



**John Kirabi Wanjiku t/a Modern Coast Bus v Ohuru (Civil Appeal
E027 of 2023) [2024] KEHC 8077 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E027 OF 2023
JM CHIGITI, J
JULY 5, 2024**

BETWEEN

JOHN KIRABI WANJIKU T/A MODERN COAST BUS APPELLANT

AND

JOHN KEBATI OHURU RESPONDENT

JUDGMENT

The Appellant's Case

1. The Appeal herein revolves both on the issue of quantum of damages and liability.
2. PW1 PC Kasera while in examination in-chief gave evidence that both the motorcycle and motor-vehicle were heading towards the same directions with the motorcycle trailing the motor-vehicle bus.
3. It is his evidence that the Motorcycle overtook the bus while carrying two pillion passengers cross examination, he admitted that matter was still being investigated and it was an offence for a rider to have onboard two pillion [passengers and that the same were committing an offence.
4. At the trial Court the Appellant relied on the *Paul Lawi Lokole v Auto Industries Limited* (2020) eKLR where the court of Appeal upheld the decision of the trial Magistrate where liability was apportioned at 50:50% each between the Plaintiff and Defendant by stating;

“I am inclined to agree with the Learned Counsel for the Respondents that the Appellant by voluntarily boarding motorcycle registration no. KMDE 362M with another passenger violated the law and the same could have precluded the motorcycle from swerving to avert the accident. I'm also unable to fault the Learned Magistrate's findings that both motorcycle registration no. KMDE 362M and Motorcycle registration no. KMJA 461H were equally to blame for the accident.



5. The issue of general damages, it is his submission that the Respondent pleaded the following injuries: -
 - a. Cut wound to the upper mouth lip,
 - b. Abrasions to both hands posteriorly
 - c. Pelvic contusion with resultant pelvic fracture
 - d. Fracture of the right tibia/fibula bones
 - e. Healing abrasions left leg anteriorly.
6. The Learned Trial Magistrate assessed the General Damages in the sum of Kshs 1,000,000/= and special damages assessed at Kshs 81,800/=
7. Aggrieved by the Judgment of the Learned Trial Magistrate the Appellant lodged the Appeal on grounds that the award of damages made by the Learned Trial Magistrate were inordinately excessive as compared to the damages awarded in other similar cases.
8. It is the Appellants case that the Respondent failed to table any evidence during the hearing of undergoing for further treatment.
9. The Appellant relied on the Decision of *Jitan Nagra v Abidnego Nyandusi Oigo* (2018) in which the High court awarded Kshs 450,000/= where the Plaintiff had sustained, compound right tibia fracture, segmental distal fracture of the right femur, deep cut wounds on the back, right knee and lateral lane and lacerations on the occipital area which injuries are more grievous suffered by the Respondent herein.
10. It's the Appellants submissions that considering the above two decisions above, the Appellant proposed an award of Kshs 400,000/= which was reasonable taking into consideration the comparatives touching on the similar injuries in the recent past. Reliance is placed in the case of *Ossuman Mohamed & Another v Saluro Bundit Mobumed*, Civil Appeal No. 30 of 1997(unreported) wherein the following passage, in the case of *Kigaragari v Aya* [1982 -1988] IKAR 768 is employed;

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees.”
11. The Appellant submits that an award of between Kshs. 400,000 to Kshs 600,000 would be sufficient and reasonable in the circumstances/= and also factoring the costs of the inflation as well and that the award of Kshs1,000,0000 was inordinately high.
12. The Respondent did not file submissions.

Analysis and determination:

13. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. On the issue of liability, PW1 PC Kasera testified that while in examination in-chief gave evidence that both the motorcycle and motor-vehicle were heading towards the same directions with the motorcycle trailing the motor-vehicle bus. It is his evidence that the Motorcycle overtook the bus while carrying two pillion passengers cross examination, he admitted that matter was still being investigated and it was an offence for a rider to have onboard two pillion passengers and that the same were committing an offence.
15. This is proof that an accident actually took place involving the Appellant. The police abstract confirms that an accident occurred. The fact that the investigating officer was not called to testify is not fatal. It is my finding that on a balance of probabilities the Appellant proved his case. However, there was a level of negligence on the part of the motorbike rider and he should shoulder part of the liability.
16. In the result, I find the driver of the motor vehicle to be 50 % reliable while the motorbike bike rider shoulders 50% liability.
17. In order to determine the issue of general damages I have looked at the injuries sustained by the Appellant.
18. The Respondent pleaded the following injuries: -
 - a. Cut wound to the upper mouth lip,
 - b. Abrasions to both hands posteriorly
 - c. Pelvic contusion with resultant pelvic fracture
 - d. Fracture of the right tibia/fibula bones
 - e. Healing abrasions left leg anteriorly.
19. In the case of *Gabriel Kariuki & Anor v Monica Wangui Wangechi* (2016) eKLR, the High court reduced the trial Court ward of Kshs 800,000/= to Kshs 400,000/= where the plaintiff's had sustained fracture of the neck, bilateral rib fracture, bilateral lung contusion, fracture C2, fractured cervical spine and fracture of right ankle which injuries are more grievous.
20. Upon assessing the nature of the injuries sustained by the Respondent in the instant appeal I have come to the conclusion that the sum of Kshs. 400,000 will suffice we general Damages. There was no proof of special damages.

Disposition;

21. The liability should be shouldered equally at 50:50.

Orders;

1. The appeal is successful.
2. The Appellant and the Respondent shall share liability equally at 50% each.
3. The general damages are assessed at Kshs. 400.000 less 50% totaling to Kshs.200,000.
4. Special damages - nil.
5. Costs to the Appellant.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JULY 2024.

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J. CHIGITI (SC)

JUDGE

