REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E272 OF 2024

LOREEN ABIRE OGULA …….. 1ST APPELLANT

KITUKU ALIVIDZAH ……...……. 2ND APPELLANT

- VERSUS -

PAUL OTIENO ONDIEK .....……..…….…… RESPONDENT

(Being an appeal from the judgment and decree of Hon. E.A. Obina SPM delivered on the 5/12/2024 in Kisumu CMCC No. 32 of 2013, Paul Otieno Ondiek v Loreen Abire Ogula & Another)

J U D G M E N T

1. The respondent filed the primary suit before the trial court vide an amended plaint dated **25/2/2013** seeking general damages and the costs of the suit for injuries sustained following a road traffic accident.

2. The 1st appellant entered appearance and filed a statement of defence dated **22/8/2017** in which she denied the respondent's claim and put him to strict proof of the same.

3. The matter proceeded to trial and by a judgment delivered on **5/12/2024,** the trial court decreed: -

    a) ***Liability at 100% for the respondent against the 1st appellant.***

    b) ***General damages Kshs. 220,000/-***

c) ***Costs of the suit and interest.***

4. Being dissatisfied with the said judgment/decree, the appellants lodged this appeal vide the Memorandum of Appeal dated **20/12/2024** and raised six (6) grounds of appeal as follows: -

a) ***The learned trial magistrate erred in fact and in law in failing to appreciate the evidence of the defendants thereby finding the defendants 100% liable, leading to miscarriage of justice.***

b) ***The learned trial magistrate greatly misdirected himself by ignoring and treating the submissions of the defendants on liability superficially thereby arriving at the wrong conclusion on liability.***

c) ***The quantum of general damages for loss of amenities is oppressive and punitive and amounts to miscarriage of justice as the plaintiff was not amongst those involved in the accident.***

d) ***The learned trial magistrate ignored the appellant's submissions, paid lip service and made no reference to all the precedent on general damages cited before him, thus coming to a wrong decision on quantum.***

e) ***The learned magistrate considered extraneous circumstances to arrive at the erred findings in law and in fact.***

f) ***The Honourable magistrate's decision is plainly wrong and is against the weight of evidence.***

5. The appeal was disposed off by written submissions which I have duly considered.

6. This being a first appeal, the Court is duty bound to evaluate the evidence afresh and come to its own independent findings and conclusions but at all times having in mind that it did not have the advantage of seeing the witnesses testify. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**

7. Before the trial court, the respondent (**Pw1)** testified that on the **14/11/2012** between 7 – 8pm he was heading home aboard a matatu registration number **KAH 724B** along the Kisumu – Busia road. That when they reached the Spectre Molasses International, he saw an oncoming saloon vehicle registration **KBS 473J** that was being driven at a high speed and in a zig zag manner. The said saloon vehicle collided head on with the matatu in which he was in. The said vehicle was owned by the 1st appellant and driven by the 2nd appellant at the time.

8. That he sustained injuries to the head, shoulder, left leg and neck. That he was taken to Kisumu District Hospital and later to Russia (JOOTRH) Kisumu where he was treated and discharged.

9. He blamed the driver of the saloon car for causing the accident as he was driving at a high speed and in a zig zag manner. That at the time of his testimony, he had not healed well. In cross-examination, he stated that he was treated and discharged and that they were about 13 – 14 people in the matatu. In re-examination, he clarified that the accident occurred at night and that he reported the incident the following day.

10. When it came time to put up their defence, the 1st appellant did not call any evidence. Rather, the parties entered into a consent on the production of a number of documents as exhibits after which the 1st appellant closed her case.

11. It is based on this evidence that the trial court rendered its decision. From the foregoing, the grounds of appeal may be summarized into one, *viz, '**that the trial court misdirected itself in ignoring the evidence, submissions, authorities and principles applicable on liability and quantum and consequently came to a wrong conclusion on the same'.***

12. On liability, the 1st appellant was held 100% liable for causing the accident. In **Ndatho v Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment)**, the court reiterated Lord Reid's statement in ***Stapley v Gypsum Mines Limited (2) (1953) A.C 663 at P. 681*****,** wherein he stated thus: -

> ***"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it ... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard***

two or more as having jointly cause the accident. I doubt whether any test can apply generally."

13. The general rule of law is that he who alleges must prove. That is the command of ***section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya.*** In **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that: -

> ***"As a general proposition under section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."***

14. In the present case, it was the respondent's duty to produce evidence that the 1st appellant was liable for causing the accident that led to the injuries complained of.

15. As earlier stated, the respondent was categorical on how the accident occurred. His testimony was that he was aboard **Mv. Reg No. KAH 724B** when the 1st appellant's vehicle was so negligently driven at an overspeed

that it caused the subject accident. He blamed the driver of the saloon car that hit the vehicle that he was in for the accident.

16. To that point, the evidentiary burden of proof shifted from the respondent to the 1st appellant. It was the 1st appellant to displace that burden by calling evidence in support of her defence. She failed to do so. Therefore, the respondent's case remained proved as presented before the trial court.

17. Without there being any evidence to counter the respondent's testimony that the vehicle he had boarded was hit by an oncoming vehicle because the driver of the vehicle he was in was being driven negligently, could the trial court err in holding the appellant 100% liable? I don't think so. There was no evidence that was tendered to show how the respondent could have or did actually contribute to the accident. It was for the appellants to enjoin the owner of the vehicle that collided with theirs and claim contribution. Having failed to do so, they had to bear the burden alone which could not be shared with the respondent.

18. Accordingly, the trial court's holding the 1st appellant liable at 100% cannot be faulted. In **Acceller Global Logistics vs Gladys Nasembu Waswa & Another (2020) KEHC 9074 (KLR)**, it was held that where there is no evidence called by the defence, the plaintiff's case remains uncontroverted.

19. In **Jamlik Muchangi Miano vs Attorney General (2017) KEHC 8422 (KLR)** Mativo J (as he then was) held: -

> ***"Where a party fails to call evidence in support of his case, that party's pleading remains mere statements of fact since in so doing the party fails to substantiate his pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against the defence is uncontroverted and therefore challenged."***

20. The foregoing is the correct statement of the law where no evidence is called to support the denials in a defence. The defence cannot stand on the face of tested evidence of a plaintiff. Accordingly, the trial court was correct in holding the appellant 100% liable in circumstances.

21. The 1st appellant impugned the trial court's judgment on the quantum of damages terming it excessive. The law on the circumstances under which an appellate court will interfere with an award of quantum by the trial court is settled. That an appellate court will only interfere with an award of damages if; ***in exercising its discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice.*** See

Mbogo & another Vs Shah (1968) EA and **Mkube v Nyamuro [1983] KLR 403**.

22. In **Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003 (unreported),** the Court of Appeal observed that: -

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257)."***

23. Further, in **Kemfro Africa Ltd -Vs- A.M. Lubia and Another (1988) KAR 722,** the Court of Appeal stated: -

> ***"The Principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left***

out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. The same position was taken in Denshire Muteti Wambui V. KPLC (2013) eKLR."

24. In his amended plaint, the respondent pleaded that he sustained the following injuries;

    a) Blunt head injury involving the right side of the neck.

    b) Dislocation of the right shoulder and elbow joints.

    c) Blunt chest injury with damage to the left rib cage.

25. In the P3 form produced by the respondent, it was noted that the respondent had sustained blunt injuries to the neck, head, right shoulder as well as tenderness on the left chest, knee and left ankle. The totality of the evidence on injuries sustained thus pointed to the respondent having sustained soft tissue injuries.

26. The appellant's case is thus that the trial court's award of **Kshs. 220,000/-** was excessive**.**

27. On this appeal, the Court has considered the submissions and authorities relied on by both parties on the award for damages. The Court considers the following cases as being comparable to the instant suit: -

a) In **Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichuri [2005] eKLR,** the 3rd plaintiff suffered multiple soft tissue injuries on the left elbow frame and injuries on both ankles and was awarded **Kshs. 350,000/-** as general damages.

b) In **Ogembo & Anor v Maisa (2023) KEHC 436(KLR)**, the injuries consisted of soft tissue injuries and two degloving injuries. The Court awarded **Kshs. 300,000/-.**

c) In **Khetia Draper Ltd v Chesoli [2025] KEHC 3718 (KLR),** the plaintiff sustained minor to moderate soft tissue injuries and the High Court upheld an award of **Kshs. 250,000/-** as general damages.

28. From the foregoing, it would be incorrect to term the award made by the trial court as excessive. In light of injuries suffered, the award of **Kshs. 220,000/-** cannot be said to be excessive and is comparable with the awards given in the cases referred to above.

29. The appellants further impugned the decision of the trial court on the ground that the trial court ignored their submissions or treated them superficially

thereby arriving at a wrong decision. It is trite that submissions, arguments, or assertions made by counsel in court are not evidence. Evidence must be presented through witness testimony, affidavits, or production of documents in accordance with the ***Evidence Act,*** and submissions cannot act as a substitute for this legal requirement. The Court has considered the impugned judgment. The fact that the submissions were not reiterated does not in itself mean that they were not considered. What is relevant is that they were considered and the court arrived at the correct position of the law.

30. The upshot of the above is that the Court finds the appeal to be without merit and dismisses the same with costs to the respondent.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **30th** day of **April, 2026**.

A. MABEYA, FCI Arb

JUDGE