

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL APPEAL NO. E024 OF 2024

PLANET COACH LIMITED.....1ST

APPELLANT

BENJAMIN NGAO.....2ND

APPELLANT

VS

NDUNY'E NGIO.....

.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. J. Omwange (P.M.) delivered on 13.11.2024 in CMCC No. E054 of 2023 at Garissa).

JUDGMENT

1. By an amended plaint dated the 01.08.2024, the respondent moved the trial court averring that on or about 01.05.2022, the respondent was lawfully a fare paying passenger in motor vehicle registration number KDB 148D Scania Bus/Coach along Garissa - Mwingi road within chuma market area when the said motor vehicle owned by the 1st appellant was negligently, recklessly and/or carelessly driven by the 2nd appellant, or his authorized driver, servant, agent or employee without due regard to its passengers while attempting to overtake another MV, hit motor vehicle registration number KDB 004D from behind, lost control, veered off the road, hit a stone and fell thereby causing a road traffic accident consequences whereof the respondent sustained serious injuries for which she claimed damages. Consequently, the respondent suffered pain and loss.

2. The particulars of negligence and the injuries were set out as follows:
 - i. **Driving motor vehicle Regn. number KDB 148D Scania Bus/Coach in a careless manner.**
 - ii. **Driving at an excessive speed in the circumstances of the road.**
 - iii. **Failure to slow down, brake, swerve or act in any other reasonable manner to avoid the said accident.**
 - iv. **Failure to keep proper lookout of other road users.**
 - v. **Driving in a zig zag manner in the circumstances.**
 - vi. **Driving on the wrong side of the road.**
 - vii. **Failure to prevent the said accident.**
 - viii. **Driving without due care and attention.**
 - ix. **Driving a defective motor vehicle registration number KDB 148D Scania Bus/Coach.**
3. Particulars of the injuries suffered by the respondent were listed as follows: blunt injuries to the hand, blunt injuries to the head, blunt injuries to the left upper limb, blunt injuries to the left periorbital region and trauma to the eyes.
4. Reasons wherefore, she sought for judgment against the appellants for general damages, special damages of Kes. 3550 and costs of the suit.
5. The appellants entered appearance and consequently filed a statement of defence dated 09.11.2023 in which they denied the claim that at all material times to this suit, the 2nd appellant was the driver of the suit vehicle. On the other hand, it was denied that the 1st appellant was the registered owner of the suit vehicle

and therefore, the respondent was put to strict proof of the foregoing. They also denied the particulars of negligence as pleaded by the respondent. That without prejudice and in the alternative to the foregoing, the occurrence of the accident was caused solely and/or substantially contributed to the respondent's own negligence.

6. Additionally, the appellants denied being vicariously liable and further denied the averment that the doctrine of *res ipsa loquitor* was applicable in the circumstances herein and instead pleaded the doctrine of *volenti non-fit injuria*.
7. The particulars of the respondent's negligence were listed as follows:
 - i. Failing to take any or adequate precaution for her own safety.
 - ii. Failing to heed the instructions on safety precautions when travelling.
 - iii. Failing to heed the traffic rules and regulations when travelling.
8. The respondent filed a reply to defence dated 27.11.202 reiterating the content in the plaint thus joining issues with the defendants' defence. Further, the particulars of negligence attributed to the respondent under para 5 of the statement of defence were denied and the appellants put to strict proof.
9. The trial court found the appellants 100% liable and awarded the respondent general damages of Kshs. 600,000.00/-, special damages of Kshs. 3,550, plus costs and interest to run from the date of judgment until full payment.

10. The appellants being dissatisfied with the judgment particularly on quantum filed a memorandum of appeal dated 11.12.2024 citing the following grounds:

- i. The learned trial magistrate erred in law and fact by disregarding established legal precedent and thereby erroneously arriving at a wrong conclusion on quantum.**
- ii. The learned trial magistrate erred in law and fact when he failed to consider the applicants' submissions on quantum.**
- iii. The learned trial magistrate erred in law and fact in not making an award which was within limits of already decided cases of similar nature.**
- iv. The learned trial magistrate erred in law and fact in awarding judgment for soft tissue injuries as follows: general damages, Kes. 600,000.00/- and special damages Kes. 3,550.00/- without showing how he arrived at those figures and in total disregard of the submissions of the defendant on the issue of quantum.**

11. It was prayed thus that:

- i. The whole judgment by the trial court be set aside.**
- ii. The appeal be allowed.**
- iii. The costs of this appeal and that of the trial court be awarded to the appellant.**
- iv. Such further orders as may be made by this Honourable Court.**

12. The appeal was canvassed by way of written submissions.
13. The appellants in their submissions dated 11.07.2025 urged that the award of Kes. 600,000.00/- for soft tissue injuries was inordinately high and not supported by the nature of injuries sustained - namely cut wounds and bruises without severe complications. To support the foregoing, reliance was placed on the case of **Hassan Farid vs Sataiya Ene Mepukori (2018)** - where the plaintiff sustained soft injuries and was awarded Kes. 120,000 for similar injuries; **Justine Nyamweya Ochoki vs Jumaa Karisa (2020)** where on appeal, the court set aside an award of Kes. 300,000 and substituted it with an award of Kes. 150,000; and the case of **Edward Mutevu Maithya vs Edwin Nyamweya (2022)** where the plaintiff sustained cut wounds on the scalp, bruises on the back, bruises on the right upper limb and bruises on the left lower limb yet the court revised the award downward to Kes. 100,000.00/-. That in the given circumstance, an amount of Kes. 120,000.00/- was sufficient.
14. On the issue of costs, counsel urged that section 27 of the Civil Procedure Act grants the court discretion in their award. It was submitted that, in the circumstances of this case, the court should exercise that discretion in favour of the appellants and award them the costs of the suit.
15. The respondent on the other hand filed submissions dated 13.10.2025 urging that the appellants did not demonstrate any legal or factual error warranting interference by the appellate court. To buttress the fact that an appellate court may disturb a discretionary decision, reliance was placed on the case of **United**

India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] KLR where it was held that an appellate court only interferes if the trial court misdirected itself in law, misapprehended facts, considered irrelevant matters, ignored relevant considerations, or made a plainly wrong decision. Further reference was made in respect to the case of **Nina Mweu t/a Sassma Farm vs Muus Kenya Ltd & Another [2015] eKLR** where it was held that no point of law or substantial procedural error had been raised by the appellants to warrant the court upset the trial court's finding.

16. Counsel urged the court to find that the trial magistrate had acted within the law and had properly exercised discretion in awarding damages. It was submitted that, in light of this, the appeal ought to be dismissed in its entirety with costs, since the appellants had failed to meet the threshold necessary for the appellate court's interference.

17. This being a first appeal, this court must re-evaluate and re-assess the evidence afresh and make its own conclusions. It must, however, remember that the trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of **Mbogo and Another vs Shah [1968] EA 93** the Court of appeal stated that:

"... this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because

it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. Upon careful consideration of the record of appeal, the judgment of the trial court, the grounds set out in the memorandum of appeal, and the written submissions by both parties, this Court identifies the issues that fall for determination as:

- i. Whether the trial court’s award of Kes. 600,000 was inordinately high and should be set aside.**
- ii. Who should bear the costs of the appeal.**

19. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

20. From the record, the respondent suffered the following injuries: blunt injuries to the hand, blunt injuries to the head, blunt injuries to the left upper limb, blunt injuries to the left periorbital region and trauma to the eyes.

21. In the case of **Nyambati Nyaswabu Erick vs Toyota Kenya Ltd & 2 Others (2019) eKLR**, Justice D.S. Majanja held as follows:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

22. In the case of **Ufrah Motors Bazaar & another vs Kibe (Civil Appeal 39 of 2021) [2023] KEHC 1285 (KLR) (27 January 2023)** (Judgment), the court confirmed an award of Kes. 220,000/- for soft tissue injuries on the right shoulder joint, soft tissue injuries of the chest, soft tissue injuries of the back, deep lacerations on the right-hand arm, forearm and hand, soft tissue injuries of the knee joints and soft tissue injuries of the right hip joint.

23. On costs, this court seeks guidance from the guiding principles applicable in the exercise of discretion from the determination by the Supreme Court in the case of **Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party

who calls forth the event by instituting suit will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs- those costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases.

24. Upon review, the injuries pleaded and proved, this court holds the view that while the trial court exercised its discretion, the award of Kes. 600,000.00/- appears significantly higher than comparable awards for similar injuries cited above. This court is persuaded that the award was abit high taking into account inflation rates and comparable injuries in related cases. In my view therefore, an award of kshs 400,000/= would suffice as general damages for pain and suffering.

25. As to special damages the same were sufficiently proved hence no need for interference.

26. In the end, the orders that are commendable to me are as follows:

- i. The appeal succeeds in part.**
- ii. The award of general damages of Kes. 600,000.00/- is set aside and substituted with Kes 400,000/=**
- iii. Special damages of Kes.3,500**
- iv. Each party to bear own costs in respect to this appeal**

Dated, signed and delivered virtually this 19th day of January 2026

J.N.ONYIEGO
JUDGE