



**REPUBLIC OF KENYA**

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

**MILIMANI HIGH COURT (CIVIL APPEAL DIVISION)**

**CIVIL APPEAL NO. E680 OF 2023**

**AQSA COMMODITIES LTD.....1<sup>ST</sup>**

**APPELLANT**

**HASSAN MOHAMED.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**DERRICK KARIUKI MUTURI.....1<sup>ST</sup>**

**RESPONDENT**

**EXPRESS CONNECTIONS LTD**

**T/A DOUBLE M .....2<sup>ND</sup>**

**RESPONDENT**

*(Being an appeal from the judgment and decree of the Small Claim's Court at Nairobi Honourable C.A. Okumu RM/Adjudicator in Milimani SCCC E3682 of 2022 delivered on 30.06.2023)*

**JUDGMENT**

- 1.** The trial adjudicator, following the statement of claim filed by the Respondent and the subsequent response and a full hearing, entered the following judgment in favour of the 1<sup>st</sup>

Respondent/Claimant in the sum of Kshs 291,921/= plus costs and interest.

2. The case before the trial court originated from a road traffic accident that occurred on 01.07.2020 at approximately 10:00 AM along Jogoo Road at the Rabai/Jogoo junction in Nairobi, involving two motor vehicles: a minibus, registration number KBP 970E (owned by Express Connections Ltd T/A Double M), and an Isuzu Canter lorry, registration number KBW 907J (owned by Aqsa Commodities Ltd and driven by Hassan Mohamed). The Claimant, Derrick Kariuki Muturi, was lawfully travelling as a passenger in the minibus when the collision occurred, and he subsequently sustained injuries described as blunt and abrasion soft tissue head injuries. The Claimant initiated proceedings against the driver and owner of the lorry (Aqsa Commodities Ltd and Hassan Mohamed, the Appellants), alleging their negligence caused the accident. The Appellants denied liability, countered that the accident was caused by the negligence of the bus driver (the 2<sup>nd</sup> Respondent/Third Party in the claim), and sought indemnity or contribution from the bus owner. The Court, after hearing the evidence, ultimately found the driver and owner of the lorry 100% liable for causing the accident, absolved the Third Party from any liability, and awarded the Claimant general damages of Kshs 200,000 and special damages of Kshs 71,921, leading to the current appeal against that judgment.

3. From the proceedings, the Third Party was enjoined in the matter, entered an appearance and filed a response but never called any witnesses to testify.
4. The Appellants have now appealed against the decision of the trial court on liability and quantum on the following grounds:
  - a) ***That the learned Magistrate erred in law in rendering a judgment that is not based on the evidence presented before her.***
  - b) ***That the learned Magistrate in law in finding that the Appellants were 100 % liable which is contrary to the evidence on record.***
  - c) ***That the learned Magistrate erred in law in failing to give due right to the testimony of the Appellants' witnesses and the documentary evidence.***
  - d) ***That the learned Magistrate erred in law in failing to evaluate and make a determination to the effect that the witness statement of the 2<sup>nd</sup> Respondent's witness Joshua Mwangi was worthless in terms of evidential value as the witness was not brought to court for examination and the statement was also unsigned and undated.***
  - e) ***That the learned Magistrate erred in law by failing to find that the 2<sup>nd</sup> Respondent was the sole cause of the accident.***
  - f) ***That the learned Magistrate erred in law by absolving the 2<sup>nd</sup> Respondent (Original 3<sup>rd</sup> Party) when the weight of the evidence by the Appellants' witnesses demonstrated that the 2<sup>nd</sup> Respondent's driver was the sole cause of the accident.***

- g) That the learned Magistrate erred in law by assessing damages excessively and contrary to well-known principles and authorities.**
- h) That the learned Magistrate erred in law by failing to give weight to, consider and fathom the Appellants' written submissions and authorities.**
- i) That the learned Magistrate erred in law in awarding costs against the Appellants.**

5. The Appellants seek that the judgment of the trial magistrate against the Appellants be dismissed with costs. That judgment be entered on liability at 100% in favour of the 1<sup>st</sup> Respondent against the 2<sup>nd</sup> Respondent and re-assessment of damages.

6. The following issues arise for determination:

- a) Whether the trial court erred in apportioning liability at 100% against the Appellants.**
- b) Whether the quantum of damages was excessive or erroneous.**
- c) Who is to bear the costs herein.**

### **Appellants' submissions**

7. The Appellants submit that the Trial Court failed to analyze the evidence in detail, leading to the erroneous conclusion that the Appellant's motor vehicle, which was on the main road, was at fault. The Appellants maintain that the accident was caused by the 2<sup>nd</sup> Respondent's Bus (KBP 970E), a double M bus, which abruptly emerged from a feeder road into a junction and cut across the main road without checking for cross traffic. The 2<sup>nd</sup> Appellant (RW1),

the driver of the Appellant's vehicle (KBW 907J), testified that he was driving along Jogoo Road at a moderate speed, below 50 kph, when the collision occurred despite his efforts to hoot and brake, and he was seriously injured. This testimony was supported by RW3, a police officer, who produced the Occurrence Book (OB) extract (REX 9). This extract confirmed that the bus failed to give way and was subsequently hit by the canter lorry on the right side.

- 8.** The Appellants submitted that the police blamed the driver of KBP 970E, and the Trial Court erred by concentrating on a scanty police abstract rather than the detailed OB extract, while giving undue weight to the 1<sup>st</sup> Respondent's testimony. They stress that RW1 demonstrated no negligence as he was in his correct lane on the major road. Furthermore, the 2<sup>nd</sup> Respondent failed to call any witnesses, rendering their driver's unsigned and undated witness statement worthless, and RW3 confirmed that an allegation within that statement that RW1 was escaping a road block was fabricated. The Appellants conclude that they proved negligence on the part of the driver of KBP 970E, attaching vicarious liability to the 2<sup>nd</sup> Respondent, and therefore, the 2<sup>nd</sup> Respondent ought to have been found 100% liable for the accident, making the finding of 100% liability against the Appellant an error that caused injustice.
- 9.** On the matter of quantum of damages, and on a without prejudice basis to their strong position on liability, the Appellants argue that the General Damages awarded by the

Trial Court were excessive. They submit that the Claimant sustained relatively minor injuries, classified as blunt and abrasion soft tissue injuries. The Appellants contend that the Trial Court erred in awarding Kshs 200,000/= in General Damages. They cite a comparable case where the High Court awarded Kshs 100,000/= for more serious injuries, including loss of consciousness and cut wounds, which were absent in the current case. Based on this comparison, the Appellants propose that the General Damages should be reduced to Kshs 70,000.

### **Respondents' submissions**

**10.** The Respondents did not submit.

### **Analysis and Determination**

**11.** As a first appellate court, I am bound by the principle in **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** to re-evaluate and re-analyze the evidence afresh while bearing in mind that I did not have the opportunity to see or hear the witnesses testify.

**12.** On liability, as held in **Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991]**, there is no liability without fault. Mere occurrence of an accident does not impute negligence unless supported by cogent evidence. Further, in **Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR), Mativo J.** stated that when the plaintiff fails to discharge the burden of proof, the defendant is under no obligation to rebut that which is not established.

- 13.** However, the law is that the burden of proof rests on the plaintiff. **Section 107 and 108** of the Evidence Act, Cap. 80 Laws of Kenya, provides that he who alleges must prove.
- 14.** Where both parties provide conflicting versions of events and there is no independent corroboration or clear documentary evidence, courts often apportion liability. This was the principle adopted in similar cases such as ***Khambi & Another v Mahithi and Another [1968] EA 70*** where the court held:

***“It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge.”***

- 15.** The present case requires the court to determine, on the available evidence, who between the drivers of KBP 970E and KBW 907J was to blame and to what extent. The 1<sup>st</sup> Respondent, a fare-paying passenger in KBP 970E, pleaded that the accident was caused by the negligence of the 2<sup>nd</sup> Appellant, the driver of KBW 907J. The Appellants denied negligence and, in the alternative, attributed the accident wholly to the bus driver, on whose behalf the 2<sup>nd</sup> Respondent would be vicariously liable. Although a third-party notice was issued to the 2<sup>nd</sup> Respondent, it did not enter appearance or tender any evidence at the hearing.

- 16.** The 1<sup>st</sup> Respondent testified as a passenger and, quite understandably, offered limited insight into how the collision occurred. He relied heavily on a police abstract which, at the time it was issued, did not assign blame. Conversely, the Appellants presented three witnesses. RW1, the 2<sup>nd</sup> Appellant and driver of KBW 907J, testified that he was driving along Jogoo Road, a major road, when KBP 970E suddenly emerged from Rabai Road, a feeder road, and cut across his path without yielding. His testimony was supported by RW2, an investigator, and more significantly by RW3, a police officer who produced both the Occurrence Book (OB) extract and a later police abstract issued after investigations were concluded.
- 17.** The OB entry, made contemporaneously with the accident report, indicated that the bus “failed to give way and was hit by the Canter on the right side,” clearly attributing fault to the bus driver’s failure to yield when entering a main road. RW3 also clarified that the unsigned and undated statement attributed to the bus driver, which alleged that the Canter was fleeing a roadblock, was unverified, contradicted police records, and was therefore unreliable. Notably, the 2<sup>nd</sup> Respondent opted not to call any witness or offer any admissible evidence to rebut the Appellants’ version, despite being the party best placed to clarify the bus driver’s conduct. An unsigned, undated witness statement, which was never adopted at a statement in chief, carries no evidential weight.

- 18.** The trial court nonetheless held the Appellants 100% liable, seemingly relying primarily on the passenger's limited testimony and the earlier abstract while failing to meaningfully engage with the contemporaneous OB entry and the later police abstract. The OB represents the most reliable objective record and, in the absence of contrary evidence, ought to have been given significant probative weight. By disregarding the OB and the corroborated testimony of RW1 and RW3, the trial court misdirected itself on a critical evidentiary issue.
- 19.** While apportionment is appropriate where both accounts are equally plausible, this case does not present such a scenario. The Appellants' evidence was consistent and corroborated by official police records; the 1<sup>st</sup> Respondent did not witness the mechanics of the accident; and the 2<sup>nd</sup> Respondent, the party directly implicated, provided no evidence at all. The totality of the evidence points to a single, clear cause of the accident, namely, the bus driver's failure to yield when joining a major road from a feeder road. Accordingly, the trial court's finding that the Appellants were 100% liable was against the weight of the evidence and was founded on a misapprehension of material records. It must therefore be set aside and replaced with a finding that liability rests wholly with the 2<sup>nd</sup> Respondent, who, despite being enjoined, entered an appearance and file its response but failed to call any witnesses.

20. The law on burden and standard of proof is settled.

**Sections 107 and 108** of the Evidence Act place the legal burden on he who alleges to prove, on a balance of probabilities. In negligence, the principle is that there is no liability without fault; the mere occurrence of an accident does not of itself amount to proof of negligence. Thus, the 1<sup>st</sup> Respondent bore the burden of proving, by cogent evidence, that the 2<sup>nd</sup> Appellant was negligent in the manner pleaded, and that such negligence caused or materially contributed to the collision. Only if that primary burden was discharged would the evidential burden shift to the Appellants.

21. I, therefore, find that the 2<sup>nd</sup> Respondent is 100% liable for the accident that occurred on 01.07.2020.

22. On damages, I am guided by the decision of the Court of Appeal in Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 where the court held 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”***

23. On quantum, some of the principles that courts will take into account when assessing quantum are-

***a) That assessment of damages is a matter of exercise of discretion and it depends on the facts and circumstances of each case.***

***b) Money as an award cannot review a physical frame that has been battered and shattered or a lost life. The award is only meant to give a party reasonable compensation.***

***c) It is desirable that so far as possible, comparable injuries should be compensated by comparable awards.***

**24.** The starting point is the nature of the injuries, the evidence led at the trial, and the applicable appellate principles on interference with a trial court's discretion. The medical evidence and the Claimant's testimony at the trial court established that he sustained blunt and abrasion soft tissue injuries to the head, with no fractures, no loss of consciousness, and no evidence of permanent disability or long-term functional limitation. The trial court nonetheless awarded Kshs 200,000 as general damages for pain, suffering and loss of amenities.

**25.** In their submissions, the Appellants argued that the Claimant's injuries were "relatively minor" soft tissue injuries and urged that, in light of comparable High Court decisions, an award of Kshs 200,000 was manifestly excessive.

**26.** In my view, the trial court did not err in its assessment of general damages. The court properly appreciated the nature of the injuries sustained, namely soft tissue injuries, and exercised its discretion judiciously. Taking into account the injuries actually suffered, the absence of permanent incapacitation, the need to maintain reasonable parity with awards made in comparable cases, and bearing in mind the

passage of time and modest inflation, I find that the award of **Kshs 200,000** cannot be said to be inordinately high or based on wrong principles. I therefore find no justification to interfere with the trial court's award of general damages, and the same is accordingly upheld.

**27.** The upshot of the above is that:

- i. The appeal is allowed.***
- ii. Liability to be borne by the 2<sup>nd</sup> Respondent.***
- iii. General damages Kshs 200,000/= upheld.***
- iv. Special damages Kshs 71,921/=.***

**28.** Costs of the appeal and the lower court to be borne by the 2<sup>nd</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup>  
DAY OF DECEMBER 2025.**

**LINUS P. KASSAN**  
**JUDGE**

In the presence of:-

Ms Ondieki for Appellant

No appearance for Respondent

Carol - Court Assistant

ORIGINAL