

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E048 OF 2024

SAMUEL KIBET MENJO (*Suing through next friend Francis Kipkurgut Menjo*).....APPELLANT

VERSUS

**GREAT RIFT EXPRESS SHUTTLE COMPANY LIMITED.1ST
RESPONDENT**

**CROWN BUS COMPANY LIMITED.....2ND
RESPONDENT**

(Being an appeal from the judgment of Hon. Yusuf M. Barasa) delivered on 25th April 2024 in Naivasha CMCC No. 266 of 2020)

JUDGMENT

Background

1. The Appellant was the plaintiff in the lower court. He sued through his next friend claiming damages arising from a road traffic accident that occurred on 18th July 2017 along the Naivasha-Nairobi Road. The accident involved motor vehicle registration KBX 947A and motor vehicle registration KBE 391V, and a motorcycle registration KMCS 414F.
2. The Respondents filed a statement of defence denying negligence and attributing the accident to the rider of

motorcycle KMCS 414F, who was alleged to have negligently encroached onto the road thereby causing the accident.

3. The Respondents issued a Third Party Notice dated 15th September 2021 against the owner of motorcycle registration KMCS 414F, stated to be Captain Motorcycle Manufacturing Company Limited. The said Third Party did not enter appearance.
4. The trial court heard the case and dismissed the Appellant's suit, holding that the Respondents were not liable for the accident, and ordered that each party bears its own costs.

The Appeal

5. Dissatisfied with the trial court's decision, the Appellant filed the instant appeal which is based on the contention that the learned trial magistrate improperly exercised judicial discretion by taking into account irrelevant considerations and/or failing to consider material and relevant matters, thereby reaching a decision that was erroneous in law and fact and inconsistent with the Constitution, the Civil Procedure Act, the Evidence Act and applicable common law principles. It is further contended that the trial court failed to properly evaluate the pleadings, evidence and written submissions on record, and consequently arrived at a determination that was not supported by the facts or the law.

6. The Appellant further argues that the trial court wrongly dismissed the suit despite the Appellant having discharged the burden of proof on a balance of probabilities, and that the magistrate adopted a selective approach to the evidence on liability, imposed a higher standard of proof than is required in civil claims, and failed to frame, list and determine all issues arising from the pleadings and evidence, ultimately leading to an unjust and unsustainable finding on liability.
7. The Appellant's case was that the Respondents were liable for the accident and consequently liable to compensate him for the injuries suffered.
8. On their part, the Respondents maintained that their vehicles were not to blame at all for the occurrence of the accident, and that the blame lay wholly with the rider of motorcycle registration KMCS 414F.
9. Both Respondents supported the conclusion of the trial court that the Appellant failed to prove negligence against them on a balance of probabilities.
10. The Respondents emphasised that parties are bound by their pleadings, and relied on the decision in ***Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others (2014) eKLR***, as well as ***Raila Amolo Odinga & another vs. IEBC & 2 others (2017) eKLR***, on the centrality of pleadings to adjudication.

11. On burden of proof, the Respondents cited ***Benter Atieno Obonyo vs. Anne Nganga & another (2021) eKLR***, and urged that under **sections 107-109 of the Evidence Act**, the burden lay on the Appellant to prove negligence against them.
12. The Respondents also relied on the authorities of ***Mary Wambui Kabugu vs. Kenya Bus Services Ltd (Civil Appeal No. 195 of 1995)*** (as cited in ***Florence Mutheu Musembi & another vs. Francis Karengi (2021) eKLR***), and ***Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258***, for the proposition that negligence must be proved, as there is no liability without fault.
13. The Respondents further relied on ***Eastern Produce (K) Ltd vs. Christopher Atiado Osiro (2006) eKLR***, reiterating that the onus of proof in negligence rests on the person who alleges.

Duty of the First Appellate Court

14. This being a first appeal, this Court has the duty to reconsider the evidence, re-evaluate it afresh, and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. This principle is well settled in ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123*** and ***Peters vs. Sunday Post Ltd [1958] EA 424***.

Issues for Determination

15. Having considered the pleadings, the record, the grounds of appeal and submissions, I find that the main issues for determination are: -

- a) ***Whether the Appellant was injured as a result of the accident said to have occurred on 18th July 2017.***
- b) ***Whether the Appellant sued the correct parties.***
- c) ***Who was to blame for the accident (liability).***
- d) ***Whether the Appellant is entitled to compensation, and if so, the appropriate quantum.***

Analysis and Determination

16. On the first issue of whether the Appellant was injured as a result of the accident, I find that it was not disputed that the accident occurred on 18th July 2017. It was also not contested that the Appellant sustained serious injuries in the said accident to the extent that he is incapable of suing in his own name.

17. The medical evidence presented by the Appellant's witness Dr. Joseph Sokobe (PW2) confirmed serious head injuries, with one medical witness indicating that the Appellant was headed to a vegetative state. The record shows that the Appellant was admitted for a prolonged period (over six months), which supports the seriousness of the injuries.

18. On the material placed before the court, it is clear that the Appellant sustained serious injuries. I am satisfied that the Appellant proved, on a balance of probabilities, that he suffered grave injuries following the accident.
19. Turning to the issue of whether the Appellant sued the correct parties, I note that the trial court correctly acknowledged that the Respondents were properly included in the suit as it was not disputed that their motor vehicles were involved in the accident. The Appellant argued that if there existed any third party who ought to have borne responsibility, it was for the Respondents to pursue third party proceedings, and not to defeat the Appellant's claim merely because another party (such as a motorcycle rider) may have been involved.
20. My finding is that where a plaintiff has sued parties who are proper defendants in the suit, the existence of third-party involvement does not automatically absolve the sued parties from responsibility unless liability is disproved. The Appellant's contention that third party proceedings were available is reasonable. I find that the Appellant did not fail merely because another road user may have contributed to the accident.
21. On the critical question on liability and who is to blame for the accident, the Appellant argued that the trial court wrongly apportioned 100% liability to a motorcycle (KMES 414F), despite evidence suggesting that the 2nd

Respondent's motor vehicle played a role in the chain of events leading to the accident.

22. PW3, a police officer, testified that the motorcycle joined the main highway and collided head-on with motor vehicle KBE 391V, and that in the course of avoiding the motorcycle, another collision occurred with motor vehicle KBX 947A, in which the Appellant was a passenger.

23. It was not disputed that the accident involved multiple vehicles and a motorcycle. Where evidence shows that the actions of more than one road user contributed to the accident, liability should be apportioned according to blameworthiness. The Appellant disputes any finding that would leave the Respondents entirely blameless, and maintains that liability ought to have been shared, at least as against the 2nd Respondent.

24. It did not escape the attention of this court that the Respondents blamed the motorcyclist for the accident and are reported to have issued Third Party notices to the owner of the said motorcycle who did not enter an appearance.

25. Under Order 1 Rules 15-22 of the Civil Procedure Rules (CPR), once a Third Party Notice is issued and the proposed third party fails to enter appearance or file a defence, the court may proceed to enter judgment against the third party in default upon the requisite application. Importantly,

however, the failure by a proposed third party to participate in the suit does not of itself defeat the plaintiff's claim against the defendants already on record; rather, it leaves the defendants to answer the claim on the evidence, and only thereafter pursue their right to contribution or indemnity as against the defaulting third party in the manner provided by law. In this regard, third party procedure is a defendant-driven mechanism meant to protect the defendant's interests, and not a bar to the plaintiff's suit merely because the defendant alleges that another party was responsible.

26. On the material presented before the court, I am not persuaded that the trial court was justified to attribute blame wholly to a non-party motorcycle rider and thereby dismiss the claim against the Respondents entirely, particularly where the Respondents' vehicles were involved in the collision sequence.
27. Accordingly, I find that the Appellant proved his case on liability against the Respondents on a balance of probabilities. In the absence of a clear basis for 100% exoneration of the Respondents, I would apportion liability equally as between the Respondents.
28. Having found that the Appellant sustained serious injuries and that the Respondents bear liability, it follows that the Appellant is entitled to damages.

Special damages

29. The Appellant pleaded and proved a hospital bill of Kshs. 3,121,285/=, supported by receipts produced at the trial. It is trite that special damages must be specifically pleaded and strictly proved. I find that the Appellant has demonstrated proof of this expenditure and I therefore award special damages of Kshs. 3,121,285/=.

General damages

30. The Appellant sought a total sum of Kshs. 4,456,280/= before the trial court as sufficient compensation for the injuries he had sustained in the accident. He also submitted that the trial court indicated that had it found liability, it would have awarded Kshs. 3,000,000/= as general damages.

31. My finding is that given the serious nature of injuries described as severe head injury, long hospitalization, incapacity requiring next friend, an award of general damages in the sum of Kshs. 3,000,000/= is not unreasonable.

Disposition

32. In the end, I find that the appeal has merit. I therefore allow it and make the following orders: -

a) The judgment of the trial court dismissing the suit is set aside.

b) Judgment is entered for the Appellant against the Respondents on liability, apportioned as follows:

i) 1st Respondent: 50%

- ii) **2nd Respondent: 50%**
- c) **Damages are awarded as follows:**
 - i) **General damages: KES. 3,000,000/=**
 - ii) **Special damages: KES. 3,121,285/=**
 - iii) **Total: KES. 6,121,285/=**
- d) **The total award shall be subjected to the apportioned liability stated above.**
- e) **The Appellant shall have costs of the suit in the lower court and costs of the appeal, together with interest at court rates until payment in full.**

33. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 9TH DAY OF APRIL, 2026.

**HON. W. A. OKWANY
JUDGE
9/04/2026**

FOR APPELLANT No appearance

FOR RESPONDENT Ms Oteyo

COURT ASSISTANT Karani

45 days stay of execution is granted