REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E065 OF 2023

BUNDA CAKE AND FEEDS LIMITED…… APPELLANT

VERSUS

CHARLES KIMITI KYALO……1ST RESPONDENT
ANNE EMILY NGACHE……2ND RESPONDENT

(Appeal from the judgement and decree, of Hon. MW Murage (Mrs), Principal Magistrate, PM, delivered on 16th December, 2022, in Milimani MCCC No. E2966 of 2016)

JUDGEMENT

1. The matter, at the trial court, had been initiated by the 1st respondent, against the appellant and the 2nd respondent. It was personal injury claim, arising from injuries that she had suffered in a road traffic accident. The accident had happened on 29th March 2014, and had involved motor vehicles belonging to the appellant and the 2nd respondent; being registration marks and numbers KAT 689Y and KBU 682C, respectively. The 1st respondent was a passenger in KBU 682C, owned by the 2nd respondent. She attributed negligence on the drivers of both vehicles.

2. The appellant and the 2nd respondent resisted the claim, in their separate defences. They blamed each other, in the alternative, for the accident, on account of negligence.

3. A trial was conducted. The 1st respondent testified, and called a doctor as her witness, and produced a medical report. The Advocate for the 2nd respondent participated in the proceedings, but closed the defence, without calling witnesses. The appellant did not participate in the

proceedings, and did not offer evidence, by way calling witnesses. Judgement was delivered, on 16th December 2022. The appellant and the 2nd respondent were found to be 100% liable. General damages were assessed, at Kshs. 1,550,000.00, and special damages at Kshs. 280,000.00; plus, costs and interests.

4. The appellant was aggrieved, hence the appeal. The grounds are that the 1st respondent had adduced evidence which pointed to the 2nd respondent having caused the accident; the evidence of the appellant's witness not considered; failing to find that the evidence tendered by the appellant had not been controverted by the 2nd respondent, neither did it controvert that by the appellant; the submissions by the appellant were not considered, in both quantum and liability; failure to apportion liability at 50:50; and the general damages awarded were excessive.

5. Directions, on the disposal of the appeal, were taken on 2nd May 2025 and 8th May 2024, for disposal by way of written submissions. Despite directions having been given, as back as 2nd May 2025, when the matter was placed before me, on 12th September 2025, during service week, none of the parties had filed their written submissions.

6. Let me start with liability. From the plaint, I see that the claimant, the 1st respondent herein, was a passenger in the vehicle of the 2nd respondent. That vehicle collided with that belonging to the appellant. Negligence was attributed to both, by the 1st respondent. In their respective defences, the appellant and the 2nd respondent blamed each other. At the trial, only the 1st respondent offered evidence. She adopted her witness statement, and testified, on cross examination, that she blamed both drivers for the accident, and pointed out that no driver had been blamed for the accident in the

police abstract. That was the only evidence that was availed on the accident.

7. The appellant asserts, in the grounds of appeal, that the 1st respondent had blamed 2nd respondent. I do not see that from the record before me. The 1st respondent adopted her witness statement, dated 24th November 2015. In that statement, she did not blame the 2nd respondent solely, for the accident, instead she blamed both drivers. She wrote, in the statement, "when we approached the Ngata Area or thereabout, the 1st and 2nd defendants' drivers/agents the negligently drove, managed and or controlled the motor vehicles that they caused or permitted them to violently collide with each other." At trial, she stated, "*No driver was blamed for the accident in the police abstract ... I blame the two drivers for the accident*." I do not see any material, where the 1st respondent is depicted as blaming the driver of the vehicle of the 2nd respondent, for wholly causing the accident, or for having substantially caused the accident. She blamed the both of them, without stating whether one of them contributed more than the other to the collision. There would have been no basis, therefore, for the trial court to find the 2nd respondent either wholly liable or to have contributed substantially more to the accident than the appellant.

8. On the court failing to apportion liability at 50:50, against both the appellant and the 2nd respondent, I would agree with the appellant. There was a collision of 2 motor vehicles, it cannot then be that both drivers were 100% liable for the collision. Apportionment of liability should be done, to separate the contribution of each of the drivers, to the collision, to ease the exercise of settlement of whatever award the court may impose. To find the 2 drivers jointly responsible, at 100%, is to create a difficulty, when it comes to settlement of the award. The trial court should have

endeavoured to apportion liability between the appellant and the 2nd respondent.

9. Should the liability have been at 50:50? It would be at 50:50, if both drivers contributed equally to the collision. The courts, in such cases as *Hussein Omar Farah vs. Lento Agencies* [2016] eKLR (Omolo, Tonoi & Githinji, J), *Matunda Fruits Bus Services Limited vs. Moses Wangila & another* [2018] eKLR (J. Ngugi, J) and *Philip Papoi Papa vs. Jiginashkumar Rameshbai & another* [2017] eKLR (Meoli, J), held that where the evidence does not bring facts that demonstrate how each driver contributed to the accident, the both drivers ought to be held equally liable. The 1st respondent blames both, and no effort to separate or apportion contribution as between them. That effort should have come from the appellant and the 2nd respondent. Yet, the appellant and the 2nd respondents chose not to present their drivers as witnesses, to shed light on what transpired, which would have aided in apportionment. In the absence of such evidence, and as the collision was not contested by either of them, or at any rate, they led no evidence to demonstrate that there was no such collision, the trial court should have apportioned liability between them equally, at 50:50.

10. In one of the grounds, the appellant claims that the evidence of his witnesses was not controverted by the 2nd respondent. I am not at all clear on what the appellant means by that submission, given that the appellant and the 2nd respondent did not offer any evidence at trial. They did not call witnesses. The case, the 1st respondent presented orally, at trial, was not controverted, by either of the defendants.

11. It could be that the appellant is referring to the case that it presented in its pleadings, the defence, inclusive of

the witness statement. Pleadings are not evidence. They merely make allegations. Trials are conducted for the purpose of evidence being adduced, to establish the allegations made in the pleadings. The facts, stated in the pleadings, are not evidence. The facts stated in the trial testimonies are evidence, inclusive of any documents and other material presented at the trial as evidence, to supplement the oral testimonies. To the extent that the appellant did not present any witness, meant that it did not adduce any evidence, to support its defence. The facts, alleged in the defence pleadings herein, were allegations, that were unproven.

12. It could be that the appellant has in mind the witness statements that it filed simultaneously with its defence. It did not file a single witness statement. Even if it had, such witness statement would not amount to evidence, that the trial court can rely on or attach value to, so long no witness is placed in the witness box, to breathe life into it, by way of oral testimony, under oath, which is subjected for cross-examination. The witness statement is not on oath, unless it is a witness afidvait. If it is not on aoth, it would conatain mre allagetaions of fact, that are not authenticated. They would be mere allegations that are not on oath. Such statements are of evidential value, unless adopted by a witness at the stand, who has been sworn. By adopting it, while under oath, the contents would have the force of a document or statement made on oath. The mere filing of the witness statement, which is unsworn, does not give it any evidential value. Value lies with its adoption by a sworn witness.

13. The appellant could also have in mind the documents filed in its list of documents. Just like in the case of the witness statements, the mere filing of documents, which are not annexures to a sworn affidavit, does not confer on them

any evidential value. They are of value only where they are bespoken by a sworn witness, and produced as exhibits. Other option, would be where the documents are produced by the consent of the parties in the matter, without being bespoken by witnesses. Neither of those happened, hence the documents, filed by the appellant, did not amount to evidence, which the trial court could evaluate and analyse, for the purpose of the judgment.

14. On the general damages, I note that the parties did not file written submissions and, therefore, I have nothing to guide me. Anyhow, I sit as a first appellant court, and going by *Selle and Another vs. Associated Motor Boat Company Ltd & Others* [1968] EA 123 (Sir Clement de Lestang, VP), I have jurisdiction to re-evaluate the evidence, and come to my own conclusions, as I am not tied to the conclusions of the trial court.

15. The 1st respondent sustained a dislocation of the right hip, deep cuts on the right upper eyelid, deep cuts on the left hand and bruises all over her head. General damages were awarded at Kshs. 1,500,000.00.

16. I have looked up decisions of my colleagues, and of the higher courts, on comparable injuries, and this is what I have come across. In *Kembe vs. Abiud* [2023] KEHC 1673 (KLR) (Odera, J), the claimant had sustained a dislocation of the right hip joint, dislocation of the right knee joint, chest pain, head ache, stiff neck, severe back pain, tenderness and swelling on left hand, and Kshs. 250,000.00 general damages were awarded. In *Kipyegen vs. Kingori & another* [2025] KEHC 3779 (KLR)(Gichohi, J), the injuries were a dislocation of the right hip joint, multiple cut wounds on the face, loss of right upper incisor tooth, blunt injury to left shoulder joint, blunt injury of anterior chest wall, soft tissue injuries of the left wrist joint, blunt injuries to the head and

blunt injuries to the head, and Kshs. 400,000.00 general damages was awarded.

17. The injuries suffered by the 1st respondent herein were less severe, compared with those in *Kipyegen vs. Kingori & another* [2025] KEHC 3779 (KLR) (Gichohi, J). the 1st respondent should not have been awarded damages higher than Kshs. 400,000.00. the award of Kshs. 1,500,000.00 was excessively on the higher side. I note that a medical report, by Dr. Moses Kinuthia, dated 14th December 2015, was produced. It refers to far more serious injuries that what was pleaded, that is to say fractures of the left superior and inferior pubic rami, fracture of the right acetabulum, dislocation of the right hip, deep cut wounds left upper eyelid, deep cut wound on frontal scalp and left upper limb, and multiple lacerations and bruises on both legs and left upper limb. It is said that she was admitted in hospital for 32 days. That appears to be supported by the case summary from Kenyatta National Hospital. Unfortunately, these severe injuries were not pleaded. Parties are bound by their pleadings. The plaint was amended, at some stage, but the amendments effected had nothing to do with the injuries.

18. On special damages, the trial court awarded Kshs. 280,000.00. The 1st respondent had claimed or pleaded Kshs. 647,108,000.00. The principle is that special damages should be both specifically pleaded and specifically proved. The trial court was persuaded that what was specifically proved amounted to Kshs. 280,000.00, that is from the documents filed by the 1st respondent. I have gone through the receipts, and they total to about that much. However, I see the invoice, dated 30th April 2014, from Kenyatta National Hospital, it was for a total of Kshs. 484,740.00. It confirms that Kshs. 360,000.00 had been paid, leaving a balance of Kshs. 124,740.00. I also see a clearance certificate, from the accountant, in charge of the private wing, of

Kenyatta National Hospital, dated 30th April 2014, it confirms that the invoice of Kshs. 484,740.00 had been settled in full. The 1st respondent should have been awarded the full amount of Kshs. 484,740.00, as there is evidence that it was paid, hence the clearance certificate. However, as there is no cross-appeal by her, I shall not interfere with the award on special damages.

19. In the end, I find the appeal merited. On the matter of liability, the judgment of the trial court assessing liability at 50:50 is hereby vacated, and substituted with an order that liability be borne at 50:50 as between the appellant and the 2nd respondent. The award on special damages shall remain intact, while that on general damages are hereby reduced to Kshs. 400,000.00. There shall be no order on costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 10TH DAY OF FEBRUARY 2026.

WM MUSYOKA
JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.
Mr. Maurice Onyango, Court Assistant, Milimani, Nairobi.

Advocates
Mr. Githua, instructed by Iseme Kamau & Maema, Advocates for the appellant.
Ms. Akinyi, instructed by Migos-Ogamba & Waudo, Advocates for the 1st respondent.
Mr. King'oo, instructed by King'oo & Associates, Advocates for the 2nd respondent.