

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI
CIVIL APPEAL NO. 26 OF 2018

1. JOTHAM MWARIRI NJAMI

2. BEN DAVID MAHUI T/A BEMWA STATIONERS

3. CHANIA COOL BUS SERVICES.....APPELLANTS

=VERSUS=

ANDREW KIMUTAI KANDIE.....RESPONDENT

**(Being an appeal from the Judgment of Hon. E. G. Nderitu (SPM) in VOI
SPMCC NO. 270 of 2016 delivered on 12th November 2018)**

JUDGMENT

1. This case arose from a road traffic accident that occurred on 21st December 2015 along the Mombasa-Nairobi Highway.
2. The Respondent was driving his motor vehicle from Mombasa to Nairobi when a bus driven by the Appellants' authorized driver lost control, veered off its lane, and collided head-on with the Respondent's vehicle, causing him serious injuries.

3. The Respondent testified that he saw the approaching bus suddenly move onto his lane from about ten metres away in an attempt to overtake several vehicles ahead, and despite his efforts to brake and swerve to his extreme left, the collision was unavoidable.
4. The trial court found that the bus driver attempted to overtake when it was unsafe to do so, failed to keep to his proper lane, and created a dangerous situation, while the Respondent was on his rightful lane and tried to avoid the accident.
5. The court held the Appellants jointly and severally 100% vicariously liable for the negligence of their driver, who sadly passed away in the accident.
6. Regarding the Respondent's injuries, the evidence showed he sustained a severe compound fracture of the right tibia and fibula with vascular damage, was trapped in his driver's cabin, and required rescue by other vehicles.
7. He was admitted to Aga Khan Hospital from December 2015 to January 2016, accumulating a bill of over Kshs 5.6 million, then transferred to Moi Teaching and Referral Hospital and St Luke Orthopedic Hospital where he

underwent multiple operations including bone grafting and skin grafting.

8. At the time of his testimony three years after the accident, he was still on crutches with a grossly disfigured and infected leg, and the doctor indicated there was a high possibility the leg might need amputation due to malunion.
9. The court awarded general damages for pain and suffering of Kshs 2,500,000, lost earnings of Kshs 650,000 for a period of 26 months at Kshs 25,000 per month, diminished earning capacity of Kshs 2,160,000 using a multiplicand of Kshs 15,000 and a multiplier of 12 years, future medical expenses of Kshs 150,000 for removal of screws, and special damages of Kshs 6,002,978 as proved by receipts, bringing the total judgment amount to Kshs 11,460,978, plus costs and interest from the date of judgment.
10. The Appellants have appealed against the said judgment on the grounds that the learned Magistrate made several errors of fact and law.

11. They contend that the total award of Kshs. 11,312,978 for general and special damages was excessive and manifestly too high given the injuries suffered, and that the Magistrate failed to consider conventional awards for similar injuries.
12. They also challenge the finding of 100% liability against them. Further, they claim that service of summons upon the 1st and 3rd Appellants did not comply with Order 5 Rules 7 and 8 of the Civil Procedure Rules, 2010, thereby violating their right to a fair hearing and rendering the judgment against them procedurally invalid.
13. The Appellants additionally assert that the Magistrate erred by relying on the Police Abstract as proof of ownership and as implicating the 3rd Appellant.
14. Finally, they argue that no demand letters were served upon them, so they cannot be held liable for any costs awarded by the court.
15. The parties filed written submissions as follows:- The appellant challenged the finding by the trial court that the appellant was solely liable for the road accident.

16. The submissions re-evaluate the evidence, noting that the respondent was the only eyewitness, and that the police officer who testified (PW2) did not conduct the actual investigation, making his evidence on liability hearsay and therefore inadmissible.
17. The sketch plan was not prepared by PW2, and the police abstract does not reliably prove fault.
18. The appellant contends that the bus driver's overtaking may have been lawful, that the respondent may have contributed by failing to give way or driving too fast, and that liability should be apportioned equally at 50:50 rather than 100% against the appellant.
19. On the assessment of general damages for pain and suffering, the appellant argues the award of Kshs 2,500,000 was excessive.
20. Comparing similar injuries, mainly a compound right tibia fracture with no permanent disability or amputation, recent cases show awards between Kshs 800,000 and Kshs 1,500,000.
21. The appellant submits that Kshs 1,000,000 would be sufficient.

- 22.Regarding diminished earnings, the trial court awarded Kshs 2,160,000 using a multiplier approach, but the medical reports did not assess permanent disability or total inability to work. The appellant argues this head of damages should be a global award, and Kshs 500,000 is appropriate.
- 23.On lost earnings (Kshs 650,000) and special damages (Kshs 6,002,978 plus Kshs 150,000 for future medical care), the appellant submits they were not strictly proven.
- 24.Some medical bills were invoices without receipts, and the respondent did not show he notified his employer or applied for sick leave under the Employment Act, so lost earnings are impermissible.
25. Finally, on costs, the appellant asks each party to bear their own costs because the driver who caused the accident is deceased, the appellant is sued only under vicarious liability, and the circumstances are exceptional.
- 26.The respondent's submissions oppose the appellants' appeal from the judgment delivered on 12th November 2018 by the Senior Principal Magistrate in Voi SPMCC No. 270 of 2016.

27. The respondent argues that the trial court properly found the appellants 100% liable for a road traffic accident that occurred on 21st December 2015 along the Nairobi-Mombasa highway, involving a bus belonging to the appellants and the respondent's vehicle, causing the respondent severe injuries.

28. The respondent emphasizes that his evidence was uncontroverted because the appellants called no witnesses and produced no documents to challenge liability or quantum.

29. The respondent submits that as a first appeal, the High Court must re-evaluate the evidence but should not interfere with the trial court's discretion on damages unless it applied wrong principles, considered irrelevant factors, or arrived at an inordinately high or low award.

30. On general damages for pain and suffering, the respondent notes the trial court awarded Kshs. 2,500,000, supported by medical evidence including P3 forms, discharge summaries, and reports from three doctors showing a compound fracture of the right tibia and fibula, vascular damage, multiple surgeries, skin and bone

grafting, risk of amputation, and continued use of crutches. The respondent argues this award is reasonable and within the range of comparable cases.

31. On future medical expenses, the trial court awarded Kshs. 150,000 based on Dr. Rono's unchallenged evidence that the respondent requires surgery to remove metal plates and screws.

32. On lost income, the respondent was awarded Kshs. 650,000 for the period from the accident to the trial, based on his unchallenged testimony that he earned Kshs. 25,000 per month as a driver and was completely incapacitated.

33. On diminished earning capacity, the trial court awarded Kshs. 2,160,000 using a multiplier of 12 years and a multiplicand of Kshs. 15,000, and the respondent submits this was a proper exercise of judicial discretion given his permanent disability, age (43 at the time of accident), and inability to return to work as a driver.

34. On special damages, the respondent was awarded Kshs. 6,002,978, which was specifically pleaded and proved by

way of receipts, hospital bills, ambulance charges, and other documented expenses.

35. The respondent further submits that the appellants' complaints about service of summons and demand letters are raised for the first time on appeal and are without merit, because the appellants entered unconditional appearance, filed a defence, and participated fully in the trial without protest, thereby waiving any objection to service.

36. The respondent concludes that the appellants have not demonstrated any error by the trial magistrate and prays that the appeal be dismissed with costs.

37. The issues for determination in this appeal are as follows;

- a. Whether the trial court erred in finding the Appellants 100% vicariously liable for the road traffic accident;**
- b. Whether the award of general damages for pain and suffering was manifestly excessive;**
- c. Whether the awards for loss of earnings and diminished earning capacity were justified;**

- d. Whether the special damages were strictly proved; and**
- e. Whether the Appellants' complaints regarding service of summons and demand letters have any merit.**

38. This being a first appeal, this Court has a duty to re-evaluate the evidence on record and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses as the trial court did.

39. The appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on the wrong principle.

40. The principles governing first appeals were well established in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the court held that the appellate 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 for that fact.

41. Furthermore, regarding the assessment of damages, the appellate court will not normally interfere with the discretion of the trial court unless it is shown that the trial court acted on wrong principles, took into account irrelevant factors, or arrived at an award that is so inordinately high or low as to represent an erroneous estimate.

42. This principle was restated in **Butt v Khan [1978] eKLR**, where the Court of Appeal held that an appellate court will not disturb an award of general damages unless the trial court acted on wrong principles or the award is manifestly excessive or so low as to be erroneous.

43. On the first issue of liability, this Court finds that the trial magistrate was correct in holding the Appellants 100% vicariously liable for the negligence of their driver.

44. The Respondent testified as an eyewitness that the bus being driven by the Appellants' driver suddenly moved onto his lane from about ten metres away in an attempt to overtake several vehicles ahead, and despite his efforts to

brake and swerve to his extreme left, the collision was unavoidable.

45. The trial court found that the bus driver attempted to overtake when it was unsafe to do so, failed to keep to his proper lane, and created a dangerous situation.

46. The Appellants called no witnesses at the trial and produced no evidence to challenge the Respondent's version of events or to establish any contributory negligence on his part.

47. In the absence of rebuttal evidence, the Respondent's evidence remained uncontroverted.

48. The appellant bears the burden of showing that the accident occurred without the negligence of its driver.

49. In this case, the Appellants did not discharge that burden. The Respondent was on his rightful lane, saw the bus approaching from a distance of only ten metres, and took evasive action.

50. There was no evidence that the Respondent was speeding or that he failed to give way when it was safe or reasonable to do so.

51. The argument that liability should be apportioned equally at 50:50 is therefore without merit.
52. Where a defendant alleges contributory negligence against another driver but fails to take out third party proceedings to enjoin that driver to the suit, the court cannot apportion liability to a person who is not a party.
53. The Appellants did not enjoin the Respondent as a third party, and they led no evidence to establish any fault on his part.
54. Consequently, the finding of 100% liability against the Appellants is affirmed.
55. On the issue of service of summons and demand letters, this Court finds that the Appellants' complaints are raised for the first time on appeal and are without merit.
56. The record shows that the Appellants entered unconditional appearance, filed a defence, and participated fully in the trial without raising any objection regarding service.
57. By doing so, they waived any irregularity in service. A party cannot participate in proceedings fully and then,

after an adverse judgment, raise procedural objections that could have been raised at the outset.

58.Regarding the complaint about lack of demand letters, there is no legal requirement that a demand letter must be served before a suit can be filed or before costs can be awarded.

59.The issue of costs is a discretionary matter for the trial court, and there is no basis shown for interfering with the award of costs.

60.On the issue of the police abstract as proof of ownership, this Court finds that the trial magistrate was entitled to rely on the police abstract.

61.Section 8 of the Traffic Act provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

62.The police abstract produced in evidence indicated the Appellants as the owners of the bus.

63.The Appellants did not produce any evidence to rebut this presumption, such as a certificate of search from the Registrar of Motor Vehicles showing a different owner.

64. A police abstract is sufficient proof of ownership on a balance of probabilities where it is produced in court without objection and the defendant fails to adduce evidence to rebut it.
65. The court further held that while a certificate of search from the Registrar of Motor Vehicles would be the best evidence, it is not the only way to prove ownership, and the police abstract, being a public document, can be relied upon in civil cases where the standard of proof is on a balance of probabilities.
66. Section 8 of the Traffic Act leaves room for proof of ownership by other evidence, and a police abstract containing the name and address of the owner as at the date of the accident is sufficient in the absence of rebuttal evidence.
67. The Appellants did not challenge the contents of the police abstract through cross-examination or by calling any witness, and they did not produce any document to contradict the ownership indicated therein.
68. The trial magistrate therefore properly relied on the police abstract as proof of ownership.

69. Turning to the assessment of general damages for pain and suffering, the trial court awarded Kshs 2,500,000.

70. The Appellants contend that this award was excessive, arguing that comparable injuries attract awards between Kshs 800,000 and Kshs 1,500,000.

71. This Court disagrees. The evidence showed that the Respondent sustained a severe compound fracture of the right tibia and fibula with vascular damage.

72. He was trapped in his driver's cabin and required rescue by other vehicles.

73. He was admitted to Aga Khan Hospital from December 2015 to January 2016, accumulating a bill of over Kshs 5.6 million.

74. He was then transferred to Moi Teaching and Referral Hospital and St Luke Orthopedic Hospital, where he underwent multiple operations including bone grafting and skin grafting.

75. At the time of his testimony three years after the accident, he was still on crutches with a grossly disfigured and infected leg, and the doctor indicated there was a high

possibility that the leg might need amputation due to malunion.

76. These are extremely severe injuries with lasting consequences and a real risk of amputation.

77. I find that the award of Kshs 2,500,000 is not manifestly excessive but rather falls within the range of reasonable compensation for such catastrophic injuries.

78. This Court therefore upholds the award for pain and suffering.

79. Regarding the award for lost earnings of Kshs 650,000 for a period of 26 months at Kshs 25,000 per month, this Court finds that the trial magistrate properly exercised his discretion.

80. The Respondent testified that he was a driver earning Kshs 25,000 per month and that he was completely incapacitated from the date of the accident until the time of his testimony three years later.

81. This testimony was uncontroverted. The Appellants argue that the Respondent did not show that he notified his employer or applied for sick leave under the Employment

Act, but that argument misunderstands the nature of a claim for lost earnings in a tort action.

82. The claim is for actual loss of income resulting from the injuries caused by the Appellants' negligence, not for statutory sick pay.

83. The Respondent's uncontroverted testimony that he was earning Kshs 25,000 per month and that he could not work for 26 months due to his injuries is sufficient proof on a balance of probabilities.

84. The award of Kshs 650,000 is reasonable and is affirmed.

85. On the award for diminished earning capacity of Kshs 2,160,000 using a multiplicand of Kshs 15,000 and a multiplier of 12 years, this Court finds that the trial magistrate properly applied the law.

86. Diminished earning capacity is a separate head of damages from loss of earnings, compensating the plaintiff for the reduced ability to earn income in the future as a result of the injuries.

87. An award for loss of earning capacity can be made both when the plaintiff is employed at the time of trial and even when he is not so employed, and that the assessment

requires the court to consider the plaintiff's age, the nature of the injuries, the degree of disability, and the plaintiff's prospects in the labour market.

88. The medical evidence showed that the Respondent, a driver by profession, had suffered a severe compound fracture with vascular damage, was still on crutches three years after the accident, had a grossly disfigured and infected leg, and faced a high possibility of amputation.

89. It is clear that his ability to work as a driver or in any occupation requiring mobility has been permanently and severely diminished.

90. The trial court used a multiplicand of Kshs 15,000 (lower than his previous monthly earnings of Kshs 25,000, presumably accounting for the possibility that he might have found less demanding work) and a multiplier of 12 years, reflecting that he was 43 years old at the time of the accident and would have had a remaining working life of approximately 17 years but for the accident.

91. The multiplier of 12 years is reasonable and even conservative.

92. This Court finds no error in the trial court's assessment, and the award of Kshs 2,160,000 is affirmed.

93. Regarding special damages, the trial court awarded Kshs 6,002,978 as proved by receipts, plus Kshs 150,000 for future medical expenses for the removal of screws.

94. The law on special damages is well settled: special damages must be not only specifically pleaded but also strictly proved. In this case, the Respondent pleaded the special damages and produced receipts, hospital bills, discharge summaries, and other documentary evidence to prove the expenditure.

95. The trial magistrate carefully reviewed the evidence and found that the amount of Kshs 6,002,978 was proved.

96. The Appellants argue that some medical bills were invoices without receipts, but they have not pointed to any specific item in the trial court's award that was not proved.

97. The trial magistrate, as the trier of fact, was in the best position to assess the documentary evidence, and this Court sees no reason to interfere with that finding.

98. The award of Kshs 150,000 for future medical expenses to remove screws was based on the unchallenged evidence of Dr. Rono, who testified that the Respondent requires surgery to remove metal plates and screws.

99. The Appellants did not call any medical expert to challenge this evidence, and the trial court was entitled to accept it. The award for special damages is therefore affirmed.

100. On the issue of costs, the Appellants argue that no demand letters were served upon them, so they cannot be held liable for costs.

101. This argument is without merit. Under section 27 of the Civil Procedure Act, costs follow the event unless the court, for good reason, orders otherwise.

102. There is no requirement that a demand letter must be served before costs can be awarded.

103. The Appellants have not demonstrated any exceptional circumstances that would justify departing from the general rule that costs follow the event.

104. The trial court's award of costs to the Respondent is therefore upheld.

105. In conclusion, this Court finds that the Appellants have failed to demonstrate any error of fact or law on the part of the trial magistrate that would justify interference with the judgment.

106. The trial court correctly found the Appellants 100% vicariously liable for the accident, properly assessed the quantum of damages under all heads, and correctly awarded costs to the Respondent.

107. The complaints regarding service of summons and demand letters are raised too late and lack merit.

108. The appeal is therefore dismissed in its entirety, with costs to the Respondent.

109. Orders to issue accordingly.

**Dated, signed and delivered this 22nd day of April 2026
in open court at Voi High Court.**

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

..... for the Appellant

..... for the Respondent

ORIGINAL