

**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL CASE NO. E027 OF 2023**

CHRISPUS KURIA NJOGA, -----

APPELLANT

VERSUS

JOSEPH KAMAMI MWEMA-----

RESPONDENT

*(Being an appeal from the judgement of Honorable E. Kelly, Senior Resident Magistrate delivered on 28<sup>th</sup> March 2023 vide, Chief Magistrate Civil Case No. E151 of 2020).*

**JUDGMENT**

1. By a plaintiff dated 21<sup>st</sup> May 2020, the plaintiff sued the defendant seeking for judgement against the defendant for: -

- a) General damages,
- b) Special damages Kshs 13,050,

c) Costs of the suit.

2. The plaintiff's case is that the defendant is the registered owner of motor vehicle registration number KCG 147A. That on or around 27<sup>th</sup> July 2019, he was travelling as lawful passenger in the defendant's motor vehicle along Fly-Over-Njabini Road and at Kirita River, the defendant's motor vehicle was driven so negligently by his authorized driver and/or agent that it lost control and collided with another motor vehicle registration number KBF 9417D thus causing the accident.
3. The particulars of negligence attributed on the part of the defendant's driver or agent as follows; driving motor vehicle at an excessive speed in the circumstance of the road, failing to slow down, stop, brake, swap, or act in any other reasonable way to avert the said accident, driving on the wrong side of the road, failing to keep proper lookout to other road users, driving without due care and attention,

and/or regard to other road users and in zig zag manner.

4. The plaintiff also relies on the document of res ipsa loquitor

5. The plaintiff avers that as a result of the said accident, he sustained the following injuries; fractured distal end of the left tibia and fibula with fragment, severe soft tissue injuries on the left leg, deep cut wound on the right knee joint leading to soft tissue injury and blunt injury to the anterior chest wall.

6. The particulars of special damages are tabulated at paragraph 8 of the claim as follows: -

- a) Medical report-----Kshs 8000,
- b) P3 form-----Kshs 1000,
- c) medical expenses -----Kshs 4050
- d) Total -----Kshs 13, 0507

7. The plaintiff's claim was opposed by the defendant vide a statement of defence dated 7<sup>th</sup> September

2020. He denied being the registered owner of the vehicle KCG 147A, that the plaintiff was travelling as stated, was involved in an accident, got injured and suffered physical injuries and/or damage

8. The particulars of negligence attributed to the defendant's driver were denied and so were the particulars of special damages

9. However, the defendant pleaded that in the alternative and on a without prejudice basis, if the accident occurred then it was solely caused and/or contributed to by the plaintiff and the driver of the other vehicle KBF 947D.

10. The particulars of negligence attributed to the plaintiff include:

*a) Failing to take any adequate precaution for his own safety;*

*b) Failing to heed the instructions on safety precautions when travelling;*

*c) Failing to heed the traffic rules and regulations when travelling;*

*d) Failing to use the safety belt provided by the defendant*

11. The particulars of negligence attributed to the driver of vehicle KBF 947D are: -

*a) Driving without due care and attention;*

*b) Failing to maintain any or any proper lookout;*

*c) Failing to have any or due regard for other road users and in particular motor vehicle registration number KCG 147A;*

*d) Driving on the path of motor vehicle registration number KCG 147A endangering (the lives of) other road users with his manner of driving;*

*e) Failing to swerve, to stop and/or apply brakes or in any other way steer and/or*

*control the said motor vehicle as to avoid a collision;*

*f) Causing the accident;*

*g) Res-ipsa loquitor.*

12. The defendant further averred that, if the accident occurred as alleged, then it occurred without the negligence of the defendant, and/or was inevitable.

13. The case proceeded to full hearing. The plaintiff's case was supported by his evidence wherein he relied on the statement he filed alongside the plaint, in which he reiterates the content of plaint save to produce the document in support of the claim.

14. PW2 Obed Omuyoma who examined the plaintiff and produced a medical report stated that, the plaintiff suffered fracture of tibia and fibula and soft tissue injuries. That the bone was detached completely at the fracture. He awarded 20%

permanent disability. In cross-examination he stated that a fracture heals in 6 weeks and that he examined the plaintiff after 5 months of the accident and was still in crutches.

15. PW3 No. 54233 PC John Karuri who produced a police abstract testified that, the accident involved the two vehicles herein, and occurred when motor vehicle KBF 947D hit a pothole and the tyre came off while in motion and it collided with the other vehicle. In cross-examination, he stated that, he blames both drivers.

16. The defendant did not adduce any evidence at the hearing of the case but the medical report by Dr. Jennipher Kahuthu dated 3<sup>rd</sup> August 2020 was produced by consent of the parties.

17. The hearing was concluded and the parties filed their final submission. By a judgment the dated 28<sup>th</sup> March 2023, the defendant was found 20% liable. The plaintiff was awarded Kshs 90,000 as

general damages and Kshs 12,050 as special damages. The costs of the suit were awarded to the plaintiff and interest from date of judgment.

18. However, the plaintiff is aggrieved by the decision of the trial court and appeals against it on the following grounds:

*a) That the trial Magistrate erred in law and in fact by finding the appellants 80% liable notwithstanding that there was overwhelming evidence to blame the respondent and no evidence to controvert the appellant's evidence.*

*b) That the learned Magistrate erred in law and in fact by apportioning liability to the appellant when there was overwhelming evidence against the defendants/respondent*

*c) That the learned Magistrate erred in law and in fact by awarding judgment on quantum that was too low when there was overwhelming evidence to support the appellant's case;*

*d) That the learned trial Magistrate erred in law and in fact by failing to consider the plaintiff/appellant's submissions on quantum payable and therefore awarding general damages which were too low comparable to the injuries suffered by the appellant*

*e) That the learned trial Magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before her.*

19. The appeal was disposed of vide filing of submissions

20. The appellant in submissions dated 3<sup>rd</sup> October 2023 argued that the trial court erred by failing to apportion 80% of the liability to any party while apportioning only 20% to the respondent. That from

the judgment, it was either the appellant or the 3<sup>rd</sup> party who were liable for the 80% liability.

21. The appellant submitted that he was a passenger in the respondent's motor vehicle and did not therefore contribute to the accident. Further, he was the only eyewitness to the accident and gave evidence in the trial court that the respondent's driver swerved to the right and occasioned the accident. However, the trial court ignored his testimony and relied on the evidence of PW2 who produced the police abstract but was not the investigating officer nor was he an eyewitness.

22. That the Court of Appeal in the case of Joyce Mumbi Mugi vs The Co-operative Bank of Kenya Limited & 2 others Civil Appeal No. 214 of 2024 held that where a motor vehicle is being driven at a normal and reasonable speed and an accident occurs or it veers off the road, there must be an

explanation given by either the driver or a passenger who was in the vehicle or a bystander.

23. Further, the respondent did not call any witnesses in support of its case including the driver of its vehicle which in turn meant that the appellant's evidence was not challenged. That in the case of Board of Trustee Meru Diocese Kirimara Parish vs Dores Wanja Bore (2020) eKLR the High Court held that the failure of the defendant to adduce evidence meant that the evidence by the plaintiff was not controverted and therefore the plaintiff discharged the burden of proof on a balance of probabilities.

24. The appellant further argued that the 3<sup>rd</sup> party was not a party to the suit and could not therefore be held to have been liable. Reliance was placed on the case of John Njenga Maina vs Humphrey Kinyua Rukjeria (2016) eKLR where the High Court stated that where a defendant seeks contribution or indemnity from any person not a party to the suit

then such defendant is required to apply for leave of court to issue a third party notice. The court went on to hold that the trial court erred in solely blaming the accident on the party that was not present in court and that in the absence of the third party, the respondent should shoulder full responsibility.

25. The appellant submitted that the failure of the respondent to call any witnesses meant his evidence was not challenged and therefore the Magistrate erred in apportioning the respondent 20% liability instead of 100% liability

26. On quantum, the appellant cited the case of *Shabani vs County Council of Nairobi (1985) KLR 516* where the Court of Appeal laid out the circumstances in which it can interfere with an award of damages being where; the award is inordinately high or low as to represent an erroneous estimate, or that the judge proceeded on wrong principles or misapprehended the evidence in

some material aspect thus arriving at a figure that was inordinately high or low.

27. The appellant submitted that award of damages herein is inordinately low. That he proposed an award of Kshs. 800,000 and relied on the case of West Kenya Sugar Company Ltd vs Bonventure Abwire Were (2019) eKLR where the plaintiff suffered an injury to the shoulder, and a fracture of the distal ends of the right tibia and fibula.

28. The appellant faulted the trial Magistrate for holding that the afore case law was not comparable arguing that the injuries he sustained were more severe than those in the authority cited. That as a result the trial Magistrate arrived at an award that was low in comparison to the injuries suffered.

29. The appellant prayed that the court set aside the judgment on liability and quantum and enter judgment in favour of the appellant with liability apportioned at 100% against the respondent and

the award of general damages be revised to Kshs. 800,000.

30. However, the respondent in submissions dated 29<sup>th</sup> March 2024, argued that the appellant did not state and/or adduce any evidence to show that the respondent was negligent at all. That during the trial the appellant called three (3) witnesses including PW3 54233 Police Constable John Karuri who blamed motor vehicle registration No. KBF 947D of causing the accident after its tyre came off, causing it to lose control and hit and/or ram into his motor vehicle.

31. That, the appellant having failed to prove his case on a balance of probabilities, there was no sufficient evidence to warrant the respondent being held to be liable at 20%. He relied on the case of Mary Wambui Kabugu vs. Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995 as cited in Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis

Karenga [2021] eKLR and Benter Atieno Obonyo v Anne Nganga & another [2021] eKLR where the courts referred to section 107, 108 and 109 of the Evidence Act and held that the age long principle of law is he who alleged must prove

32.The respondent further relied on the case Eastern Produce (K) Limited V Christopher Atiado Osiro [2006] eKLR the court cited the case of Kiema Mutuku v. Kenya Cargo Hauling Services Ltd. (1991) 2 KAR 258 where it was held that a plaintiff must prove some negligence where the claim is based on negligence.

33.On quantum, the respondent submitted that assessment of damages is discretionary and should be exercised judicially. That an appellate court will interfere with the exercise of jurisdiction where the trial court; took into account an irrelevant factor or, left out of account a relevant factor or, the amount is so inordinately low or so inordinately high that it

must be a wholly erroneous estimate of the damages.

34. The respondent further submitted that awards must be within consistent limits and must be made taking into account comparable injuries or similar injuries and awards as held in the case of *Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR.*

35. The respondent argued that the award of Kshs. 450,000 as general damages is sufficient taking into account the injuries sustained by the appellant. He relied on the case of, *Harun Muyoma Boge v Dr. Daniel Otieno Agulo, Migori HCCA No. 86 of 2012* cited with approval in *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR* where the plaintiff sustained multiple injuries and fractures of right tibia and fibula with the High Court awarding damages of Kshs. 300,000.

36. That in the case of Naom Momanyi vs. G4S Security Services Kenya Limited [2018] eKLR the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300,000.

37. Similarly, in Wakim Sodas Limited vs. Sammy Aritos [2017] eKLR the plaintiff sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula and was awarded general damages of Kshs. 400,000, which was upheld by the appellate court.

38. Further in Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR the appellant sustained soft tissue injuries, head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb and the High Court upholding the award of Kshs. 300,000 holding that award of

damages range between Kshs. 300,000 to Kshs. 500,000.

39. Further, in the case of *Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR* the plaintiff suffered lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and was awarded Kshs. 450,000 on appeal.

40. The respondent cited section 27 of the Civil Procedure Act and submitted that costs follow the event and urged the court to dismiss the appeal in totality and award him costs of the appeal.

41. In consideration the appeal this court notes 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 afresh and arrive at its own conclusion.

42. The court stated as follows: -

*“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some*

*point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

43. To revert back to this matter and in considering the arguments advanced by the parties and the material before the court, it is noted that, the liability against the plaintiff was based on the evidence of PW3 PC Karuri. However, at page 7 of the judgment the trial court acknowledges that, the witness admitted that he was not the investigating officer, did not visit the scene and did not have the police file. That there was no evidence of the point of impact of the accident.

44. Further, the defendant did not testify as to how the accident occurred to rebut the plaintiff's evidence or support averments in the defence. Therefore, to hold the defendant liable at 20% only based on the

plaintiff's evidence that he failed to swerve to avoid the accident and yet he never corroborated that evidence is not tenable. Furthermore, the judgment is not clear as to which party is shouldering the other 80%. Moreover, PW1 testified that both drivers were to blame.

45. It is also noted from the judgment that the trial court stated that vehicle KBF was travelling from Magumu to Njabini direction, "hence it can be deduced that the two vehicles were headed opposite direction". Notably this finding of the trial court is not supported by evidence on record and therefore, drawing inference in the circumstances may lead to a conclusion that, the court descended into an arena of litigation.

46. Further, the court did not attribute any liability on the owner of the vehicle KBF stating that, it was unfortunate that motor vehicle KBF was not a party

to the suit. The question is who should have made the owner of that vehicle a party?

47.The provisions of Order 1 Rule 15 of the Civil Procedure Rules provides for joinder of a third party. The defendant/respondent attributed liability to the owner of vehicle KBF and should have joined him once sued. Therefore, the plaintiff cannot be blamed.

48.Finally, the plaintiff was a passenger, how could he contribute to the accident when he was not on the steering of any of the two vehicles and indeed no evidence was led to support the particulars of negligence attributed to him.

49.As a result, judgment on liability set aside and substituted with the finding that the defendant is 100% liability.

50.As regard quantum the trial court relied heavily on the evidence of Dr. Omuyoma stating at page 8 of judgment trial court that Dr. Jennipher Kahuthu was

not called to testify to elaborate on contents of her report. However, the parties admitted her report by consent and the doctor was not required to testify. Therefore, the court's finding not factually correct.

51. Be that as it may, the trial court analysed the authorities cited in supporting the proposed amount for general damages. That said, the injuries pleaded herein are basically; fracture of tibia and fibula, and soft tissue injuries.

52. Dr. Omuyoma testified that a fracture should heal in 6 weeks. He examined plaintiff after 5 months. He classified degree of injury as grievous harm. He did not justify the basis of 20% permanent disability. Subsequently Dr. Kahuthu examined the plaintiff on 3<sup>rd</sup> August 2020, a year after the accident and found inter alia, he was walking with aid of a walking stick. That, the x-ray taken showed healed fracture. No permanent disability anticipated.

53. In given circumstances had the trial court considered the report by Dr. Kahuthu, then the amount awarded would have been different. I therefore set aside award of Kshs 90,000 as general damages substitute with Kshs 450,000, which the trial court found reasonable. Notably there is no cross-appeal. The costs of case in the trial court are awarded to the plaintiff, and appeal be met by each party. Interest on the sum herein to accrue from date of judgment in the trial court.

54. Ordered accordingly.

Dated, delivered and signed on this 24<sup>th</sup> day of February 2026

**GRACE L. NZIOKA**

**JUDGE**

In the presence of

Mr. Owour for the appellant

N/A for the defendant

Hannah -Court assistant