REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. E025 OF 2025

CITY GAS EAST AFRICA LTD…… APPELLANT

VERSUS

GETRUDE MONGINA OMAGWA……RESPONDENT

(Being an appeal on from the judgment and decree of Hon. C.A. Ogweno (SRM) Dated 8/12/2022 in Kisii CMCC NO. E412 OF 2020)

JUDGMENT

1. Vide plaint dated 17/9/2019, the respondent filed the suit before the lower court on grounds that on 10/7/2020, he was a pillion passenger on motor cycle registration number KMEL 759K YAMAHA along Kiss-Migori Road when the appellant's driver negligently drove motor vehicle registration number KCV 203R (hereinafter the subject vehicle) and it hit the motor cycle causing the respondent injuries.

2. The appellant filed a statement of defence dated 14/10//2020 denying liability and blamed the respondent for the accident and sought orders that the suit be dismissed with costs. He averred that the respondent minor was walking unattended and he unexpectedly crossed the road when running and dashed into the path of the subject vehicle thus the accident was inevitable. He blamed the minor and his next friend for the accident.

3. The matter proceeded for hearing and both parties called their witnesses. Vide judgment delivered on 6/12/2022, the trial court entered liability at 100% as against the appellant and awarded the respondent Kshs. 800,000/= for quantum.

4. The appellant was dissatisfied with that judgment and filed the memorandum of appeal dated 12/2/2025.

The Appeal

5. The appellants filed the memorandum of appeal on record on the issue of both liability and quantum. On liability, the grounds were that there were inconsistencies in the respondent's pleadings and testimonies as well as contradictory statements between the respondent and police officer thus the appellant was not wholly to blame for the accident. On quantum, the grounds were that the award was excessive, the second medical report was not considered and the respondent did not discharge its burden of proof for an award for general damages. The appellant sought orders that the trial court’s award on liability and quantum be reviewed.

6. The appeal proceeded by way of submissions. The appellant’s were dated 5/9/2025 whereas the respondent’s were dated 22/9/2025.

Analysis and Determination

7. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both

on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in **Peters – vs- Sunday Post Limited [1958] EA 424**.

8. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR** where the court held that: -

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be 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 damage."***

Whether the issue of liability was properly determined

9. The burden of proof as per **Section 107 (1), 109 and 112 of the Evidence Act, Cap 80 Laws of Kenya** is outlines as: -

> ***"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."***

10. The scope and extent of the fundamental legal principles on who is to blame for negligence are settled. In the cases of **Nandwa v Kenya Kazi Ltd [1988] KLR 488 and Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR** the Court held that: -

> ***"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the***

defendant provides same answer adequate to displace that inference."

11. From the record, it is undisputed that on 10/7/2020 an accident occurred between the appellant's subject vehicle and the respondent who was a pillion passenger on motor cycle registration KMEL 759K YAMAHA. The respondent testified that the appellant's driver drove negligently at a high speed and he lost control and hit the motorcycle. That the subject vehicle was overtaking when it hit the motor cycle on the side.

12. Though the appellant blamed the respondent for the accident, it did not call any witness more so the driver of the subject vehicle to narrate how the accident occurred and how the respondent contributed to it thus the respondent's averments remained uncontested. I do also note that the appellant did not prosecute any third-party proceedings as against the rider of the motorcycle. The police officer, PW2, testified that both the subject vehicle and motor cycle were headed in the same direction when the subject vehicle hit

the motorcycle when trying to overtake it. I do agree with the Hon. Magistrate that the testimony was given on the basis of police investigations thus the respondent's case was collaborated.

13. Noting that the respondent was a pillion passenger and further noting that the appellant did not call any witnesses to rebut the claimant's averments, I do find that the appellant bore no liability in the causation of the accident. I do also note that the subject vehicle hit the motor cycle from behind thus he bore a much greater duty to avoid the accident. Though overloading is a traffic offense, the appellant did not allege or proof that the accident was caused as a result of the bike losing balance, stability or control due to overloading thus the defense was not viable. From the record, the accident occurred when the subject vehicle was attempting to over-take the motor cycle knocking it from behind. The respondent did not repute those circumstances.

14. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** the court in setting out the legal burden of proof in civil cases stated: -

> ***"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."***

15. Further in **William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 Kimaru J** (as he then was) stated that: -

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

16. In the end, I do find that the lower court's finding on liability was sound and the same is hereby upheld.

Whether the award of Kshs. 800,000/= for general damages was inordinately high or low.

17. The issue for consideration is whether the trial court erred in awarding Kshs. 800,000/= for general damages. This Court is called to access whether the award was inordinately high or low. The guiding principle in the assessment of damages is that an award must reflect the

trend of previous, recent and comparable awards. This position finds support in the case of **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** where the Court of Appeal held: -

> ***"Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."***

18. The appellant submitted that the award of inordinately high and that the trial court failed to consider the appellant's expert witness, DW2, who poked holes on the medical report produced by the respondent thus raising medical questions on whether the pleaded injuries were suffered noting that the respondent abandoned use of crutches four days after the accident and had healed without any residual disability.

19. I take note of the P3 form issued on 10/7/2020, treatment notes from KTRH and the medical report dated

14/7/2020 which listed the injuries as; whiplash injuries to the neck, chest contusions, dislocation of the right shoulder and fractures of the right radius, tibia and fibula. The second medical report was dated 19/2/2021 which confirmed the injuries as; displaced fracture of the right distal radius, right mid-shaft tibia and fibula and anterior right dislocation of the shoulder. I do note that the 2nd medical report relied on medical records and x-ray films which confirmed the injuries. There was no other x-ray taken, I do however note that the respondent was referred for 2nd x-rays but failed to comply.

20. Noting that there was a discrepancy between the testimonies of the two medical experts, I do find that the lower court was correct in falling back to the treatment notes from KTRH noting that they were freshly taken after the accident without any bias for or against either party. The treatment notes confirmed that the respondent suffered a right shoulder dislocation, fracture of the right radius/ulna, fracture of the right tibia and fibula. Whether or not there

was treatment, the fact remained that the respondent sustained those injuries, and both the 1st and 2nd medical reports confirmed those injuries.

21. In assessing whether the award was inordinately high or low, I rely on the following cases: -

Alex Wanjala v Pwani Oil Products Limited & Another (2019) eKLR where the appellant sustained a closed head injury leading to loss of consciousness for several weeks, closed fracture of the right humerus and closed fracture of the right femur with the court awarding Kshs. 600,000 for general damages.

Philip Mwago v Lilian Njeri Thuo (2019) eklr where the plaintiff suffered fracture of the left humerus with 8% permanent disability and was awarded Kshs. 500,000/=.

Michael MainaGitonga V Serah Njuguna [2012] eKLR therein the plaintiff suffered multiple fractures of the pelvis, dislocation of the right hip with displaced fracture of

the right acetabulum, comminuted fractures of the right tibia and fibula on the proximal end with fracture of the tibia plateau, soft tissue injuries of the chest. The Court awarded Kshs.1,500,000/= as general damages.

Joseph Njuguna Gachie Vs Jacinta Kavuu Kyengo, HCCA No. 31 Of 2017, Odunga J. reduced to Kshs 600,000/= the general damages which the trial Court had assessed at Kshs 1,000,000/=. The Plaintiff had suffered the following injuries; Blunt temporal injury with swelling; Facial bruises; Blunt injury on the left forearm; Comminuted fracture of left radius and dislocated left ulna joint. The plaintiff therein sustained more injuries compared to the case before me.

22. I have also considered the authorities quoted before this Court.

23. From the above and taking into consideration the lapse in time and changing economic circumstances between

when the authorities were delivered and now, and further taking into consideration that no amount can restitute the claimant to exactly how he was before the accident occurred or even take away his pain and suffering, I find that an award of Kshs. 800,000/= was not inordinately high and was commensurate with the injuries sustained. That award is upheld.

24. The upshot is that the appeal is found to be unmerited and the same is dismissed.

25. Each party to bear its own costs.

JUDGEMENT DELIVERED virtually, **DATED** and **SIGNED** this **5th day of November, 2025.**

In the presence of:

Siele:CA

Magoma for the appellant

Oduor for the respondent

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J.K.NG'ARNG'AR

JUDGE