REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CIVIL DIVISION

CIVIL APPEAL CASE NUMBER E008 OF 2023

DANIEL ODHIAMBO:: APPELLANT

=VERSUS=

JACKLINE NECHESA WANJALA::::::::::::::::::::::::::::::::::::1ST RESPONDENT
TURKRIFT SHUTTLE SACCO LIMITED::::::::::::::::::::::::::2ND RESPONDENT
DICKSON KIMANI KAMAU::3RD RESPONDENT
SPRING VALLEY MACHINERY LTD::::::::::::::::::::::::::::::4TH RESPONDENT

CORAM: LADY JUSTICE R. WENDOH

JUDGMENT

By a plaint dated 14/1/2021, the 1st Respondent **Jackline Nechesa Wanjala,** then plaintiff, sued the appellant, then 3rd defendant for general and special damages for injuries that the Respondent sustained following a road traffic accident involving motor vehicle Registration No. KCQ 950B Toyota Matatu and motor cycle registration No. KMFC 349B along Kapenguria - Lodwar Road at Chepareria area.

The 1st Respondent was travelling as a passenger in the motor vehicle KCQ 950B.

The 1st Respondent at paragraph 8 of the plaint set out the particulars of negligence against the 3rd Respondent which are inter alia, that the vehicle was driven at an excessive speed; that the driver failed to have reasonable control of the vehicle;

that the driver failed to have a proper look out and that the driver failed to keep a safe distance and failed to swerve, stop or brake to avoid the accident.

The appellant filed a statement of defence on 23/3/2021 denying all the allegations pleaded and pleaded inter alia that the plaintiff failed to take care of his own safety; that the plaintiff failed to heed traffic rules, failed to wear a seat belt, that engaged the driver in endless banter and pleaded doctrine of *volenti non fit injuria.*

After a full hearing, the trial court delivered its Judgment as follows**: -**

Liability 100% in favour of the plaintiff against the 3rd Respondent;

General damages of Kshs.120,000/= and;

Special damages of Kshs. 6,550/=.

The appellant is aggrieved by the said Judgment and preferred this appeal. The memorandum of appeal filed by the firm of Kimondo and Gachoka Counsel for the appellant listed nine grounds which can be condensed in three broad grounds;-

1. **Whether the Respondents proved that the appellant was liable for the accident;**
2. **Whether the Respondents sued the wrong party;**
3. **Whether the award of damages was excessive.**

The appellant prays that the Judgment delivered on 9/11/2023 be substituted with an order dismissing the 1st Respondent's suit against the appellant with costs.

Directions were taken that the appeal do proceed by way of written submissions.

This being a first appeal, it behoves this court to evaluate all the evidence tendered before the court afresh, analyse it and come to its own conclusions. The court must however make allowance for the fact that it neither saw nor heard the witnesses testify in order to assess their demeanor. This principle has been discussed in many decisions including **Selle & Another -V- Associated Motors Boat Limited & others (1968) EA 123** where the court said:-

"This being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial ... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this 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 in this respect..."

The Respondents case (Plaintiffs)

The parties testified in CMCC.4A/2023 Where **Jackline Nechesa Wanjala** testified as PW1. She told the court that she was travelling along Kitale – Lodwar Road on 18/12/202 aboard motor vehicle KCQ 950B which was driven by the appellant, **Daniel Odhiambo (3rd defendant)** when it was involved in an accident with a motor cycle. She was with her son **Tyren Trevor Wanjala** (1st Respondent) She stated in her witness statement that the motor vehicle was following a motor cycle which had a passenger; that the motor cyclist slowed down and the motor vehicle crushed into the motor cycle. Both her and her son were injured and were rushed to Kapenguria Referral Hospital. She blamed the accident on the driver of the motor vehicle who she said, was driving at a high speed and did not keep a safe distance from the motor cycle.

PW2 Sgt. Janet Wafula of Kapenguria Police station produced the police abstract following a report vide OB No. 34/22/12/2020 where a collision occurred between motor vehicle KCQ 950B and motor cycle KMFE 319B following which two passengers in the vehicle were injured. PW2 was not the Investigations Officer and could not tell how the accident occurred. The abstract was recorded that the case was under investigations.

The appellants Case (Defendant)

The appellant called one witness in his defence. DW1 Sgt. Janet Wafula (PW2) produced an abstract issued on 23/12/2020 vide OB 47/18/12/2021 involving motor vehicle KCQ 950B and a motor cycle KMFE 319B. She also produced the OB which indicated that the appellant was the driver of the motor vehicle which was heading to Kapenguria from Lodwar when the motor cycle overtook a Probox and collided head on with the appellant's motor vehicle as a result of which the pillion passenger died while the rider received serious injuries. DW1 was not the Investigating officer and that the matter was still pending investigations.

Appellant's Submissions.

The appellant identified three issues for consideration: -

1. **Whether the Respondent sued the correct party;**
2. **Who caused the accident?**
3. **Whether the award in damages was manifestly excessive;**

As regards the first issue, it was submitted that Sections 107,108 and 109 of the Evidence Act places the burden of proof on the party that alleges the existence of a fact; that the 1st Respondent failed to discharge that burden because there was no evidence to prove that the appellant was negligent; that PW1 having testified that

she sat towards the rear of the vehicle, was not able to have a clear view of the road ahead; that PW1's narration that the front part of the motor vehicle collided with the motor cycle in the middle part was contrary to the fact that it is the driver's door that was damaged; that PW2 only produced the police abstract but did not produce the OB abstract which was later produced by DW1 (appellant). In regard to OB entry 47/18/12/2020, it was submitted that the OB extract captured what the Investigating officer recorded as what occurred at the scene of the accident; that the motor cyclist was overtaking a Probox and collided head on with the motor vehicle in which the passengers were injured while the pillion passenger on the motor cycle died and the rider was injured. Counsel urged that the fact that the motor vehicle KCQ 950B hit the motor cycle is not enough proof that the driver of the vehicle was negligent; that the motor vehicle inspection report and OB report did not prove that the appellant was speeding; that the court failed to take into account the inspection report or the fact that the motor cyclist was to blame for the accident.

Counsel relied on the case of **Sammy Ngugi Mwaura -VS- John Mbugua Kaaga (2006) eKLR** where the Court of Appeal held that the Respondents had sued the wrong party? Counsel submitted that the Respondent had not proved that the appellant was negligent. Counsel also relied on the decisions of **Makube -VS- Nyamuro CA 8/1983 and Treadsetters Tyres Ltd -Vs- John Wekesa**

Wepukhulu (2010) eKLR where the court affirmed the burden of proof in civil cases. In **Nickson Muthoka Mutavi -Vs_ Kenya Agricultural Research Institute (2016) eKLR,** the court quoted **Halsbury's Laws of England 4th Edition Paragraph 662 Pg 471** when it said that a plaintiff in an action for negligence must prove that he was injured as a result of the negligent act or omission by the Defendant.

Other decisions relied upon are **Simpson -Vs- Peat [1952] IALL ER 447; and Daniel Kimani Njoroge -Vs- James K. Kihara (2011) eKLR** where the court dismissed the plaintiff's case for failure to prove negligence on a balance of probability. According to the appellant, it is the motor cyclist who was to blame for the accident and yet the wrong person was sued.

On the award of Kshs.120,000/= in damages, Counsel submitted that the Respondent only suffered soft tissue injuries and based on the decisions of **Onsongo -VS – Owino CA E.102/2023; Wilson Mbogo -Vs- Harrison Nyagen Mosigis CA E054/2023 and Boaz Obure & Another -Vs- Samuel Kiyuka Okityo HCA E088/2023,** counsel urged that an award of Kshs.80,000/= was adequate.

<u>The Respondent's submissions.</u>

On the question of liability, it was submitted that PW1's evidence confirmed that the driver of the suit motor vehicle was to blame for the occurrence of the accident in that it was driven at a high speed as a result of which it collided with the motor cycle that was ahead of it; that the testimony of PW2 who also testified as DW1 only confirmed the occurrence of the accident but not the circumstances of the occurrence of the accident; that no evidence was tendered by the appellant to contradict PW1's testimony; that the appellant, the driver of the suit vehicle did not testify hence the evidence of PW1 remained unchallenged. Counsel relied on the decision of **Nandwa -Vs- Kenya Nazi Limited (1988) KECA 42 (KLR)** It was urged that the appellant having failed to testify to how the accident occurred, the Respondent is entitled to Judgment at 100%, On liability

On quantum, it was submitted that the court assessed the damages in line with the principles laid down in **West (H) & Sons Limited -VS- Shepherd (1964) AC 326** and quoted **in Duncan Kimathi Karagania -Vs- Ngugi David & 4 others HCC 75/2012 "that money cannot renew a shattered frame but that damages should represent reasonable compensation based on comparable injuries".** Counsel also relied on the decision in **KIM PHO CHOO -Vs- Camden & Islignton Area Health Authority (1979) I ALL ER 332** it was urged that the award was reasonable in the circumstances.

I have duly considered the grounds of appeal, submissions made on behalf of both parties and the evidence on record.

The issues for consideration are :-

1. **Who is to blame for the accident the appellant or a third party?**
2. **Whether the damages were excessive.**

Liability

As rightly submitted, section 107, 108 and 119 of the Evidence Act places the burden of proof on the party who alleges the existence of a fact.

"In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the Defendant. However, if in the cause of trial there is a proved set of facts which raises a prima facie inference that the accident was

In Civil cases, the standard of proof is on a balance of probabilities which means that there is greater than 50% likelihood that a fact is true. The question before this court is therefore whether the 1st Respondent proved his case as required of him. There is no dispute that the 1st Respondent was travelling as a passenger in motor vehicle KCQ 950B as a fare paying passenger with his mother. There is also no

dispute that the 1st Respondent was injured following an accident involving motor vehicle KCQ 950 B with motor cycle KMFC 349B. The question is whether the driver of KCQ 950B, that is the appellant was negligent or was it the motor cyclist or both?

PW1 Jackline Nekesa testified that the motor vehicle was driven at a high speed and the vehicle was driving behind the motor cycle when it slowed down, the vehicle hit the motor cycle from the rear as a result of which the pillion passenger sustained fatal injuries while the two of them were also injured. PW2 produced the police abstract on behalf of the Investigation Officer. PW2 again testified as DW1 for the appellant. She was not the Investigating Officer and so she did not visit the scene. In the abstract dated 30/12/2020, issued to PW1, it was indicated that the case was pending investigations and the likely person to be charged was the appellant (driver). This abstract was issued by the Investigations Officer who had issued another abstract to DW1 on 23/12/2020. In the abstract issued to the appellant, relating to OB 47/18/12/2020, and the OB indicated that the appellant's vehicle collided head on with the motor cycle which was overtaking another vehicle (probox). DW1 (PW2) was not in a position to explain why the two abstracts issued by the same Investigating Officer contained different information though they relate to the same incident.

The Investigating Officer must have received the information regarding the accident from somebody else and it was only proper that the Investigating officer testify to disclose the source of her information and may be, produce the sketch map of the scene to determine exactly where the accident occurred and whether it tallies with the information in the abstract.

In addition, courts have held that a police abstract is not proof of occurrence of an accident. In the case of **Kanithi Kimunya -Vs- Aden Guyo (2014) eKLR** it was held **"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular station".**

Again in **ZOS and CAO -Vs- Amollo Stephen (2019) eKLR , Judge Aburuli said " The police abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of the accident, but proof of the fact that following an accident the occurrence thereof was reported to the police who took conformance of the accident. It is the police, having received information of a report of occurrence of an accident would investigate and establish the circumstances under which such an accident occurred….. It was incumbent upon the appellant at the time of hearing to either call an eye witness who saw the accident take place to prove the listed particulars of negligence attributed …..**

or shed light on the result of the investigations and as to who was to blame for the subject accident."

The appellant who was the driver of the suit motor vehicle failed to testify or call an eye witness to the accident to tell the court how the accident and who was to blame for the accident. The appellant did not testify to provide some answers adequate to displace the narration of the events set forth by PW1, that the appellant was to blame for the accident. In their submissions, the appellant's counsel seemed to rely on a motor vehicle inspection report which allegedly controverted PW1's testimony. However, no such report was produced as evidence. Submissions are not evidence.

In their submissions, the appellant blames the accident on the motor cyclist who was joined to the proceedings as a third party. The trial court in its Judgment addressed the third party issue at Paragraph 27 and 28 (page 75 of Record of Appeal). The court said **"the same goes for the 3rd party enjoined herein. A request for Judgment dated 17.09.2022 filed 21.09.2022 was never endorsed by the court and interlocutory judgment entered. Further, a look at the return of service therein, the same was by substituted service by way of service through the post. I note that there is no description of how the process server came to know of the registered post of the 3rd party.**

I hold there was no service of summons to enter appearance upon the 3rd party as required by the rules and as such the suit against the 3rd party is equally invalid."

From the above finding it meant there was no third party enjoined to these proceedings upon whom to lay or apportion blame. In the end, I find that PW1's narration of how the accident occurred stands unchallenged. The appellant owed the 1st Respondent a duty of care, to transport the 1st Respondent to his destination but he did not do so. There was no attempt by the appellant to prove the allegations of negligence attributed to the 1st Respondent in paragraph 9 of the defence. I do agree with the trial court's finding on liability at 100% as against the appellant.

Quantum

1. The first respondent suffered the following injuries; blunt injury to the head, to the neck, chest, back, both knees and the left upper limb. On 24/12/2020 when the doctor examined her, he found healing wounds on both knees and mild tenderness to the chest. The appellant submitted that on award of Kshs 80,000/= was fair compensation and ruled on the following decision; **Onsongo -vs- Owino CA E102/2023; In Wilson Mboga & another -vs- Harrison Nyangau Mosigisis HCA E054/2023** where the High Court

substituted the award of Kshs 300,000/= with this Kshs 80,000/= for soft tissue injuries; In Boaz **Obure & another -vs- Samwel Kiyuka Timothy Okwanyo HCA E008/2023** where an award of Kshs 250,000/= was substituted with Kshs 70,000/= for soft tissue injuries.

2. The 1st respondent relied on several decisions in the lower court. They included **Johnstone Mutuku Kilango -vs- Elijah Wambua [2016] eKLR** where the appellant sustained blunt trauma to right knee, right ankle 3X4 cm bruises to right chin, blunt trauma to right hip and lower back, and an award of Kshs.250,000/= was upheld by the High Court. In **Catherine Wanjiku Kingori & others -vs- Gibson Theuri Gichui [2005]** several plaintiffs suffered soft tissue injuries and awards of between Kshs 100,000/= to Kshs 350,000/= were made.

3. **In Ndungu Dennis -vs- Ann Wanjiru Ndirangu [2018],** the respondent suffered minor bruises on the back, no fractures on tibia and fabula which was hit, tenderness on right leg. The award was reduced from Kshs 300,000/= to Kshs 100,000/=; In **George Mugo & another -vs- AKM (minor suing through next friend and mother AM [2018] eKLR**, the respondent sustained blunt injury to left shoulder, blunt chest injury anterior;

blunt injury to the left wrist and left arm. The lower court made an award of Kshs 300,000/= but it was reduced to Khs 100,000/=.

4. Having considered all these comparable awards made for soft injures, I find that the award of Kshs 120,000/= is not too high as to be a wrong estimation of the damages. The court finds no reason to interfere with tea award in damages.

5. The appellant did not challenge the award of special damages which were supported by receipts. In the end I find no merit in the appeal and it is hereby dismissed with costs to the respondent.

In the end, I find no merit in the appeal. It is hereby dismissed with costs to the 1st Respondent.

Judgment delivered, dated and signed in open court at **Kapenguria** on this **22nd day of April, 2026.**

R. WENDOH
JUDGE

***In the Presence of*:-**

Appellant- No appearance

Respondent- Ms. Otieno

Juma/Hellen-Court Assistants