REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 165 OF 2019

EASY COACH LIMITED.....1ST APPELLANT

RASTO SHUNDU SARAI..... 2ND APPELLANT

VERSUS

GIDEON OTIENO OULU ….....1ST RESPONDENT

OMUONO OMONDI SIMON.....2ND RESPONDENT

(Being an Appeal for the Judgment/Decree of Hon. Yator Senior Resident Magistrate delivered on 19th September, 2019 in Molo CMCC No. 146 of 2017)

JUDGMENT

1. On 28/10/2016, Gedion Otieno Oulu (the 1st Respondent), was a fare-paying passenger in Motor Vehicle Registration No. KCH 420V, a Nissan Matatu (hereinafter, the "Nissan Matatu"). He boarded the Nissan Matatu in Nairobi and was heading to Kisumu.

2. The 1st Respondent would not reach Kisumu on that day. On getting to the Sachangwan area – past Nakuru town – the Nissan Matatu was involved in a collision with another motor vehicle – a bus registration number KCG 193V (hereinafter, "Easy Coach Bus")– belonging to Easy Coach Limited, the 1st Appellant herein.

3. The accident was fatal. At least one person – the driver of the Nissan Matatu died following the accident. The 1st Appellant was, by his recollection, thrown out of the Nissan Matatu on impact. He became unconscious and suffered serious injuries. He was admitted at War Memorial Hospital in Nakuru for several weeks – a few days of which he was in the Intensive Care Unit.

4. A few months after he was discharged from the Hospital, the 1st Respondent was bonded to testify in a Traffic Case in which the driver of the Easy Coach Bus was charged with several charges related to the road traffic accident including causing death by dangerous driving. After hearing two witnesses – including the 1st Respondent – the Prosecution successfully applied for the charges to be withdrawn under Section 87(a) of the Criminal Procedure Code. The ostensible reason for the application, according the Court file, was that the Prosecution and Investigating Officer had determined that it would have been more fruitful to pursue an inquest in the case.

5. In any event, in June, 2017, the 1st Respondent took out a Plaint at Molo Law Courts and jointly sued the 1st Appellant, the driver of the Easy Coach Bus, and Omuono Omondi Simon, the 2nd Respondent for general damages for pain and suffering for injuries sustained as a result of the road traffic accident as well as for future costs of surgical operations; special damages for medical costs, costs and interests. The 2nd Respondent is the owner of the Nissan Matatu. As alluded to earlier, the driver of the vehicle died as a result of the road traffic accident. The suit was filed at Molo Law Courts and was intituled as ***Molo Chief Magistrate's Civil Suit No. 146 of 2017***.

6. Several other people were injured in the accident. At least eight other suits were filed at Molo Law Courts by other Plaintiffs who were injured in the accident. They include the following suits:

a. Molo CMCC No. 85 of 2017

b. Molo CMCC No. 104 of 2017

c. Molo CMCC No. 162 of 2017

d. Molo CMCC No. 243 of 2017

e. Molo CMCC No. 251 of 2017

f. Molo CMCC No. 286 of 2017

g. Molo CMCC No. 412 of 2017

h. *Molo CMCC No. 413 of 2017*

7. ***Molo Chief Magistrate's Civil Suit No. 146 of 2017,*** the subject of this appeal, was selected as the test suit for purposes of determining the issue of liability with respect to the series of cases.

8. At the conclusion of the test suit, the Learned Magistrate concluded that the Appellants were solely to blame for the accident and assigned liability at 100% to their burden. The Appellants are aggrieved by that decision – as well as the assessment of quantum of damages reached by the Learned Magistrate – and have appealed to this Court. In their Memorandum of Appeal, the Appellants have listed nine grounds of appeal. They are, reproduced verbatim, as follows:

1. That the learned Trial Magistrate erred in Law and in fact by finding the Appellants to be solely liable for the road traffic accident that occurred on the 28th October, 2016.

2. That the learned trial magistrate erred in fact and in law by failing to analyse and take into consideration the testimony and evidence of the 2nd Appellant with regards to how he accident happened.

3. That the learned trial magistrate erred in law and in fact in relying on issues which had not come out in evidence or pleaded by the parties.

4. That the learned trial magistrate erred in law and in fact by failing to properly consider the import of the 1st Respondent's inconsistencies and contradicting testimonies as given during the traffic case and this instant case.

5. That the learned trial magistrate erred in law and in fact by failing to apportion liability, despite the fact that there was no sufficient evidence supporting the Respondent's version on how the Accident occurred.

6. That the learned trial magistrate erred in fact and in law by failing to state why she chose to believe the version of the 1st Respondent as opposed to the version of the Appellant despite the wanting credibility of the Respondents' witnesses.

7. That the learned trial magistrate erred in law and in fact by failing to properly analyse the evidence on record and the submissions by the Appellants hence ended up reaching at a wrong conclusion as to who was to blame for the accident.

8. That the learned trial magistrate erred in law and in fact by failing to make proper consideration when awarding general damages hence ended up making an award under general damages that was manifestly excessive.

9. That the learned trial magistrate erred in law and in fact by awarding special damages that were not specifically pleaded and strictly proven.

9. The appeal is opposed by both the 1st Respondent, who was the original Plaintiff, and the 2nd Respondent, who was the 3rd Defendant in the suit in the lower Court. Both think the Appeal has no merit and urge the Court to dismiss it – although the 2nd Appellant would like the general damages reduced.

10. This is a first appeal. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

*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 (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

11. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as

a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt – vs-Thomas (1), [1947] A.C. 484.

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

12. The appropriate standard of review established in these cases can be stated in three complementary principles:

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

13. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resourt v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

14. During the hearing at the Trial Court, the 1st Respondent testified and then called two more witnesses. The 1st Respondent testified as PW1. He told the Court that he was a passenger on board the Nissan Matatu from Nairobi to Kisumu and that on getting to the Sachangwan area, the Nissan Matatu was on the climbing lane when the Easy Coach Bus was descending on its way from the opposite direction. He testified that the Easy Coach Bus left its lane and encroached onto the climbing lane where it hit the Nissan Matatu on the front right side. The 1st Respondent testified that he was seated right behind the driver and had put his seat belt on. However, as a result of the impact of the collision, he was thrown outside the vehicle and lost consciousness.

15. The 1st Respondent testified that he sustained multiple injuries and was treated at various medical facilities. In cross examination, he denied the assertion by the Defence that there was an insane person inside the Nissan Matatu who was struggling with the driver for the control of the steering wheel. He insisted that the vehicle had been well driven throughout that the driver of the Easy Coach Bus was to blame for the accident.

16. On cross-examination, the 1st Respondent was reminded of his testimony in the Traffic Case where he said that he did not see the accident. This time, the 1st Respondent insisted that he saw the bus as it hit the Nissan Matatu while the latter was on the Climbing Lane. He also expressed surprise that his own Plaint had particularized negligence against the driver of the Nissan Matatu.

17. PC Ng'etich, a Police Officer at Molo Police Station, testified as PW3. He conceded that he was not the Investigating Officer in the case but said that he was testifying from what he could gather from the Police file on the accident. He produced the Police file as an exhibit in the case. PC Ng'etich testified that Police investigations showed that the driver of the Easy Coach Bus was responsible for the accident and that he was charged with various offences for the accident though the charges were withdrawn under Section 87(a) of the Criminal Procedure Code. He said that this means that the driver can be charged again. He insisted that the statements by the eye witnesses were united in saying that the driver of the Easy Coach Bus caused the accident.

18. He testified that the accident occurred while the bus was trying to overtake another vehicle while using the proceeding lane not meant for it and it hit the Nissan Matatu while "duly proceeding." He informed the Court that he had relied on the witness statement recorded by one Brian Ochieng Opiyo, who was a passenger on the Easy Coach Bus and that there had been no indication of a "mad" person in the matatu struggling for control with the driver. He conceded that the statement of Brian Ochieng was recorded more than three months after the accident and after the 2nd Appellant had already been charged with the traffic offences. He did not know why it took so long to record that statement.

19. PW2 was Dr. Obed Muyoma who testified as to the injuries sustained by the 1st Respondent and produced a medical report. He testified that upon examining the 1st Respondent, he reached the conclusion that he had suffered permanent disability of 20% and implants to record in future would cost Kshs. 200,000 at various hospitals with the likelihood of costing more in other hospitals.

20. The Appellants called two witnesses during the trial. The 2nd Appellant testified first. He informed the Court that he was the driver of

the Easy Coach Bus and that after clearing a sharp corner at Salgaa-Sachangwan, there was a trailer coming from Nakuru heading towards Eldoret and another trailer on the climbing lane and that the Nissan Matatu came from behind the trailers suddenly and drove onto his lane as it was heading towards Eldoret.

21. He testified that he put on the lights to warn the driver of the Nissan Matatu but that there was no response. The 2nd Appellant testified that he swerved to the left, but instead of the Nissan Matatu passing through the middle, it persisted into the left lane and went back to the middle lane, where they met head on. That upon impact, both vehicles settled on the right.

22. DW2, was Dr Jeniffer Kahotho. Her testimony was centred on the extent of disability sustained by the 1st Respondent. She set the percentage of permanent disability at 0% and estimated that the 1st Respondent's future medical expenses would be Kshs. 100,000.

23. DW3 was Bernard Kalei, a private investigator. He testified on behalf of the 2nd Respondent. He told the Court that he investigated the accident on the instructions of DirectLine Insurance Co. In sum, the investigator told the Court that after visiting the scene of the accident and interviewing several people, he concluded that it was driver of the Easy Coach Bus that was to blame for the accident because it was evident that the impact was on the climbing lane and that the driver of the Easy Coach Bus had attempted to overtake without due care and at a very high speed. Mr. Kalei produced the Investigation Report as an exhibit in the case. The report completely absolves the driver of the Nissan Matatu from any responsibility for the accident.

24. In a considered judgment, the Learned Trial Magistrate dismissed the suit against the 2nd Respondent and held that the 1st and 2nd appellants were entirely liable for the accident. The Learned Magistrate reasoned that given the point of impact – which was in the middle lane – it was highly unlikely that the driver of the Nissan Matatu went into the lane of the Easy Coach Bus. Ruling that the fact that traffic charges were withdrawn against the 2nd Appellant was irrelevant to the findings whether he was, in fact, responsible for the accident, the Learned Magistrate ruled that she was "convinced that the said accident was solely caused by the Easy Coach Bus driver after he allegedly overtook at a continuous yellow line and got into the lane of the matatu thus causing the accident. As such, I do hereby dismiss the suit against the 3rd Defendant [the 2nd Respondent] with costs and find the [Appellants] to be jointly and severally liable at 100%."

25. After finding the 1st and 2nd Appellants to be 100% liable, the Learned Magistrate proceeded to award the special damages as claimed and proved and awarded general damages at Kshs. 2,000,000, special damages at Kshs. 698,012, future operation at Kshs. 200,000. In total, she awarded the sum of Kshs. 2,898,012. She also awarded costs and interest at court rates.

26. The appeal was argued by way of Written Submissions.

27. The Appellant's first raise issue with the Learn Trial Magistrate's reliance on the evidence of the 1st Respondent. They argue that the 1st Respondent's evidence in the Traffic Case that arose from the accident (***Molo Traffic Case 1671 of 2017***), differed from his evidence in the civil suit. They point out that while he had testified in the Traffic Case that he neither saw how the accident took place nor the bus before the accident, he testified in this case that he saw the bus before he lost consciousness. The Appellants fault the Learned Magistrate for not appreciating the contradictions in the 1st Respondent's testimonies in the two cases. They also fault the Learned Trial Magistrate for not giving reasons why she chose to believe the version of events given by the 1st Respondent and not the 2nd Appellant.

28. The Appellants also contend that the 1st Respondent had deviated from his pleadings: while his pleadings stated that the 2nd Respondent was "careless and negligent and that he failed to swerve, control, or brake the motor vehicle he was travelling in", while giving testimony the 1st Respondent stated that he wholly blamed the driver of the Easy Coach Bus and claimed that he was not aware that his Plaint had blamed the driver of the Nissan Matatu. In this regard, the Appellants relied on ***Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others*** for the proposition that any evidence which a party gives which contradicts their pleadings should be disregarded because parties are bound by their pleadings.

29. Based on these two points, the Appellants argue that it was an error for the Trial Court to have relied on the testimony of the 1st Respondent as he was an unreliable witness.

30. Turning to the evidence of both PC Ng'etich and Mr. Kalei, the Private Investigator, the Appellants term both as "hearsay evidence" because they were both based on conversations or information from other persons who were not before the Court. They also relied on ***Ephantus Mwangi & Another vs Duncan Mwangi Civil Appeal no. 77 of 1982 1KAR 278.***

31. The 1st Respondent contends that the trial court properly entered judgment against the Appellants. They reiterate their submissions in the lower court and insist that it is the Easy Coach Driver who veered off his lane and hit the Nissan Matatu, which was being driven in the proper lane. He refutes the claims of an insane person interfering with the driver of the Nissan Matatu.

32. On the issue of quantum, the 1st Respondent submitted that the award reached by the trial court was based on principles set out in law and upon consideration of the evidence tendered. They beckon the court to refer to the principles set out in ***Robert Musyoki Kitavi v Coastal Bottlers Ltd(1985) 1 KAR 891, Butt vs Khan Civil Appeal No. 40 of 1977 and Valley Bakery Ltd and Another Vs Matthew Musyoki*** on when the an appellate court can interfere with the trial court's discretion on damages.

33. The 1st Respondent sets out the injuries he sustained in the accident and the medical procedures he endured as justification for the amount awarded. He relied on ***Duncan Kimathi Karagani vs Ngugi David and 3 Others (2016) eKLR***. He also contends that the amount given under special damages was duly proven by the 1st Respondent and maintains that the appeal lacks merit.

34. The 2nd Respondent submitted on liability and quantum. On liability, he retold the testimony given in the trial court by PW1, PW3, DW1 and DW3. He emphasized that the evidence of PW1, PW3 and DW3 had sufficiently demonstrated that the Easy Coach Bus was to blame for the accident. He accused DW1 of having given inconsistent evidence as to the side of the road where the accident occurred. He relied on ***Anthony Francis Wareham t/a AF Wareham & 2 Others vs Kenya Post Office Savings Bank (2004)*** in support of his argument

that in the absence of evidence to support the facts pleaded, the party with the burden of proof must fail. He also relied on ***Duncan Kimathi Karagani vs Ngugi***

David and 3 Others (2016) eKLR. (supra).

35. The 2nd Respondent also denies that the 1st Respondent's evidence in the Criminal case was contradictory with evidence given in the Civil suit. He argues that the Appellant's cannot rely on the 2nd Appellant's discharge from the criminal case to absolve themselves from liability in the civil suit. He also denies the narrative of an insane person in the Nissan Matatu who interfered with the driver of the said matatu. They rely on ***David Brown Kipkoriri Chebii vs Rael Chebii(2016) eKLR*** in cautioning the court against interfering with the findings of fact by the trial court.

36. On the issue of quantum, the 2nd Respondent argues that the trial Court erred by awarding the Respondent an amount that is inordinately excessive. He argues that the amount of Kshs. 1,200,000 would be sufficient for the injuries sustained by the 1st Respondent. He relies on the authorities of ***Denshire Muteti Wambua vs Kenya Power and Lighting Co. Ltd (2013) eKLR, Jitan Nagra v Abednego Nyandusi Oigo (2018)eKLR, Zackary Kariithi v Jashon Otieno Ochola (2016)eKLR, Patrick Kinyanjui Njama v Evans Juma Mukweyi (2017)eKLR, Lucy Waruguru Gatundu v Francis Kinyanjui Njuku (2017)eKLR*** **and** ***Mohamed Muyunga v Vinoth Abwolet Eshepet (2020)eKLR***.

37. It is true, as the Respondents have submitted, that an Appellate Court only departs from the factual findings of a Trial Court in exceptional circumstances. An appellate Court will not interfere with the factual findings of the Trial Court if the conclusions reached can be reasonably justified from the totality of the evidence received at trial especially in the context of conflicting testimony.

38. The main question that emerges in the present case is whether it can it be said that the 1st Respondent adduced sufficient evidence in the Court below to entitle the Trial Court to conclude that the 2nd Appellant was solely to blame for the accident under the legal threshold of preponderance of evidence.

39. Having considered the entire Trial Court record and the submissions of all the parties on appeal, I am unable to answer this main question in the affirmative. There are at least ficw reasons for this contretemps with the finding by the Trial Court that the 2nd Appellant bore 100% liability for the accident in the circumstances of this case.

40. First, there is material discrepancy between the evidence the 1st Respondent gave during the Civil Trial and the testimony he gave during the Traffic Case in which the 2nd Appellant had been charged with offences arising from the same accident. The proceedings of the Traffic Case were produced as evidence in the Civil Suit. In the Traffic Case, the 1st Respondent was quite categorical that he did not witness the accident and was not sure which lane the Nissan Matatu was on when the accident happened. In cross-examination, in the Traffic Case, the 1st Respondent stated:

> *I did not see how the accident took place. I am not sure the lane our vehicle was moving on but I think our vehicle was on the climbing lane. I did not see any commotion. I did not see any bus before the accident.*

41. The 1st Respondent's statement to the Police, which was produced by his own witness, PC Ngetich, was to the same effect. Yet, in the Civil Suit in the Trial Court, the 1st Respondent's doubts seem to have significantly dissipated. He now stated, more than two years after the accident:

> *I was sat (sic) behind Sachangwan area on a descending Easy Coach the driver and while around climbing lane we were hit by a headed on opposite direction on point of impact was on the left side as you take Kisumu on the middle lane……Our vehicle was hit from the driver's side i.e. front right…..*

42. These are diametrically opposed versions of the same accident by the same witness on two occasions both given under oath. They jar on the reasonable ear seeking a harmonious version of the accident. Yet, when given an opportunity to explain the dissonance, the 1st Respondent merely insisted that his version given in the Civil Suit, which was later in time, was the correct one.

43. The second reason to impugn the finding on liability by the Trial Court is the variance between the evidence tendered by the 1st Respondent and his pleadings. In his Amended Plaint, the 1st Respondent sued both the Appellants and the 2nd Respondent. He goes on to particularize the negligence of the 2nd Respondent's driver. He includes in his particulars the following in paragraph 5 of the Amended Plaint:

> *a) Driving without due care and attention;*
>
> *b) Driving without proper look out before proceeding on;*
>
> *c) Driving with excessive speed in the circumstances;*
>
> *d) Failing to swerve, control the motor vehicle KCH 420V and/or brake in any way to avoid the accident;*
>
> *e) Failing to ascertain that the road was clear before proceeding on;*
>
> *f) Being generally careless and negligent;*
>
> *g) Driving a defective motor vehicle;*

h) *Res ipsa loquitor*.

44. Despite these particulars, on the witness stand, the 1st Respondent explained that the 2nd Respondent's driver had done his best and was not at all to blame for the accident: he neither drove at an excessive speed nor failed to swerve to avoid the accident. The 2nd Respondent's driver was, the 1st Respondent insisted, blameless. What about the inconvenient details in the Plaint, he was asked. He simply denied that he was aware that those details were in his Plaint. As for the verifying affidavit which he swore confirming that the factual details in the Plaint were accurate, he similarly denied knowing about the varying factual details.

45. The third reason to be a tad doubtful about the foundation of the Trial Court's conclusions is that although the Court seemed to give credibility to the narrative of PC Ng'etich, his whole testimony, other than the Police File produced, was hearsay. PC Ng'etich was not a witness to the accident and neither was he the Investigating Officer. He did not interrogate the eye witnesses. His role in the trial should have been limited to producing the Police File. The Police File that he produced did not, on the whole, support the view taken by the Court that the 2nd Appellant was wholly to blame for the accident. Two of the witness statements in the file were ambivalent on who caused the accident. The third statement – by Brian Ochieng Opiyo – put the blame on the 2nd Appellant.

However, the statement was, inexplicably, recorded in January, 2017 – more than three months after the accident. No explanation was given why the statement was recorded so long after the accident, and long after the 2nd Appellant had been charged with an offence and after two witnesses had testified refusing to put blame on him for the accident.

46. Fourth, the evidence by Mr. Kalei – the 2nd Respondent's witness ─ also suffers from a lot of the same weaknesses as that of PC Ng'etich. None of the people Mr. Kalei says he interviewed actually witnesses the accident. Indeed, Mr. Kalei went to the scene after two days.

47. Fifth, there is the testimony of Justus Apolo Andabwa in the Traffic Case. He claimed that the Easy Coach Bus was on its proper lane when the accident occurred but that the Nissan Matatu swerved to the lane of the Easy Coach Bus. This witness claimed that there was a man who was struggling with the driver of the Nissan Matatu for the control of the vehicle.

48. Where, then, does that leave us on the question of liability? The 2nd Appellant testified that it was the 2nd Respondent's driver who was to blame for the accident because that driver was attempting to overtaken two trailers and thereby traversed on to the Easy Coach Bus' lane. The 2nd Appellant claims that he was forced to swerve on to the middle lane in order to avoid a collision but that the Nissan Matatu swerved back to the same lane hence leading to the head-on collision.

49. While this is a plausible theory of how the accident happened in the absence of any other more compelling narrative, it raises several questions. First, it would be easy to conclude that at a minimum, the Easy Coach Bus was speeding. This is because after impact, the bus landed on the right hand side of the road where it was stopped by a tree. Second, the point of impact leaves a jarring perception about the veracity of the 2nd Appellant's narrative. That narrative is, of course, self-serving. Unfortunately, his counterpart did not live to give his version.

50. In my view, this is one of those instances where the Court had two conflicting versions of the accident and no reasonable means of untying the tie. In such circumstances, the correct position is to split blame equally between the two drivers. Where there is no concrete evidence to determine who is to blame between two drivers in a collision, both should be held equally liable. That position was stated in ***Hussein Omar Farah vs. Lento Agencies*** **[2006] eKLR,** ***Matunda Fruits Bus Services Ltd vs. Moses Wangila & another*** **[2018] eKLR** and ***Eliud Papoi Papa vs. Jigneshkumar Rameshbai Patel & another*** **[2017] eKLR**.

51. In ***Hussein Omar Farah v Lento Agencies [2006] eKLR (Nairobi Civil Appeal No. 34 of 2005*****),*** the Court of Appeal, held as follows:

> *In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame… The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.*

52. Justice Meoli followed the principle in this decisional law in ***Eliud Papoi Papa v Jigneshkumar Rameshbai Patel & another [2017] eKLR (High Court of Kenya at Naivasha Civil Case No. 23 of 2015)*** where she stated as follows:

> *Thus, the court is confronted with conflicting and irreconcilable evidence regarding how the collision occurred and which driver is to blame. It is true that under Section 107 of the Evidence Act the Plaintiff was obligated to prove his allegations of negligence against the Defendants. However, the existence of conflicting versions on the collision does not necessarily mean that nobody was liable; a collision involving two vehicles almost always involves fault on the part of one or both drivers….*
>
> *The Plaintiff's and Defendant's account of the accident was equally doubtful. Of the collision however there is no dispute. In the circumstances, and based on the decision of the Court of Appeal in* ***Hussein Omar Farah*** *and* ***Anne Wambui Ndiritu****, I must find that the deceased and DW1 contributed equally in causing the collision and both must shoulder liability at 50:50*.

53. In the present case, I am persuaded that this is the correct principle to apply. It is clear that a collision occurred and the 1st Respondent sustained serious injuries following the collision. However, of the two dueling accounts of the collision, it is not possible to determine which one is more plausible or to determine which of the two drivers is more blameworthy. Faced with these two conflicting accounts, I split the liability equally. Liability will be apportioned at 50% each between the Appellants and the 2nd Respondent.

54. I will now turn to quantum.

55. Although the Appellants listed at least two grounds of appeal as against quantum, in their submissions, they did not address the issue at all. The 2nd Respondent, on the other hand, submitted that the general damages awarded was excessive. He did not, however, file a cross appeal. He suggested that the correct figure should be Kshs. 1,500,000.

56. General damages awarded at the Lower Court can only be interfered with if it is "*so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the (court) 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*." (*See* ***Butt –vs- Khan, Nairobi Civil Appeal NO. 40 of 1977***).

57. In the circumstances of this case, can the award of Kshs. 2,000,000/- be said to be so inordinately low as to warrant any interference by this Court sitting as an appellate Court? I think not. The injuries suffered by the 1st Respondent are quite serious and the award of general damages is in keeping with the decided cases. On appeal, the Court looks to see if there is a pattern of awards from which the Trial Court's award sharply departs to become an outlier or whether seen objectively an award is palpably or manifestly excessive or too low. This is not the case here.

58. Turning to the award of special damages, I note that they were all specifically pleaded and strictly proved in evidence. There is no reversible error on these as well.

59. The upshot is that the appeal partly succeeds. The apportionment of liability is reversed. The award of damages is affirmed. The result is that the Court makes the following orders:

> **a. The apportionment of liability by the Trial Court in its judgment dated 19/09/2019 is hereby reversed. In its place, judgment on liability is entered whereby the Appellants and the 2nd Respondent herein will share liability equally (50% basis each).**
>
> **b. The award of damages – both general and special – is hereby affirmed.**

60. Since the appeal has partly succeeded, each party will bear its own costs on appeal.

61. Orders accordingly.

Dated at Nairobi this 3rd day of June, 2021

……

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.