REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E018 OF 2024

ANN WAMBUI KAROBIA……1ST APPELLANT

JOHN GAITHO MWANGI……2ND APPELLANT

VERSUS

MARY NYAMBURA NJUGUNA……RESPONDENT/CROSS-APPELLANT

As consolidated with

CIVIL APPEAL NO. E025 OF 2024

MARY NYAMBURA NJUGUNA…… ……APPELLANT

VERSUS

ANN WAMBUI KAROBIA……1ST RESPONDENT

JOHN GAITHO MWANGI……2ND RESPONDENT

(Being appeals from the Judgment and Decree of Hon. E.Kelly (PM) in Naivasha CMCC No. E527 of 2021 delivered on 12th March, 2024)

JUDGMENT

Background of the Appeal

1. For the purposes of this judgment and for the reason of the consolidation of the two appeals, the parties shall be addressed in their capacities and description in Civil Appeal No. E018 of 2024, the lead file.

2. The litigation before the trial court was initiated by a Plaint dated 17th August 2021, where the Respondent instituted a suit against the Appellants seeking general damages for pain, suffering, and loss of amenities, special damages of Kshs 234,220/=, together with costs of the suit and interest thereon.
3. The Respondent's case was that on or about 23rd June 2018, she was lawfully travelling as a passenger in motor vehicle registration number KCA 538E, a Toyota Passo registered in the name of the 1st Appellant. She alleged that the 2nd Appellant, being the driver of the said vehicle, negligently and carelessly drove without due regard for other road users, causing the vehicle to lose control and collide with motor vehicle registration number KCE 925R, a PSV Toyota Matatu.
4. The particulars of the negligence, injuries and special damages were then set out with the prayers that she be awarded general and special damages as well as costs of the suit.
5. In their joint Statement of Defence dated 18th January 2022, the 1st Appellant denied ownership of motor vehicle registration number KCA 538E, while the 2nd Appellant denied having driven the vehicle as alleged. They further denied the occurrence of the accident and refuted any act of negligence attributed to them. In the alternative, they contended that if the accident did occur, it resulted from the negligence of the driver of motor vehicle registration number KCE 925R, the PSV Toyota Matatu.

6. In its reserved judgment delivered on 12th March 2024, the learned trial court found both the Appellants and the Respondent equally at fault for the accident, apportioning liability in the ratio of 50:50. The Respondent was awarded general damages of Kshs. 300,000/=, and special damages of Kshs. 227,720/=, the latter being awarded in full without apportionment. The Respondent was also granted costs of the suit and interest thereon.
7. Aggrieved by this decision, the Appellants lodged the present appeal vide a Memorandum of Appeal dated 21st March 2024, seeking orders that the Respondent be found fully culpable for the accident, that the award of special damages be reduced in accordance with the degree of contribution found, that the award of special damages be reassessed, and that the costs of this appeal be borne by the Respondent.
8. The seven grounds of appeal fault the trial court: -
    a) **THAT the learned trial magistrate erred and misdirected herself in fact and law by failing to subject special damages to the contribution apportioned on liability.**
    b) **THAT the learned trial court was in error of law and fact in failing to reduce special damages by the contribution of the Respondent on liability with resultant injustice.**

c) THAT the learned trial magistrate misdirected herself on facts and law by awarding special damages to the Respondent that were not proved to the required standard.

d) THAT the learned trial court was in error of law and fact in failing to take into account certain considerations material to an estimate of evidence.

e) THAT the learned trial court was in error of law and fact in failing to find that the plaintiff was fully culpable in that she admitted in her witness statement to knowing that her brother/the driver was drunk and that she was the one directing him on how to drive at the time the accident occurred.

f) THAT the learned trial court was in error of law and fact in failing to dismiss the suit on the respondent admission that she boarded the vehicle knowing that her brother/driver was drunk and she issuing directions on how he should drive at the time the accident happened.

g) THAT the learned trial court was in error of law and fact in failing to dismiss the Respondents suit when the Respondent testified and admitted in her witness statement that the decision to make a U

turn was hers as her brother/driver was drunk and the accident happened when the drunk driver decided to heed the directions of the Respondent and attempted the U turn.

9. To the contrary, in Civil Appeal No. E025 of 2024, the Respondent, by a Memorandum of Appeal dated 11th April 2024, seeks orders that the trial court's finding on liability be set aside, that the Appellants be found wholly liable for the accident, that the general damages awarded be reassessed and increased, and that the costs of this appeal be borne by the Appellants.

10. That appeal is anchored on the following grounds:

    a) **THAT the learned Principal Magistrate erred in law and in fact in holding the Appellant, a passenger, contributorily negligent.**

    b) **THAT the learned Principal Magistrate erred in making an award on general damages that was extraordinarily low in the circumstances of the case.**

11. Parties have canvassed the appeal by way of written submissions and the court having taken time to read such submissions, elects not to reproduce same in extension but only in a summarised version.

<u>Appellants' Submissions</u>

12. The Appellants contend that, having apportioned liability between the parties at 50:50, the trial court ought to have subjected the award of special damages to the same principle of contributory negligence. In support, they refer to **United Millers Limited v Aetoni (Civil Appeal 20 of 2020) [2022] KEHC 13279 (KLR),** where it was held:

> **"This court ascribed to the school of thought that special damages must be subjected to contribution for the reason that the party who would have suffered a loss would have contributed to the causation of the accident in which he or she sustained the injury. The same principle would apply even where a party had not necessarily contributed to the causation of the incident but had conceded some form of contribution during negotiations with a view to amicably resolving the issue of liability. Once liability was apportioned at 75%-25%, the Learned Trial Magistrate acted correctly when she subjected all sums due to the Respondent to contribution."**

13. The Appellants further refer to **Gilbert Wanjala Fwamba v P.N. Mashru [2016] eKLR** and **Kennedy Ogando v Dennis Bosire Nyangena [2021] eKLR**, where the courts affirmed that

special damages must reflect the proportion of contributory negligence attributed to each party.

14. The Appellants submit that the Respondent was aware that the driver of motor vehicle registration number KCA 583E, a Toyota Passo, was intoxicated, and therefore ought not to have boarded the vehicle. Having chosen to board the vehicle despite this knowledge, the Respondent cannot now disclaim liability for the resulting misfortunes. In support, they rely on **Swan Carriers Limited v Boniface Moseti Oyaro [2019] eKLR**, where the court upheld a trial court's judgment apportioning liability to a passenger who knowingly boarded a vehicle with a mechanical defect.

Respondent's Submissions

15. The Respondent contends that her admission that she knew the 2nd Appellant was intoxicated does not establish contributory negligence on her part. She submits that, having boarded the vehicle, she had no control over the driver's actions and no reasonable means to assess the extent of his intoxication. She further submits that passengers rely on the duty of care owed by drivers and vehicle owners, who are responsible for ensuring road safety.

16. She further argues that the principle of assumption of risk requires more than mere knowledge of a potential danger; it demands a voluntary decision to engage in a known risk when a

reasonable alternative exists. The Respondent asserts that she could not determine the precise level of intoxication of the driver or its effect on his ability to operate the vehicle safely. In support, she cites **Kenya Bus Service Ltd v Humphrey [2003] eKLR**, which held that a passenger does not assume risk merely by being in a vehicle involved in an accident unless there is clear evidence of recklessness or voluntary assumption of risk. She also refers to **Joseph Kahiga Gathungu v World Vision Kenya [2014] eKLR**, where it was held that passengers are not expected to investigate the sobriety of drivers in the absence of clear and undeniable indicators of intoxication.

17. The Respondent contends that the doctrine of *volenti non fit injuria* does not apply in this case, as she did not willingly accept the risk of the accident occurring.

18. Regarding the quantum of general damages, the Respondent submits that the trial court's award of Kshs. 300,000/-, which, when subjected to 50% liability, amounted to Kshs. 150,000/=, is inordinately low given the severity of her injuries, namely a displaced fracture of the right acetabulum and a deep cut wound on the forehead.

19. She proposes an award of Kshs. 1,500,000/= in general damages, citing **Shiro v Mini Bakers (NBI) Limited [2014] KEHC 16642 (KLR),** where the court awarded a similar amount to a

plaintiff who had suffered a fracture of the posterior wall and column of the right acetabulum, deep cut wounds on the head and chest causing soft tissue injuries, and a permanent disability of 30%.

Issues, Analysis and Determination

20. Having carefully considered the Record of the trial court, the judgment of the trial court, and the rival submissions by the parties, the following issues arise for determination:

a) **Whether the trial court erred in apportioning liability at 50:50 between the Appellants and the Respondent?**

b) **Whether the apportionment of liability ought to apply to the award of special damages? and**

c) **Whether the award of general damages was inordinately low so as to warrant interference by this Court.**

Whether the trial court erred in apportioning liability at 50:50 between the Appellants and the Respondent?

21. The trial court found the Appellants and the Respondent equally to blame for the accident and apportioned liability at 50:50. The Respondent was found contributorily negligent on the basis that she knew the 2nd Appellant, who was driving motor vehicle registration number KCA 538E, was intoxicated, yet nonetheless chose to board the vehicle.

22. The Respondent contends that as a passenger she bore no responsibility and that liability ought to have been placed wholly upon the Appellants.

23. The principles governing contributory negligence in circumstances where a passenger knowingly accepts a lift from an intoxicated driver were articulated in **Owens v Brimmell [1977] QB 859**, where the court held that a passenger may be guilty of contributory negligence if he knew that the driver had consumed alcohol in such quantity as was likely to impair his ability to drive safely. The court further held that where such knowledge is established, damages may be reduced to reflect the passenger's share of responsibility.

24. The Respondent testified that the 2nd Appellant drove carelessly, stopped abruptly on the road, and turned into the path of an oncoming vehicle, leading to the collision. In her adopted witness statement, she stated that on 23rd June 2018 at about 2:00 PM, the 2nd Appellant, her brother, visited her at home and remained with her until about 4:30 PM. Thereafter, she agreed to accompany him in his vehicle. Upon reaching the tarmac, he proceeded in the Narok direction and later turned right across the road toward a petrol station, thereby moving into the path of an oncoming matatu travelling from Narok towards Mai-Mahiu, resulting in the collision.

25. The law on contributory negligence requires foreseeability of harm to oneself. In **De Frias v Rodney 1998 BDA LR 15**, it was held that a person is guilty of contributory negligence if he or she ought reasonably to have foreseen that failure to act with reasonable prudence might result in harm, and must take into account the possibility of others being careless. The essential question is whether the claimant failed to take reasonable care for his or her own safety.

26. From the evidence on record, it is clear that the Respondent and the 2nd Appellant had spent considerable time together prior to the journey. The Respondent admitted that the 2nd Appellant was intoxicated. Despite this knowledge, she chose to board the vehicle. Further, even after observing erratic driving, she did not alight or otherwise remove herself from the risk.

27. Contributory negligence consists in a failure to take reasonable care for one's own safety. In the circumstances of this case, the Respondent, being aware of the driver's intoxication, ought reasonably to have foreseen the danger inherent in accepting the lift.

28. In this matter the evidence is clear that while the 1st respondent drove, the respondent engaged him in a manner of directing him on how to move the motor vehicle. All that while it was known to the respondent, and that has not been denied, that the 1st appellant was intoxicated. In that scheme of things, the 1st appellant

was negligent for being a drunk driver and in the manner, he swerved to occasion the collision. On the same note, the respondent assumed the risk of not only accepting to be driven by the 1st appellant while drunk and in engaging him on how to control the motor vehicle. Both were negligent in a manner that is inseverable with precision and thus the reasonable and just resolution was to find both equally to blame. The Court therefore finds no basis upon which to interfere with the trial court's finding apportioning liability equally at 50:50. The appeal on liability is thus dismissed.

Whether the apportionment of liability ought to apply to the award of special damages

29. Having upheld the apportionment of liability at 50:50, the next issue is whether the same apportionment ought to apply to the award of special damages. While the Appellants argue that once contributory negligence is established, it must apply to the entire award, the Respondent did not advance any legal basis for excluding special damages from apportionment.

30. The principle underlying contributory negligence is that a claimant who contributes to his or her own injury can only recover damages proportionate to the defendant's degree of fault. The reduction is not confined to general damages; it applies to the total compensatory award, including costs, unless a statutory exception exists.

31. In the present case, the expenses claimed as special damages arose directly from the injuries sustained in the accident. Had the Respondent not chosen to board the vehicle driven by an intoxicated driver, she would not have incurred those expenses. The same reasoning that justifies reduction of general damages applies equally to special damages and any other award the court makes.

32. Accordingly, the Court finds that the trial court erred in failing to subject the award of special damages to the 50% contributory negligence. The Appellants are therefore liable only to the extent of their liability of 50%. That is the portion of the special damages they must justly bear.

Whether the award of general damages was inordinately low so as to warrant interference by this Court?

33. The principles upon which an appellate court may interfere with an award of damages are now well settled since **Butt v Khan [1981] KLR 349**, and later reiterated in **Kemfro Africa Limited t/a Meru Express Services & Another v A.M. Lubia & Another [1982–88] 1 KAR 727, William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)** and **Ugenya Bus Service v Gachuki (1981–1986) KLR 567.** It is well settled that assessment of damages being a matter falling for the discretion of the court, an appellate court will not disturb an award unless the trial court took into account an irrelevant factor, failed to consider a relevant one, or

arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. The overall objective is to compensate with out enriching hence the award should reflect the overall circumstances of the case while maintaining reasonable uniformity with comparable local decisions because general damages cannot be calculated with mathematical precision hence the same must remain fair and consistent.

34. The medical report by Dr. Wellington K. Kiamba dated 24th September 2020 confirms that the Respondent sustained injuries described as a displaced fracture of the right acetabulum and a deep cut wound on the forehead.

35. The doctor assessed permanent disability at 30% and noted that the Respondent required the support of a crutch at the time of examination and was likely to develop post-traumatic osteoarthritis of the right hip joint.

36. In awarding general damages of Kshs. 300,000/=, the learned trial magistrate relied on **Faith Mumbua Kiio v Patel Devika [2018] eKLR**, where for comparable injuries, including fractures and permanent disability assessed at 25%, a similar award was made by the trial court and was upheld on appeal.

37. The injuries in the cited authority are comparable to those sustained by the Respondent. This Court is satisfied that the trial court properly exercised its discretion and applied the correct

principles. The award of Kshs 300,000/= cannot be said to be inordinately low so as to warrant interference. On the evidence as applied to the law, the Court finds no justification and declines to interfere with the award of general damages.

Disposition

38. The penultimate conclusion is that Civil Appeal No. E018 of 2024 partially succeeds to the extent that the apportionment of liability at 50% shall apply to the award of special damages as well as the costs at the trial.

39. Civil Appeal No. E025 of 2024 fails in its entirety.

40. Given that the dispute involves siblings coupled with the limited success, there shall be no order as to costs.

Dated, signed and delivered at Lodwar this 27th day of February 2026

Patrick J O Otieno

Judge