**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. E038 OF 2023**

**ARINAITWE HEDWIG.....APPELLANT**

**VERSUS**

**BUSCAR E.A LIMITED.....RESPONDENT**

***(Being an Appeal from the judgment delivered by Hon. M.W. Kamau(RM) on 13th February 2022 in Molo CMCC No. E021 of 2022)***

**JUDGMENT**

1. The background of this matter is that the Appellant herein sued Respondent before the trial court vide a Plaint dated 1st February, 2022 where she sought judgment against the Respondent for:
    a) ***General damages for pain, suffering, and loss of amenities.***
    b) ***Special damages of Kshs. 3, 550.00 /=.***
    c) ***Costs of the Suit.***
    d) ***Interests on (a), (b), and (c) above.***
    e) ***Any other orders that the Honourable court may deem fit.***
2. The claim was that on or about 14th August, 2021, while she was on Board motor vehicle registration number KCR 097H, as a lawful passenger from Kampala heading to Nairobi. On reaching Nukiat Area on Londiani-Muhoroni Road, the Defendant's authorized driver drove the suit vehicle recklessly and negligently, causing it to lose control, veering off the road, and causing the accident which occasioned her serious injuries to wit; Swollen, painful, tender frontal scalp; blunt injury to the anterior chest wall; and swollen and bruised both knees.
3. The particular of negligence pleaded include; driving with no regard to other road users, excessive speed, failing to stop or swerve, driving without due care, and disregard of the traffic highway code, resulting in the accident.

4. She asserts that as a result of the accident she has suffered loss and damage, which she blames the Defendant whom she states is vicariously liable for the torts of its driver/agent.
5. The Respondent filed a Defence contesting liability and damages. He further denied the particulars of negligence in the Plaint. On his part the Respondent alleged the accident was caused solely by the negligence of the Appellant who particular were pleaded to include; failing to buckle the seat belt, jumping from the vehicle while in motion, attempting to board the vehicle while in motion and hanging dangerously on the vehicle.
6. The Respondent further relied on the doctrines of *Res Ipsa Loquitor* and vicarious liability.
7. After hearing both parties, the trial Court dismissed the Plaintiff's case in toto, arguing with regard to liability that the Plaintiff to establish her claim, it was necessary to show that the driver acted negligently and breached the duty of care, resulting in injuries. The trial Court noted that the evidence adduced left it with two versions of the cause of the accident: a sleepy driver or mechanical failures. The court found that neither version had been proven to the required standard to show that the Defendant's driver was negligent. The court also noted that the police officer's evidence did not clarify the cause of the accident.
8. Dissatisfied with that judgement, the Appellant herein lodged the current Appeal vide a Memorandum of Appeal dated 28th February, 2023, based on Nine(9) grounds of Appeal as follows;-

    ***1) The Learned Magistrate erred in law in failing to properly identify, synthesize, and analyse the issues for determination from the evidence arising from the pleadings and the testimony of the witnesses.***

    ***2) The learned trial magistrate erred in fact and law and misdirected herself by concluding that the appellant did not prove her case.***

3) ***The learned trial magistrate erred in fact and law and misdirected herself by dismissing the appellant's suit in toto.***
4) ***The learned trial magistrate erred in fact and law by failing to hold the respondent 100% liable despite the Police Abstract proving only the respondent's motor vehicle was involved in the accident.***
5) ***The learned trial magistrate erred in fact and law by failing to hold the respondent 100% liable despite the appellant proving she was a mere passenger in a carelessly and negligently driven motor vehicle.***
6) ***The learned trial magistrate erred in fact and law by failing to hold the respondent 100% liable despite the respondent having not called any witnesses to challenge or controvert the plaintiff's case.***
7) ***The Learned Trial Magistrate misdirected herself in ignoring the principles applicable in awarding quantum of damages and relevant authorities' cited.***
8) ***The Learned Trial Magistrate proceeded on wrong principles when assessing damages by failing to apply precedents and the tenets of the law applicable.***
9) ***The learned trial magistrate's decision was unjust, against the weight of evidence, based on misguided points of fact and wrong principles of law, and occasioned a miscarriage of justice.***

9. The Appellant therefore prayed for the Appeal to be allowed, the judgement set aside in its entirety and freshly considered by this Court. The Appellant also prayed for award of costs for both this Appeal and the trial court suit.
10. The Respondent herein was served with this Appeal, and notices for various Court dates, as evidence by the various Affidavits of service filed ,but they did not oppose the Appeal neither did they participate in its hearing.
11. The Appeal was thus canvassed by written submissions.

**Appellant's Submissions**

12. The Appellant's submissions focus on two main issues: proof of liability and entitlement to general damages. It was argued that the Appeal seeks to set

aside the trial court's judgment based on the evidence presented in the Plaint, witness statement, and documents. She states that the undisputed facts include the accident, the appellant's injury, that the Appellant was not charged, and that the Respondent called no witnesses.

13. On liability, it was submitted that the trial court erred in failing to consider the Appellant's evidence that the driver was reckless and negligent, causing the accident after hitting a bump. Further that the police abstract showed a charge of careless driving which was not disputed. It was her argument that the failure of the vehicle to stay on the road raises the presumption of negligence as was stated in ***Mbaka Nguru & Anor. Vs James George Rakwar [1998] eKLR*** where the Court of Appeal held that;-

> ***"It is trite that when a vehicle overturns it is for the driver to explain the reason for such overturning and in the absence of a reasonable explanation, connoting no negligence, the negligence of the driver is presumed."***

14. It was submitted that the standard of proof in civil cases is on a balance of probability as was established in ***In Miller v Minister of Pensions [1947]2ALL. ER 372*** the Court of Appeal stated thus-

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not. Thus, proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough."***

15. The Appellant argued that the Police Officer (PW3) also confirmed that the bus had mechanical issues per the Occurrence Book(OB) and therefore, the Respondent's failure to call the driver or any witness meant their Defence remained an unsubstantiated statement as held in **Trust Bank Ltd -Vs- Paramount Bank Limited & 2 Others (2009) eKLR** thus;-

> ***"It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in***

***so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged".***

16. The Appellant argued that the Respondent breached its duty of care to the passenger and therefore, the Respondent ought to have been held 100% liable.

17. On quantum, the Appellant argued that the trial court made an erroneous award on general damages despite dismissing the suit. The injuries sustained were soft tissue injuries to the frontal scalp, anterior chest wall, and both knees. The Appellant proposes an award of Kshs. 350,000/= for general damages. This proposal is supported by comparable awards for similar soft tissue injuries in various cited authorities, including :-

- ***Greatrift Express Shuttle Services Limited v Gitu (Civil Appeal E041 of 2023) [2024] KEHC 8640 (KLR) (16 July 2024) (Judgment)*** The claimant suffered soft tissue injuries. On appeal the High court upheld the lower court award of Kshs. 300,000/-.
- In the case of ***Francis Ndungu Wambui & 2 others v Benson Maina Gatia [2019] eKLR,*** the High Court awarded general damages of Kshs 300,000/- for head injury with loss of consciousness and other soft tissue injuries.
- ***Kabutia & another v PK (Suing as the Guardian and Next Friend of DM – Minor) (Civil Appeal E025 of 2022) [2023] KEHC 413 (KLR)*** where the High Court upheld that the award of general damages of Kshs 300,000/- for a minor who sustained soft tissues injuries which were serious in nature, was fair and justified.

18. In conclusion, it was submitted that the trial Magistrate erred in law and fact by failing to find the Respondent 100% liable and applied wrong principles. The Appellant prays for the lower court's judgment to be set aside and an award for general damages to be made as submitted.

**Analysis and Determination**

19. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced before the trial court in order to arrive at its own independent conclusion, taking into account that it did not have the advantage of seeing and hearing the witnesses as they testify - See ***Selle vs. Associated Motor Boat Company Ltd [1968] EA 123.***

9. From the Memorandum of Appeal and the submissions filed, it is apparent that the broad issues determination are on both liability and quantum.

10. With regard to liability, three witnesses testified, The Appellant, Arinaitwe Hedwig (PW2), provided a direct and uncontroverted account of the accident, which occurred on 14th August 2021 at approximately 11:00 am while she was a passenger in Bus registration No. KCR 097H. Seated in seat 16, she claimed to have witnessed the events leading to the loss of control of the vehicle.

11. It was her direct evidence that the cause of the accident was the driver's carelessness, specifically stating that the driver was dozing. She testified that the dozing driver hit a bump and veered off the road, causing the bus to fall into a trench. As a passenger with her seat belt on, she maintained she could not have prevented the accident.

12. The Police Constable, PC Wilberforce Koffi (PW3), corroborated the fact of the accident, confirming that it was a self-involving accident along the Muhoroni Road involving the Defendant’s vehicle. PW3 further introduced an alternative, though not legally proven, account from the driver, stating that preliminary investigations from driver indicated that the vehicle got mechanical difficulties.

13. The account of the two witnesses established two potential causes of the vehicle veering off the road: the driver's personal negligence, dozing off or the Defendant's negligence that caused the vehicle to develop mechanical problems.

14. The determining factor in establishing liability lies in the quality and weight of the evidence presented. The evidence of the Appellant (PW2) remains on record and unchallenged. Crucially, the Respondent , who is the owner of the vehicle and the employer of the driver, closed its case without calling any witnesses. Indeed, Counsel for the Respondent specifically confirmed they will not be calling the driver.
15. In the absence of any rebuttal evidence, the direct testimony of the passenger (PW2) that the accident was caused by the driver dozing and being careless must be accorded significant weight. Furthermore, even if the driver's filed statement as recorded by the police (of mechanical difficulties) was to be adopted, it would still point to a breach of the duty of care by the Respondent in ensuring the vehicle was roadworthy, for which the Respondent is vicariously liable.
16. Having failed to call the driver or any expert witness to rebut the clear evidence of negligence of dozing off while driving or to provide a sound legal explanation for the alleged mechanical difficulties in a self-involving accident, the Defendant leaves the Plaintiff's case wholly unrefuted. In any event the Appellant herein was a fare paying passenger and thus did not have any control over the subject motor vehicle as such no liability can be apportioned on her. The Respondent owed an undisputed duty of care to the Appellant in the circumstances herein.
17. As a passenger, the Appellant had no role to play in the maintenance of the said motor vehicle or the manner in which it was driven resulting in the self-involving accident.
18. In light of the foregoing, the driver was solely liable for the accident and the Respondent vicariously liable for the negligent acts of his driver. The trial Court therefore erred in dismissing the suit on alleged failure by the Appellant to establish liability.
19. This Court sets aside the trial Court determination on liability and substitutes it with a finding that the Respondent is held 100% liable.

20. On quantum, the Appellant relied on her submissions filed in the trial Court and proposed a sum of Kshs 350,000/-. On its part, the trial Court held that had liability been proved, then she would have awarded the Appellant Kshs 150,000/- as general damages for the injuries suffered. In support of that award, the trial court relied on the case of ***Daniel Gatana Ndungu &Another V Harrison Angore Katana [2020] eKLR***.

21. It is settled law that an award of general damages is discretionary and that the Appellate court should be slow to interfere with such discretion. Indeed, the Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)*** held: -

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A 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 1gure which was either inordinately high or low." This is the principle enunciated in Rook v Rairrie [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in Butt v.***

***Khan** [1981] KLR 349 when it held as per Law, J.A 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."*

22. The injuries sustained as per the evidence are; Swollen, painful, tender frontal scalp; blunt injury to the anterior chest wall; and swollen and bruised both knees. These injuries were confirmed by Dr. G.K Mwaura in his medical-legal report dated 17th January, 2022. The doctor further classified the injuries as soft tissue injuries.

23. In ***Daniel Gatana Ndungu & another v Harrison Angore Katana** [2020] eKLR* where the respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000/-on general damages and substituted it with an award of Kshs 140,000/-

24. In ***Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa** [2020] eKLR,* the respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist and was awarded Kshs 300,000/-. On appeal Nyakundi J. set aside that amount and awarded Kshs 150,000/-.

25. Further in ***John Wambua v Mathew Makau Mwololo & another (2020) eKLR***, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs. 120,000/- and this was affirmed by the High Court.

26. In light of the award granted by various Court for soft tissue injuries herein, this Court finds that the proposed award by the trail Court is within the acceptable range of award. That award is upheld.

27. Regarding Special damages, the trial Court stated that it would have awarded Kshs. 3, 550/- which was strictly pleaded and proved.

28. This Court confirms that indeed, the Appellant produced the motor vehicle search invoice of Kshs 550 and a receipt of the sum of Kshs 3, 000 paid to Kinoo Medical Clinic for procuring the medical-legal report. This Court allows the award of Kshs. 3,550/- as it was strictly pleaded and proved.

29. In conclusion therefore, the Appeal is disposed of in the following terms: -

    1. **The trial court's judgment dismissing the Appellant's suit with costs be and is hereby set aside and substituted with judgment holding the Respondent 100% liable.**
    2. **The Appellant is awarded general damages of Kshs. 150,000.**
    3. **Special damages of Kshs. 3,550/-.**
    4. **The Appellant is awarded costs of the suit before the trial court and this Appeal together with interest at Court rate.**

**Dated, signed and delivered at Nakuru this 19nd day of November, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

**N/A for Mr. Njagi for Appellant**

**N/A for Respondent**

**Kamau, Court Assistant**