

**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. E082 AND E110 OF**

**2023**

MARY NJERI

KAMAU.....APPELLANT

VERSUS

JOEL WARWIMBO WANGENDO .....1<sup>ST</sup>

RESPONDENT

SONGYI MOTORCYCLES

INTERNATIONAL LIMITED .....2<sup>ND</sup>

RESPONDENT

**JUDGMENT**

*(An appeal from the decision of Joseph Karanja (SPM) delivered on 1<sup>st</sup> September, 2023 vide Chief Magistrate Civil Case No. 11 of 2019 Naivasha)*

1. By a plaint dated 12<sup>th</sup> November 2018 and amended on 11<sup>th</sup> December, 2019 the plaintiff (herein “the

appellant”) sued the defendant (herein “the 1<sup>st</sup> respondent”) seeking for judgment against the defendant for:

*a) Kshs 224,145.00.*

*b) General damages.*

*c) Costs of the suit.*

*d) Interest on above at court rates from the date of filing suit.*

2. The plaintiff avers at paragraph 3 of the plaint that on or about 14<sup>th</sup> September, 2018 at about 6.45pm she was lawfully travelling as a pillion passenger aboard motor cycle Reg. No. KMCU 044B along the Kinangop-Naivasha road. That at NYS area, the defendant, his agent, servant, driver and or employee negligently drove, controlled and/or managed motor vehicle Nissan Pick-Up Reg. No KAM 650Q, that it collided into motor cycle Reg. No. KMCU 044B.
3. The particulars of negligence attributed to the driver of the defendant’s vehicle are tabulated as follows: -

- a) *Allowing and/or permitting motor vehicle Reg. No. KAM 650Q to be driven on a public road whist the same was brake-less and defective;*
- b) *Allowing and/or permitting unqualified personnel to drive and or control motor vehicle Reg. No. KAM 650Q on a public road;*
- c) *Failing to adhere to the traffic regulations;*
- d) *Driving at an excessive speed in the circumstance;*
- e) *Driving without any due care and attention;*
- f) *Failing to keep proper look out;*
- g) *Failing to brake, drop, swerve, slow down and/or avoid the accident;*
- h) *Allowing and/or permitting an accident to occur;*
- i) *Failing to keep distance;*
- j) *Driving without due regard to other road users;*
- k) *Res Ipsa Loquitor.*

4. The plaintiff avers that as a result of the said accident, she sustained the following injuries: -

- a) *Fracture distal end of the left tibia and fibula*

*b) Degloving injury to the left ankle joint*

5. The plaintiff further claims for special damages stipulated at paragraph 6 as follows: -

*a) Medical report----- Kshs*

*8,000.00/=*

*b) Records from registrar of motor vehicle-- Kshs*

*550.00/=*

*c) Medical expenses -----Kshs*

*215,595.00/=*

*Total-----Kshs 224,145.00/=*

6. However, the defendant denied the plaintiff's claim, in particular that, she was travelling on the material date and was involved in the accident in the manner described. That she suffered the alleged injuries, loss or damage. The particulars of alleged negligence of the defendant, his agent, and driver are denied.

7. However, in the alternative and on a without prejudice basis, the defendant pleaded that, if the accident occurred then the same was caused solely or

substantially contributed to it by the plaintiff or the beneficial owner of motor vehicle registration number KMCU 044B.

8. The particulars of negligence attributed to the plaintiff are stated as follows:

- a) Failing to wear any reflectors jacket or helmets on the motor cycle;*
- b) Being ferried b an unqualified/unskilled rider;*
- c) Failing to have any or any proper look, out or to have any sufficient regard for traffic that was/might reasonably be expected on the said road;*
- d) Being ferried on a defective motorcycle on the road;*
- e) Failing to have any or any proper look out;*
- f) Wobbling while being ferried on the road;*
- g) Jumping or attempting to jump from a moving motorcycle;*
- h) Putting out his legs wide on the road.*

9. The defendant further averred that if the alleged accident occurred which is hereby denied, then the same was inevitable and occurred despite the exercise of reasonable skill and due care on the part of the driver, servant and/or agent.

10. Finally, the defendant denied that, the doctrine of Res Ipsa Loquitor, Highway Code and Traffic Act applies herein as pleaded.

11. Be that as it were, the case proceeded to full hearing. The plaintiff's case was supported by the evidence of (PW1) No. 76934 PC Rodgers who testified that the accident involved a motorcycle registration No. KMCU 044D Skygo and motor vehicle KAM 650Q Nissan pick-up. That the rider was held to blame and charged with the offence of careless driving and riding a motorcycle without a driving license. However, at the time of the hearing, the traffic case had not been concluded.

12. In cross-examination, he stated that the motorcyclist entered the main road from the side road without giving

way to the vehicles on the road. However, the pillion passenger was not to blame in any way.

13. The plaintiff's case was also supported by her evidence wherein she relied on her witness statement and literally reiterated the averments in the amended plaint, save to produce the documents filed alongside the amended plaint as exhibits. The plaintiff maintained that the motor cycle was hit from the rear and doesn't blame the cycle rider for the accident.

14. In cross-examination, she stated that she did not know the status of the traffic case before she filed the suit herein. She maintained that the motorcyclist was not to blame and that, what the police were saying was not true. She confirmed that she could get the cyclist but would not call him as her witness.

15. On the other part, the defence case was supported by the evidence of (DW1) No. 76943 PC Rodgers Wafula who had already testified as (PW1). He produced a police OB No. 4/15/9/2018. That after investigations

were concluded, the cyclist was charged as herein stated. That no blame was placed on the part of the driver of the motor vehicle KAM 650Q.

16. In cross-examination, he admitted that he was not the investigating officer and stated that the records of the police abstract confirmed that the rider was charged with a traffic offence of careless driving as he failed to give way while joining the main road from a feeder road. However, he conceded that he did not have the traffic case number.

17. At the conclusion of the hearing and upon considering the evidence adduced and submissions tendered, the trial court delivered a judgment dated 1<sup>st</sup> September, 2023 wherein liability was apportioned among the parties in the ratio of 85:15% as against the defendant and motorcyclist (2<sup>nd</sup> respondent) respectively and in favour of the plaintiff.

18. The quantum was awarded as follows;

General	damages-----	Kshs
600,000		
Special	damages-----	<u>Kshs</u>
<u>224,145</u>		
Total	-----	Kshs 824,145
Less	15%-----	
Ksh123,621		
Total	award-----	Kshs
700,523.		

19. However, both parties are aggrieved by the decision of the trial court and appeal against it. The plaintiff relies on the following grounds: -

*a) That the Learned Magistrate erred in law and fact in apportioning liability against a rider who was not a party in the suit.*

*b) That the Learned Magistrate erred in law and fact in writing a judgment which fails to meet the criteria set out in the Civil Procedure Rules.*

20. The defendant on his part relies on the following grounds: -

- a) *That the Learned Trial Magistrate erred in law and in fact by failing to find that the respondent had not proved her case on liability;*
- b) *That the Learned Trial Magistrate erred in law and in fact by failing to dismiss the respondent's case for lack of proof of the appellant's negligence.*
- c) *That the Learned Trial Magistrate erred in law and in fact by disregarding the evidence adduced by police which cleared the appellant of any negligence in the circumstances of the accident.*
- d) *That the Learned Trial Magistrate erred in law and in fact by pre-determining liability against the appellant notwithstanding the weight of the evidence contradicting the respondent's allegations on the circumstances of the accident.*
- e) *That the Learned Trial Magistrate erred in law and in fact by apportioning the greatest liability against the appellant without any judicial backing or rationality.*

- f) *That the Learned Trial Magistrate erred in law and in fact by completely ignoring the appellant's written submissions dated 1<sup>st</sup> November, 2022 and focusing on the respondent's written submissions to reach a skewed determination on both liability and quantum.*
- g) *That the Learned Trial Magistrate erred in law and in fact by failing to consider and determine pertinent issues raised by the appellants in their written submissions dated 1<sup>st</sup> November, 2022.*
- h) *That the Learned Trial Magistrate erred in law and in fact by framing issues which predetermined the appellant's liability and compensation to the respondent*
- i) *That the Learned Trial Magistrate erred in law and in fact by failing to be guided by the doctrine of stare decisis in his judgment.*

*j) That the Learned Trial Magistrate erred in law and in fact by awarding exorbitant and excessive damages contrary to the evidence and precedents.*

21. The appeal was disposed of vide filing of submissions.

However, it is notable that the role of the 1<sup>st</sup> appellate court as stated by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123*, is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion.

22. After considering the appeal based on the grounds thereof and the other materials before court, the court finds that the first issue to determine is whether the trial court arrived at the proper decision in apportioning liability as stated herein.

23. In that regard, the plaintiff in submissions dated 10<sup>th</sup> October 2024, argued that, she was not in charge of either the motor vehicle or motorcycle involved in the accident. That her evidence as to how the accident

occurred was not challenged, rebutted nor controverted as the defendant's driver did not testify to rebut her evidence.

24. That the defendant's vehicle hit the motorcycle from the rear and that it is not usual and/or normal that drivers ram into rear of other vehicles while driving, as such the *Res ipsa loquitor* doctrine applies.

25. Further once she testified as to how the accident occurred, the burden shifted to defendant and in the absence of any explanation, the presumption is that the defendant's driver was to blame. The cases of; *Peter Ngigi Kuna & Another vs Thomas Ondili and Joyce Mumbi Ngugi vs The Co-operative Bank of Kenya Ltd and 2 Other, Civil Appeal No. 214 of 2004* were relied on.

26. The plaintiff further submitted that the defendant failed to enjoin the rider as a party to the suit, as such he is not entitled to blame a party not in the suit. The cases of; *Mugo vs Attorney General HCCA No. 1698 of*

1980, John Njenga Maina vs Humprey Kinyua Rukera HCCA No. 432 of 2012, and Benta Achieng vs Manish Shah Laiji & Another HCCA No. 108 of 2005) were relied on.

27. That the particulars of negligence against the rider were not proved and furthermore although (DW1) PC Rodgers blamed the rider, no supporting evidence in form of; occurrence books investigating report, police file, sketch plan, traffic case number, and concluded verdict of traffic case, was produced and that his evidence was secondary evidence.

28. The plaintiff relied on the case of Techard Steam and Power Limited vs Mutio Muli and Mutua Ngau (sung as personal representatives of the Estate of John Makau Ngao) HCCA No. 70/2018.

29. That the apportionment of liability is a matter of judicial discretion as stated in the cases of; Jackson Amuoko vs Abdulhalim Salvani CA 288 of 1998 and Khambi & Ann vs Mahithu & Another (1969) EA 70.

30. The defendant on its part filed submissions dated 7<sup>th</sup> October 2024 and submitted the plaintiff failed to prove the case yet she bears the legal burden to prove the allegations in the plaint once the defendant denies liability. The case of Susan Kanini Mwangangi & Another vs Patrick Mbithi Kavita (2019) eKLR was relied on. That it was not for the defendant to prove negligence on their part or part of the rider. That Police Constable who testified for plaintiff was categorical that, the driver of motor vehicle Reg. No KAM 650Q was not to blame.

31. That appellant was not a party to the suit therefore, no liability could be apportioned against her and the case should have been dismissed. Reference was made to the cases of Peter Kanithi Kimunya vs Aden Guyo Haro (2014) eKLR and David Ogol Alwar vs Mary Atieno Adwera & Another (2021) eKLR. Further reliance was placed on the case of Mulwa Karuo vs Davison Nthenge (2018) eKLR.

32. That the rider should have been sued by the plaintiff and not the defendant. Further he was not called as a witness nor sued and the fact that the driver was not charged after investigation means overwhelming evidence against the rider. That failure to call the rider as a witness should be blamed on the plaintiff.

33. To revert back to the matter herein the first issue to determine is the joinder of the rider in this matter. Joinder of a third party (often termed impleader) allows a defendant to bring a non-party into an existing lawsuit who may be liable for all or part of the plaintiff's claim, promoting efficiency and avoiding multiple suits. This process requires a third-party notice and is typically used when the third party is necessary for complete relief or, if not joined, would leave an existing party at risk of inconsistent obligations.

34. Key aspects of third-party joinder include:

*a) Purpose: To resolve all related disputes in one proceeding, saving time and costs.*

*b) Procedure: A defendant files a third-party notice (often via summons in chambers) after which the court may give directions on the liability of the new party.*

*c) Timing: It can often be done at any stage of the proceedings.*

*d) Default: If a third party fails to appear, they are deemed to admit to the validity of the decree and their liability.*

*e) Mandatory Joinder: If a person is indispensable for a fair, complete, and final adjudication, the court may compel their inclusion.*

35. In the instant matter, it is on record that by a chamber summons application dated 25<sup>th</sup> June, 2019, the defendant sought for leave to issue Third Party Notice to; Songyi Motorcycles International Limited. He also sought that subsequent to issuance of the leave, leave be granted to effect service by way of substituted

service vide registered post of the intended third party company's address, P.O. Box 10340-00100 Nairobi. Further that the said 3<sup>rd</sup> party be at liberty to enter appearance within 15 days of service of the notice and costs of the application be in the cause.

36. By an order of the court dated 14<sup>th</sup> August, 2019, the defendant was granted leave to issue a 3<sup>rd</sup> party notice, however, the court declined to allow service by substituted means and ordered that the 3<sup>rd</sup> party be served through personal service.

37. Subsequently on 3<sup>rd</sup> February, 2021, the court allowed the defendant to serve the 3<sup>rd</sup> party notice by way of registered post within 7 days of the date of the order.

38. On 10<sup>th</sup> March 2021, the defendant informed the court that he had served third party notice and the court recorded that it had noted service upon the 3<sup>rd</sup> party and affidavit (presumably) of service.

39. However, it does appear no further direction or order were given regarding the 3<sup>rd</sup> party as to its failure to

enter appearance and whether the liability between the defendant and the 3<sup>rd</sup> party would be determined in the primary suit.

40. Be that as it may, the suit continued to full hearing and determination without the participation of the 3<sup>rd</sup> party and/or any of the parties herein raising the issue of the absence of the 3<sup>rd</sup> party.

41. Furthermore, a perusal of the three issues for determination stated in the defendant's submissions in the trial court, clearly reveals that the issue of 3<sup>rd</sup> party was not identified. A perusal of the plaintiff submissions in the trial court reveal that the issue of failure to join the third party was raised with reference to Order 1 Rule 15 of the Civil Procedure Rules.

42. However, the trial court stated that "the motorcycle who was not made a party to the suit ought to bear partial blame for the occurrence of the accident". The trial court did not even name the third party as a party to the suit in the judgment.

43. Based on the aforesaid, the trial court erred in its finding that a person who is not a party to the suit can bear liability. However, that finding was misguided as the court had already granted leave to join a third party and third party notice issued and served.

44. Pursuant to the aforesaid, it is the finding of this court that the 3<sup>rd</sup> party was a party to the suit herein and any arguments to the contrary is misguided and not tenable. In fact, in the HCCA No. 82 of 2023, the plaintiff/appellant names the third party as the 2<sup>nd</sup> respondent.

45. Having resolved that issue the next issue to determine is the merit of the appeal.

46. On liability and upon evaluating the evidence adduced and already summarized herein, the court finds that the plaintiff has the primary duty to prove the case on the balance of probability. In this case, the plaintiff blamed the defendant solely for the accident thus exonerating the rider. However, the plaintiff's witness (1) laid blame

on the rider, so how does the plaintiff argue that she proved her case? If the plaintiff's case is that the rider was not to blame, then nothing would have made her case stronger and corroborated than the evidence of the rider. Why didn't he testify yet he was the one on the steering?

47. On the other part, the defendant blamed both the plaintiff and rider and adduced no evidence to support negligence on the part of the plaintiff. As regard the rider, it is the defendant's case that he emerged on the main road without stopping to give way to the other road users on the main road. But what is the basis of that evidence in the absence of the evidence of the driver of the defendant's driver? The defendant cannot rely on evidence of an officer who did not investigate the case or even visit the scene, and at most his evidence could only support and corroborate the evidence of his driver.

48. Pursuant to the aforesaid, and taking into account that the plaintiff was a passenger, not behind any of the wheels herein and therefore could not have caused the accident, and the only parties that could testify as to how the accident occurred was the rider and defendant's driver. None of them testified and therefore, it is the considered finding of this court that they share liability equally. Further the ratio of liability by the trial court is unsubstantiated.

49. Consequently, I set it aside judgment of the trial court on liability and enter judgment on liability against the defendant and 3<sup>rd</sup> party in the ratio of 50:50% and in favour of the plaintiff.

50. As regard quantum, I have considered the injuries the plaintiff suffered as pleaded, the medical documents availed, in particular Dr Obed's medical report and the submissions of the parties and authorities relied on. Notably Dr. Obed's classified the injuries as harm. The report does not indicate any hospitalization. But the

plaintiff has produced an invoice showing hospitalization at Nairobi Womens Hospital. A perusal of the final invoice at page 23 of plaintiff/appellant's record of appeal, shows date of admission as 15<sup>th</sup> September, 2018 but does not show the date of discharge which is blank. Notably, a document entitled "referral/transfer issued at the said hospital at page 15 of plaintiff/appellant record of appeal is incomplete. A P3 form was not produced.

51. Consequently, the award of Kshs 600,000 as general damages for injuries classified as harm is high and calls for interference and in any case the trial court did not justify the award and therefore the award of Kshs 600,000 is set aside and substituted with the award of Kshs 400,000 as general damages.

52. Furthermore, money cannot replace the human frame that has been battered and shattered. In that regard the Court of Appeal in the case of; Coastal Kenya Enterprises Limited v Muchiri (Civil Appeal 84 of 2017)

[2023] KECA 897 (KLR) (24 July 2023) (Judgment) stated as follows: -

*“In making these awards we identify ourselves with the words of Potter, JA in Rahima Tayab & Others vs Anna Mary Kinanu [1983] KLR 114; where it was held while relying on the oft-cited case of H West and Son Ltd vs Shephard [1964] AC 326 at 345 that:*

*'Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation.*

53. On special damages, it is noted that the trial court awarded the same on the ground that they were supported by receipts, the defendant/appellant does not state what amount was proved or not, the court should not descent into an arena of litigation but relies on evidence before it. A perusal of the defendant's submissions in the trial court reveals not contestation

on special damages to warrant interference with the judgment on special damages

54. The amount awarded shall attract interest from date of judgment in the trial court. Costs of case in trial court to the plaintiff. Each party to bear costs of the appeal

55. It is so ordered.

Dated, delivered and signed on this 23<sup>rd</sup> day of February 2026

**GRACE L. NZIOKA**

**JUDGE**

In the presence of: -

Mr. B.G Wainaina for the Plaintiff

Ms Nafula for Defendant

Ms Hannah Court Assistant

