REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO 122 OF 2019

COLLINS OCHIENG OBADO……
….PLAINTIFF

VERSUS

CROWN BUS SERVICE LIMITED……DEFENDANT

JUDGMENT

THE CLAIM

Collins Ochieng Obado (hereinafter referred to as the plaintiff) filed this suit on 21/5/2019 vide a plaint dated 17/5/2019. He sued Crown Bus Service Limited (hereinafter referred to as the defendant) on account of a road traffic accident that allegedly occurred on 14/8/2018 near Taleh area along Nairobi-Mombasa road. The plaintiff averred that on the material day, he was a lawful fare paying passenger aboard motor vehicle registration number KCA 718M along the aforementioned road when the defendant's driver drove motor vehicle registration number KBX 874R so recklessly, carelessly and/or negligently and permitted it to get involved in an accident with motor vehicle registration number KCA 718M, thereby causing serious injuries to the plaintiff.

The defendant was sued as the registered and beneficial owner of motor vehicle registration number KBX 874R at the material time. The plaintiff further averred that the accident was solely caused by the careless and reckless driving of the defendant's driver and

that the defendant was vicariously liable for the acts of commission and/or omission of its driver. The plaintiff pleaded the following particulars of negligence against the alleged defendant's driver:

a) Driving at an excessive speed or at a speed that was so excessive in the circumstances of the case;
b) Failing to slow down, stop or swerve in any other way so as to avoid the accident;
c) Failing to exercise reasonable precautions to avoid the said accident;
d) Failing to take reasonable precautions while driving on such a road;
e) Carelessly and recklessly over speeding without caring about the safety of other road users;
f) Failing to ensure that the said motor vehicle was in proper working condition, especially its brakes so as to avoid the accident.

The plaintiff averred that pursuant to the said accident, the driver of motor vehicle registration number KBX 874R on Simuyu Makokha Mukubuyi was charged with the offence of careless driving vide Makindu Traffic case No. 355 of 2018 and fined Ksh. 30,000/=. The plaintiff further pleaded particulars of injuries sustained as well as those of special damages. He relied on the doctrine of *Res ipsa loquitor* and prayed for judgment against the defendant for:

a) General damages;
b) Special damages of Ksh. 3,000/=;
c) Costs and interest.

THE DEFENDANT'S DEFENCE

The defendant entered appearance on 7/8/2019 and filed a statement of defence on the same day. The defendant denied that it was the registered and/or beneficial owner of motor vehicle registration number KBX 874R, denied the occurrence of the accident, denied that the plaintiff was a passenger in motor vehicle registration number KCA 718M, denied that motor vehicle registration number KBX 874R was driven recklessly and carelessly and denied the particulars of negligence as pleaded by the plaintiff. In the alternative, the defendant averred that if the accident occurred, as the plaintiff may prove, then the same

was caused solely and/or substantially contributed to by the plaintiff's own negligence. The defendant pleaded the following particulars of negligence against the plaintiff:

a) Leaving a minor unattended while travelling;
b) Failing to properly instruct the minor on road safety when travelling;
c) Failing to take adequate safety of the minor.

The defendant further pleaded the following particulars of negligence against the driver of motor vehicle registration number KCA 718M:

a) Driving at an excessive speed in the circumstances;
b) Failing to have any or any sufficient regard for the safety of the users of the said road by driving without due care and attention;
c) Failing to keep any or any proper lookout for other vehicles that might reasonably have been on the said road;
d) Endangering the lives of other road users in his manner of driving and overtaking;
e) Having total disregard for the traffic rules;
f) Failing to stop, slow down, to swerve or in any way so to manage the said motor vehicle so as to avoid the collision;
g) Failing to have due care and skill expected of a competent driver.

The defendant denied the particulars of injuries, loss and damage as pleaded in the plaint and further denied the applicability of the doctrine of *Res ipsa loquitor*. The defendant prayed that the plaintiff's suit be dismissed with costs.

THE EVIDENCE

The plaintiff's Case

Only the plaintiff testified in support of his case. He adopted his statement filed in court as part of his testimony. His testimony was that on 14/8/2018 he was lawfully travelling as a fare paying passenger in motor vehicle registration number KCA 718M along Nairobi-Mombasa road, when near Taleh area, the driver of motor vehicle registration number KBX 874R caused the said motor vehicle to hit motor vehicle registration number KCA 718M. The plaintiff stated that he sustained serious injuries. He blamed the driver of motor vehicle

registration number KBX 874R for driving carelessly and over speeding without caring about the safety of other road users. The plaintiff produced documents in support of his case.

The Defendant's Case

The defendant did not call any witnesses.

MAIN ISSUES FOR DETERMINATION

In my opinion, the main issues for determination are as follows:

i. Whether an accident occurred on 14/8/2018 along Mombasa-Nairobi road involving motor vehicles registration numbers KCA 718M and KBX 874R;

ii. Whether the plaintiff was a passenger in motor vehicle registration number KCA 718M at the material time;

iii. Whether the defendant was the owner of motor vehicle registration number KBX 874R at the material time;

iv. Whether the driver of motor vehicle registration number KBX 874R was to blame for the accident?

v. Whether the defendant is vicariously liable for the accident;

vi. Whether the plaintiff sustained injuries and suffered loss as a result of the alleged accident;

vii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;

viii. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

On liability, the plaintiff relied on the evidence on record and averred that the plaintiff's evidence was uncontroverted. He urged the court to hold the defendant 100% liable. That the plaintiff was a passenger and not in control so as to cause or avoid the accident.

On quantum, the plaintiff submitted a sum of Ksh. 250,000/= in general damages and relied on the following authority:

1) ***Jeredi Ukilu Osango v Geowave Ship Contractors Ltd [2014] eKLR***

The plaintiff and appellant in the appeal suffered soft tissue injuries on the head which healed leaving 4cm scar. The appellate court awarded Ksh. 180,000/= in general damages on 20/11/2014.

The plaintiff further urged the court to award special damages of Ksh. 3,000/= plus costs of the suit and interest.

THE DEFENDANT'S SUBMISSIONS

The defendant also filed written submissions. The defendant submitted that it is trite in law that the burden of proof lies on the party that alleges. It further submitted that the Plaintiff did not proof his case on liability as against the Defendant which was the owner of KBX 874R to the required legal threshold. The defendant argued that as a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. It relied on section 107 (1) of the Evidence Act. The defendant further argued that the plaintiff did not bring forward a Police officer to testify to support his claim as to who was to blame for the accident but only produced a Police Abstract.

That the Plaintiff did not also call an eye witness to shed more light to the circumstances of the accident. The defendant urged the court to disregard the plaintiff's evidence as he had not proven negligence against the defendant. The defendant relied on authorities whose copies were not annexed. On quantum, the defendant proposed a sum of Ksh. 30,000/= and once again relied on authorities whose copies were not annexed. For special damages, the defendant urged the court to award what was strictly proved.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the submissions made by the parties. From the testimony of the plaintiff and the police abstract, I have no doubt that an accident occurred on 14/8/2018 at Taleh area along Mombasa-Nairobi highway involving motor vehicles registration numbers KCA 718M and KBX 874R.

The evidence also confirms that the plaintiff was a passenger at the time of accident. This evidence was not controverted at all.

The plaintiff produced in evidence a copy of records from the Registrar of motor vehicles which indicates that the defendant was the registered owner of motor vehicle registration number KBX 874R as at 1/10/2018. The police abstract also shows that the defendant was the owner of KBX 874R at the time of accident. In any event, the defendant's representative did not attend court to deny that it was the owner of the said motor vehicle. I am satisfied that the defendant was the owner of motor vehicle registration No. KBX 874R at the time of accident.

Liability

It is the duty of the plaintiff to establish or prove negligence on the part of the defendant. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the Evidence Act which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of ***Kirugi & Another v Kabiya & 3 Others [1987] KLR 347***, the Court of Appeal held as thus:

"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

It would appear that the plaintiff could not tell how the accident occurred. The plaintiff admitted that he was asleep and was only woken up by the impact. The plaintiff could not even tell whether the motor vehicle he was travelling in was hit from the front or the rear. It is no wonder that even in his plaint, the plaintiff did not disclose how the accident occurred. He only stated that the two motor vehicles were involved in the accident, without giving the facts leading to the accident. My finding is that the plaintiff could not therefore of his own knowledge, establish the negligence on the part of the driver of motor vehicle registration number KBX 874R.

Is there any evidence that would impute negligence on the driver of motor vehicle registration number KBX 874R? The plaintiff produced in evidence, a police abstract on the accident. The same indicates that the driver of motor vehicle registration number KBX 874R was charged and convicted of the offence of careless driving and was fined Ksh. 30,000/=. The contents of the police abstract were not challenged at all by the defendant. Section 47A of the Evidence Act provides:

"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

There is no indication that there was an appeal against the conviction in the traffic case. As already indicated, the plaintiff was a mere passenger in the accident motor vehicle and there is no evidence to show that he was negligent in any manner. The conviction of the driver of the accident motor vehicle is an indication that he was negligent. I rely on the Court of Appeal authority of ***Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] KECA 167 (KLR).*** In the authority of ***Moses Theuri Ndumia v I G Transporters Limited & another [2018] KECA 297 (KLR)***, the Court of Appeal observed:

".....the Police Abstract form that indicated the driver of the 1st respondent's motor vehicle was to blame for the accident. The respondents did not call any evidence to counter this evidence..... In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondent."

Further, in ***David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo [2019] KECA 434 (KLR)***, the Court of Appeal had this to say:

"When a collision occurs between two vehicles, as between them, the issue of contributory negligence and apportionment may arise. However, as between a passenger and the owners/drivers of the two vehicles involved in the accident, liability on the part of the

owners is 100% joint and several and no question of apportionment arises unless it is proved the passenger was negligent……In the instant matter, the respondents pleaded negligence on the part of the deceased. No evidence was led to prove the alleged negligence. The doctrine of res ipsa loquitor applies in cases where the deceased or an injured person is a passenger in a motor vehicle involved in an accident. In such cases, what must be proved is the occurrence of the accident and that the person injured or deceased was a passenger in vehicle."

31. In this matter, we are satisfied that PW1 testified and tendered in evidence a police abstract proving the occurrence of the accident and establishing that the deceased was a passenger in the motor vehicle. We are fortified in our finding when we consider that the respondents did not lead any evidence to demonstrate that the 2nd respondent, as the driver of motor vehicle KAY 718S, was not negligent."

Similarly, in ***Orioki v Kevian Kenya Limited [2025] KECA 780 (KLR***), the Court of appeal held:

"The police abstract, though not conclusive, supported the finding that the appellant's actions caused the accident. Furthermore, the evidence showed that the appellant did not maintain a safe distance, which contributed to the collision. In Kenya Ports Authority v East African Power & Lighting Co. Ltd, (supra), it was held that a police abstract is prima facie evidence of facts reported to the police, and in the absence of contrary evidence, it can be relied upon. In this case, the appellant failed to adduce any compelling evidence to counter the police abstract or to disprove the causal link between his actions and the damage. The police abstract, while not conclusive, indicated that the appellant was at fault for the rear-end collision."

Being guided by the above authorities, I find that although the plaintiff could not tell how the accident occurred, there is sufficient evidence to prove that he was a passenger in one of the accident motor vehicles. There is no evidence to prove that he was negligent. The defendant did not take out third party proceedings against the driver or owner of motor vehicle registration number KCA 718M. Furthermore, the police abstract clearly indicates that the defendant's driver was charged with careless driving and convicted. The contents of

the police abstract were not challenged in any way. Consequently, I find the driver of the accident motor vehicle registration number KBX 874R 100% liable for the accident.

Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, *respondeat superior*, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. The owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the car has been lent, as if the owner was a principal and the driver his or her agent, if the driver is using the car primarily for the purpose of performing a task for the owner.

In the case of ***Morgan v Launchbury [1972] ALL ER 606***, it was held, *inter alia*, that:

"To establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner."

Similarly, In **Kaburu *Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR*** the Court of Appeal held that:

"Vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority."

Where a motor vehicle is driven by a person other than the owner, there is a rebuttable presumption that the driver was acting as an agent of the owner of the motor vehicle. In the case of ***Kenya Bus Services Ltd v Humphrey [2003] KLR 665; [2003] 2 EA 519***, the Court of Appeal cited ***Kansa v Solanki [1969] EA 318*** wherein it was held that:

" Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises* that it was driven by a person for whose negligence the owner is responsible *(See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

It has not been denied in evidence that the driver of motor vehicle registration number KBX 874R was driving in the course of his employment with the defendant. Consequently, I find the defendant **100% vicariously liable** for the accident.

Quantum

The medical evidence on record indicates that the plaintiff sustained the following injuries:

a) Cut wound on the scalp;
b) Blunt injury to the left hand; and
c) Blunt injury to the left lower limb below the knee.

There is no contrary evidence. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the fact that the defendant has been held 100% vicariously liable for the accident, the plaintiff is thus entitled to damages as against the defendant. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards.

This Court has to bear in mind the principles that guide assessment of damages as espoused in ***West (HI) and Sons Ltd v Shepherd [1964] AC 326*** where Lord Morris said:

"But 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. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional".

I am also guided by Lord Denning's decision in ***Kim Pho Choo v Camden & Islingtom Area Health Authority, [1979] 1, ALL ER 332*** which was adopted in the case of ***Nancy Oseko v Board of Governors Masai Girls High School [2011] eKLR*** where Wendoh, J stated that:

"In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant. ……the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant."

The following principles are germane in assessing damages for personal injury claims:

i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;
ii. The award should be commensurate to the injuries suffered;
iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;
iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;
v. Awards should not be inordinately too high or too low.

Based on the above principles, I proceed to assess the damages payable as follows.

General Damages for pain, suffering and loss of amenities

I have considered the injuries sustained by the plaintiff. The medical evidence produced by the plaintiff indicates that he was treated as an outpatient. I have further considered the submissions made by the parties on quantum as well as the authority relied upon by the plaintiff. The authority relied upon by the plaintiff is comparable. On my part, I have considered the following authorities:

1) ***Ochola v Owuor [2024] KEHC 7689 (KLR).***

The plaintiff and respondent in the appeal sustained soft tissue injuries to the right shoulder joint, soft tissue injuries to the anterior chest wall, soft tissue injuries to the neck, back and both knees. The trial court awarded Ksh. 250,000/= on 12/5/2022. On appeal, the award was reduced to Ksh. 150,000/= on 25/6/2024.

2) ***Pascal v Ouko [2023] KEHC 24463 (KLR).***

The plaintiff and respondent in the appeal sustained chest contusion, blunt injuries to the back, scalp, neck, upper limbs and lower limbs and lacerations to the right knee. The trial court awarded Ksh. 200,000/= in general damages on 21/12/2021. On appeal, the award was reduced to Ksh. 150,000/= on 18/10/2023.

Given the age of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. **200,000/=** in general damages would suffice. I award the same.

Special Damages

The plaintiff pleaded special damages as follows:

a) Medical report……Ksh. 3,000/=

It is trite law that special damages must be **specifically pleaded** and **strictly proved**. In ***Nizar Virani t/a Kisumu Beach Resort- v - Phoenix of East Africa Assurance Co. Ltd*** the court said: ***"It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded"***

In ***Ouma v Nairobi City Council [1976] KLR 304*** after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L. J's Judgment on page 532 and 533 in ***Ratcliffe v Evans [1832] 2Q.B. 524*** an English leading case on pleading and proof of damage:

" The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The claim was sufficiently proven by a receipt. Consequently, I award special damages to the tune of **Ksh. 3000/=**

DISPOSITION

In summary, I hold that the plaintiff has proven his case on a balance of probabilities as against the defendant. Consequently, I make the following awards:

1) General damages for pain, suffering and loss of amenities.....Ksh. 200,000/=
2) Special damages.....Ksh. 3,000/=

Total.....**Ksh. 203,000/=**

The plaintiff is also awarded interest on the damages as well as costs of the suit. The guiding principles in respect of interest are set out in section 26 of the Civil Procedure Act which provides that:

"(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

In the case of ***Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others [2018] eKLR***, the court stated that:

"First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

Second, Under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:

a. The period from the date the suit is filed to the date when the Court gives its judgment; and

b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix."

Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of ***Omunyokol Akol Johnson v Attorney General (CIVIL APPEAL NO.6 of 2012, UGSC 4*** (8th April 2015) stated in part, as follows:

"It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment……..Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment." (Emphasis supplied)

From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see ***Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR).*** Consequently, interest on general damages shall accrue at court rates from the date of judgment/decree until payment in full whereas interest on special damages shall accrue from the date of filing suit to the date of judgment.

DATED, SIGNED AND DELIVERED VIA CTS THIS 10TH DAY OF FEBRUARY, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.