in awarding the respondent exorbitant general and special damages in the circumstances of the case considering the injuries the latter sustained.
  2. That the Learned Magistrate erred in law and fact in determining the issue of liability against the weight of evidence adduced.And
  3. That the Learned Magistrate erred in law and fact by failing to consider the appellant's submissions on quantum of damages awardable in the case.
2. The appellant therefore seeks the following orders;
  - 1) That the appeal be allowed with costs.



And

- 2.) That the Lower Court's judgement on quantum of damages be set aside and replaced with this court's own assessment of the appropriate damages.

### **Analysis and determination.**

3. Learned Counsel for the parties filed written submissions online which I have perused together with the trial court's record. In the impugned judgment, the trial magistrate found the appellant, the defendant in the suit before the lower court, wholly liable for the claim and awarded the respondent, the plaintiff therein, Ksh. 300,000 and Ksh. 3,000 in general and special damages respectively. The respondent was further granted the costs of the suit. Based on medical evidence presented before the trial court, the respondent suffered soft tissue injuries to wit; blunt injuries to the scalp, right side of the face, the neck and lower back. He also sustained a cut wound on the upper lip. The injuries allegedly arose in a road traffic accident in which the appellant's motor vehicle registration number KCF 849 D is said to have lost control owing to negligent driving as a result of which it occasioned personal injuries to the respondent who was a passenger in another motor vehicle registration number KCV 877 Z.
4. It is trite law that the appellate court has the duty of re-assessing the evidence adduced before the trial court and reach its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle v. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd v. Oakdale Commodities Ltd* (1997) eKLR.
5. The respondent attacks the appeal for reasons inter alia that it is fatally defective. It is contended that the Record of Appeal does not include the decree appealed from which is said to be a primary document. The court is referred to the Court of Appeal's determination in the case of *Salama Beach Hotel Limited & 4 others V. Kenyariri & Associates Advocates & 4 Others* (2016) eKLR in which in similar circumstances an order/decreed appealed from was omitted from the Record of Appeal. The superior court struck out the appeal while observing that the appellant never sought leave to file a Supplementary Record of Appeal to include the omitted order/decreed. This defect was declared to be fatal and not even curable by the overriding objectives under the *Civil Procedure Act* and Rules made thereunder or Article 159 (2) (d) of *the constitution*.
6. The appeal herein indeed does not include the decree appealed from. The court, however, chooses to determine the appeal on its merits to avoid further delay in concluding the matter.
7. Beginning with the issue of liability, the appellant contends that the lower court's finding that the respondent proved its case on a balance of probabilities is against the weight of evidence. The respondent's evidence in relation to this aspect is that the appellant's vehicle was speeding when there was "mist". The appellant didn't offer evidence.
8. Noting that the respondent's evidence was unchallenged by counter evidence, the learned trial magistrate adjudged the appellant wholly liable for the accident and consequent injury to the respondent. The trial court relied inter alia on this court's decision in *Montex Knitwear Limited V. Goptex Knitwear Mills Limited (Nairobi (Milimani)) HCCC NO. 834 OF 2002* in which it was held in similar circumstances as obtain herein that unchallenged evidence has to be accepted as probative of the facts in issue.
9. This is indeed the established legal position. The unrebutted evidence of speeding in conditions not affording clear visibility because of misty weather is indicative of negligent or careless driving. There



is therefore no valid ground on which to fault the trial court on its determination on liability for the claim. Ground 2) of the Memorandum of Appeal as set out hereinabove accordingly fails.

10. I will consider Grounds 1) and 3) together. It is not disputed that the respondent suffered soft tissue injuries as noted above as per a medico-legal report by Dr. G.K Mwaura dated 05/08/2021. . The trial court was persuaded by case law in Catherine Wanjiru King'ori & 3 Others v. Gibson Theuri Gichubi (2005) Embu HCCA No. 71 of 2016 ( Bonface Mugendi & Another v. Emilio Murimi Njue) relied upon by the respondent and assessed general damages for pain and suffering in the sum of Ksh. 280,000 in favour of the respondent. For soft tissue injuries to the left ankle, , legs and chest Ksh. 300,000 general damages were awarded in the former case. In the latter decision, the claimant sustained soft tissue injuries to the chest, head, shoulders and abdomen and was granted a similar amount of general damages.
11. The appellant's advocates had submitted for an award of Ksh. 40,000 in general damages placing reliance in HB ( Minor suing through mother & next friend DMK) v. Jasper Nchonga Magari & Another (2021) eKLR as well as Sarah Karungari Munene v. Anestar Secondary School (2020) e KLR. The claimant complained of blunt injury to head, neck, thorax abdomen and limbs in the case of HB supra and was awarded Ksh. 60,000 in general damages . For trauma to the left side of the chest , the claimant in the latter case of Sarah Karungari Munene obtained judgement in the sum of Ksh. 40,000 in general damages. The learned trial magistrate opined that the injuries subject of these cases are less severe relative to those of the respondent in the instant matter.
12. The appellant reiterates his submissions in the lower court and opines that Ksh 100,000 in general damages is adequate compensation for the respondent for the soft tissue injuries he sustained. Reference has been made to judicial decisions in Ndungu Dennis v. Ann Wangari Ndirangu & Another (2018) eKLR and Eva Karemi & 5 others v. Koskei Kieng & Another (2020) eKLR in which general damages for pain & suffering were assessed in the sum of Ksh. 100,000 and Ksh. 40,000 respectively.

#### **Determination**

13. I find the trial court's award of Ksh. 280,000 to be reasonable . The lower court did not misdirect itself and was properly guided by comparable decided cases to arrive at the award. It should be noted that general damages are damages at large and no two cases are exactly the same. I therefore decline to fault the lower court's exercise of discretion.
14. Consequently, grounds 1) and 3) of the appeal also fail and the appeal is accordingly dismissed with costs to the respondent.

**JUDGEMENT DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF JULY 2024.**

**J. M. NANG'EA**

**JUDGE**

In the presence of :

Mr. Njuguna Advocate for the Appellant's,

Mr. Nyakwemba for the Advocate Respondent's,

The Court Assistant, Amina

