



Great Rift Express Classis Shuttle Ltd & another v Ejem (Civil Appeal E004 of 2023) [2024] KEHC 4764 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E004 OF 2023
AC MRIMA, J
APRIL 25, 2024**

BETWEEN

GREAT RIFT EXPRESS CLASSIS SHUTTLE LTD 1ST APPELLANT

PETER NJOROGE KAMAU 2ND APPELLANT

AND

ISAAC ELOTO EJEM RESPONDENT

(Being an Appeal and a Cross Appeal from the Judgment and decree of Hon. J.K Ng'arng'ar SPM in Kitale Chief Magistrates Civil Case No. E086 of 2021 delivered on 24 th January 2023)

JUDGMENT

Background:

1. Through the Complaint dated 22nd January 2021, Isaac Eloto Ejem, the Respondent in the main appeal, sued Great Rift Express Classic Shuttle Ltd., Family Bank Limited and Peter Njoroge Kamau in Kitale Chief Magistrates Civil Case No. E086 of 2021 [hereinafter referred to as 'the civil case'].
2. He sought compensation for bodily injuries sustained on being knocked down while riding motorcycle registration No. KMFB 597D.
3. There was a motor vehicle that was alleged to have caused the accident. The vehicle was registered as KCH 467D. It was a Minibus Matatu. It was managed and/or driven by Peter Njoroge Kamau [the 2nd Appellant herein]. The vehicle was jointly owned by Great Rift Express Classic Shuttle Ltd [1st Appellant herein] and Family Bank Limited.
4. The Respondent asserted that as a result of the 2nd Appellant's negligence he suffered amputation of his right lower limb above the knee, orbital fracture, fracture of the base skull, fracture of the skull, among other injuries.



5. The Respondent pleaded for special damages and general damages for pain and suffering and loss of earning.
6. The Appellants herein challenged the civil case through the defence dated 6th May 2021. They denied the Respondent's claims and put him to strict proof. It was their case that the Respondent was negligent by among other things, failing to provide adequate precaution for his safety, overtaking in a dangerous manner and failing to heed the instructions on safety precautions while riding.
7. In its judgment, the trial Court found that no one was charged for the accident and as such the circumstances of the accident were not clear.
8. In its analysis of the evidence, the trial Court was of the finding that the Respondent herein contributed to the accident. Accordingly, the trial Court apportioned liability in the ratio of 70:30 in favour of the Respondent.
9. As regards the quest for compensation for pain and suffering, the trial Court made the assessment that since skull fracture was not proved, an award of Kshs. 1,500,000/- was adequate in the circumstances.
10. The trial Court did not award anything for future treatment since it was not pleaded and not specially proved.
11. On the aspect of loss of future earning capacity, the trial Court, despite observing that there was no proof of earning, was guided by the decision in Michael W. Malenya -vs- Matunda Bus Ltd (2022) eKLR and awarded a global sum of Kshs. 500,000/-.
12. Finally, the Court awarded special damages of Kshs. 6,550/-.
13. All parties were dissatisfied with the impugned decision. To that end, the Appellants filed an Appeal whereas the Respondent filed a Cross- Appeal.

The Appeals:

14. The Appellants lodged the Memorandum Appeal dated 16th February 2023.
15. They fronted the following grounds of appeal: -
 1. That the learned trial magistrate erred in law and in fact by failing to dismiss the respondent's suit whereas negligence against the Appellants was not proved during trial.
 2. That the learned trial magistrate erred in law and in fact by failing to dismiss the Respondent's suit whereas the evidence adduced during the trial did not meet the threshold of sustaining the suit before the trial court.
 3. That the learned trial magistrate erred in law and in fact by failing to take into account relevant facts relating to the suit thus arriving at a decision that is wholly erroneous in law and facts on the issue of liability.
 4. That the learned trial magistrate erred in law and in fact by holding the Appellants herein 70% liable for causing the accident in view of the evidence adduced during trial.
 5. That the learned trial magistrate erred in law and in fact by holding that the Respondent was 30% liable for causing the accident rather than holding the Respondent 100% liable for causing the accident and dismissing the suit before the trial court.



6. That the learned trial magistrate erred in law and in fact by holding that the Appellants 70% liable for causing the accident whereas from the evidence adduced, the Respondent was improperly overtaking when the accident occurred.
 7. That the learned trial magistrate erred in law and in fact by holding the Appellants 70% liable for causing the accident whereas the evidence of the Appellant's witnesses was consistent in that the Respondent was carelessly overtaking when the accident occurred thus encroaching into the lane of the Appellant's motor vehicle
 8. That the learned trial magistrate erred in law and in fact by failing to take into account the import and veracity of the evidence of the Appellant's witnesses (DW2) on the occurrence of the accident as the witness availed with him in court, the Occurrence Book.
16. The Respondent lodged the Cross-Appeal dated 11th April 2023 and asserted the following grounds of appeal: -
1. That the Honourable trial magistrate erred in law in awarding damages that were too low under pain and suffering vis-à-vis injuries sustained by the cross appellant thereby arriving at an inordinately low award without any justification or basis of the same.
 2. That the learned trial magistrate grossly misdirected himself in treating the evidence on record and never considered the degree of incapacity suffered by the Plaintiff, failed to consider evidence tendered by the cross-appellant on incapacity and consequently come to a wrong conclusion on the same in awarding under the head of loss of earnings capacity.
 3. That honourable Magistrate erred in law in failing to appreciate the principles applicable in the award of damages under the loss of earnings thereby arriving at an inordinately low award in awarding damages to the Appellant under the head of Loss of earnings.
 4. That the honourable magistrate erred in law in failing to appreciate the principles applicable in applying the multiplicand and or multiplier approach and went ahead to apply the global award in awarding damages to the Appellant under the head loss of earnings.
 5. That the learned Magistrate erred in law and in fact and proceeded on wrong principles when assessing damages to be awarded to the cross appellant under future medical expenses and went ahead to deny the Appellant this award yet the same was pleaded and proved at the trial.
 6. That the Honourable magistrate erred in law in relying heavily on the Defendants' submission and ignoring the Cross-Appellant's submissions, grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the Plaintiff and consequently arrived on a wrong conclusion on the same.
 7. That the Honourable Magistrate erred in fact in failing to take into account the authorities cited on behalf of the Appellants with regard to damages awardable to the Respondent under loss of future earning and pain and suffering.
17. The Court directed that the appeals be heard by way of written submissions.
18. Both parties complied by filing their respective submissions.

The Appellants' submissions:

19. The Appellants' written submissions were dated 24th May 2023.



20. They contended that liability ought not to have been apportioned to them. It was their case that PW3, PC Adenyo, stated that she neither was aware that the Respondent was a licenced rider nor could state how the accident happened.
21. They further contended that it would have been fair if liability was equally apportioned since it was unclear who was to blame. To that end, the decision in Baker -vs- Market Harborough Industrial Cooperative Society Limited (1953) was relied on.
22. The Appellants also submitted that the Respondent did not call any eye witnesses to corroborate his evidence and, as such, there was no concrete evidence to support either party's case.
23. In submitting on the award of damages for pain and suffering, the Appellants while citing the decision in Joyce Moraa Oyaro -vs- Hussein Dairy Ltd. (2016) eKLR and the one in Patrick Mbatha Kyengo -vs Bayusuf Freighters Ltd. (2013) eKLR, urged the Court to maintain the sum of Kshs. of 1,500,000/-.
24. As regards future medical expenses, the Appellants submitted that they were correctly not awarded by the trial Court and the claim dismissed since the Respondent already had a prosthetic leg which was donated to him by a welfare society.
25. In conclusion, the Appellants urged the Court to uphold the Appeal with costs and set aside the lower Court award as pertains liability.

The Respondent/Cross-Appellant's submissions:

26. The Respondent/Cross-Appellant filed written submissions dated 18th July 2023.
27. In rebutting the claim that liability ought to be equally apportioned, the Respondent referred to the evidence of PW4 who stated that the motor-vehicle was swaying from side to side of the road and subsequently lost control, veering off its lane and encroaching into his lane and hit him right by his side thus crushing his lower limb.
28. He denied the claim that it was him overtaking an unknown vehicle before he hit the motor vehicle. As regards the evidence of PW3, the Respondent submitted that the importance of the entry in an Occurrence Book was to show that an accident did indeed occur.
29. The Cross-Appellant sought to impugn DW1's evidence in submitting that DW1 gave oral testimony that was different from what he filed in Court through his statement. The witness was also accused of further changing his evidence on cross-examination.
30. It was the Respondent's case that the 2nd Appellant herein breached his duty of care by speeding and losing control and hitting him.
31. In submitting on the award of damages, the Cross-Appellant stated that according to the medical evidence he suffered amputation of the right lower limb, head injury, fractured skull, fracture of base skull and that permanent disability was assessed at 50%.
32. He urged the Court to be guided by the decision in Crown Bus Service Ltd. & 2 Others -vs- BM (Minor Using through his mother & next of friend) SMA (2020) eKLR where there were comparative injuries and the Court made an award of Kshs. 2,500,000/-.
33. The Respondent, then, submitted that this was a case where an award of Kshs.4,500,000/- was appropriate considering the issue of inflation.
34. On the issue regarding failure by the trial Court to apply the principles applicable in the award of damages, the Cross-Appellant submitted that at the time of the accident, he was 23 years of age, in



good health, the breadwinner of his family whose daily ventures were boda boda riding and farming that earned him about Kshs.20,000/- monthly.

35. It was his case, therefore, that this Court ought to substitute the global sum awarded by the trial Court and adopt the multiplier approach by utilizing the Regulation of Wages (General) (Amendment) Order 2015 which was in force at the time of the accident.
36. As regards the concept of multiplier, the Cross-Appellant cited the authority in Joseph Ndegwa & Anther -vs- Japhet Ndungu Muboro, the Legal Representative of the Estate of the late Dishon Irungu Ndungu (2019) eKLR and proposed that a multiplier of 26 years would be appropriate.
37. In pointing out the erroneous application of the principles of damages, the Cross-Appellant submitted that he pleaded that he would be subjected to further medical expenses and would pay for it including a prosthesis at an approximate cost of Kshs. 350,000/-. Support to that end was drawn from the decision in Kenya Bus Service Ltd -vs- Gituma where it was found that it was not necessary for the Plaintiff to plead the amount for future medical expenses. He pleaded that the sum of Kshs. 350,000/- should be awarded since the Appellant produced no evidence to rebut the same.
38. In conclusion, the Cross-Appellant urged the Court to dismiss the Appeal with costs and that the Cross-Appeal be allowed with costs.

Analysis:

39. Having carefully appreciated the pleadings, the proceedings and the evidence presented before the trial Court, it is the Court's assessment that the main issues that arise for determination are as follows: -
 - a. Whether liability was fairly apportioned.
 - b. Whether the following awards were correctly made: -
 - i. Pain, suffering and loss of amenities.
 - ii. Loss of future earning capacity.
 - iii. Future medical expenses.
40. This Court will consider the issues sequentially, but first the role of the Court in these appeals.
41. Since this is a first appeal, this Court's role is well established. In Susan Munyi -vs- Keshar Shiani [2013] eKLR, the Court of Appeal pointed out the first appellate is duty bound to re-look at the evidence presented before the trial court with a fresh, objective pair of eyes. The Court observed;

.... As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.
42. Similarly, in Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR the Court set out the role of the first appellate Court in the following terms: -

...This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.
43. Next is the consideration of the issues.



i. Liability:

44. Liability is an issue of fact. It calls for proof.
45. Sections 107,109 and 112 of the *Evidence Act* provide for the burden of proof. In *Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal made remarks on the foregoing provisions as follows;
- 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 cast 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.
46. The civil case was heard by way of viva voce evidence. Four witnesses testified in support of the Plaintiff/ Respondent's case. They were Dr. Joseph Sokobe from Eldoret Hospital (PW1), John Koima, a Clinical Officer from Kitale County Referral Hospital (PW2), No. 81540 Cpl. Beatrice Adenyo attached at the Traffic Base, Kitale Police Station (PW3) and the Plaintiff who testified as PW4.
47. The Defendants/Appellants called two witnesses. They were Peter Njoroge Kamau [the 2nd Appellant herein who testified as DW1] and No. 75028 PC Philip Kipkeu attached at the Traffic Base, Kitale Police Station [DW2].
48. The Respondent herein [PW4] was the rider of the motor cycle whereas the 2nd Appellant [DW1] was the driver of the vehicle registered as KCH 467D make Minibus Matatu [hereinafter referred to as 'the Matatu'].
49. A total of four witnesses attempted to lead evidence on how the accident occurred. They were PW3, PW4, DW1 and DW2.
50. Apart from PW4 and DW1, the two traffic police officers [PW3 and DW2] neither witnessed the accident nor visited the scene.
51. The totality of the evidence is that it is not easily discernible as to how the accident occurred. The evidence of the Respondent and the 2nd Appellant were at total variance. The evidence of the two traffic police officers did not either aid the Court. The investigating officer did not testify and the police file was not produced.
52. That difficulty was faced by the trial Court which stated in its judgment thus: -
-The circumstances of the accident were not clearly established; hence, it is the word of the defence against that of the Plaintiff's.
53. Immediately thereafter, the trial Court held as follows: -
- According to my own analysis of the evidence I will hold that the Plaintiff too must have contributed to the accident and hence I will apportion blame up to 30%.
54. This Court notes that the trial Court, respectfully so, did not lay a basis as to why, after finding that it was not possible to establish how the accident occurred, still went ahead to find the Respondent up to 30% liable and the Appellants 70% jointly liable.
55. Courts have settled how liability ought to be apportioned in road traffic cases where vehicles collide and there is no tangible evidence on how the accident occurred and which driver was to blame.



56. For instance, the Court of Appeal in *Hussein Omar Farah -vs- Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR* held as follows: -

.... In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

57. The foregoing decision offers guidance on the way forward. Since the decision is not distinguishable in the circumstances of this case, this Court finds and hold that liability out to have been equally held between the Respondent and the Appellants.

58. This Court hereby, and respectfully so, interferes with the finding on liability by the trial Court and sets it aside. It is substituted with a finding on equal apportionment of liability.

ii. Damages:

59. On appeals regarding quantum of damages, this Court reiterates that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler (1982) KLR 277.*)

60. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727* discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

.... 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.

61. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101* and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.*

62. Having said as much, this Court will now deal with the various heads of damages which are contested in the appeals.

Pain, suffering and loss of amenities:

63. The Appellants were not averse to the trial Court's award of Kshs.1,500,000/- on this head. However, the Respondent/Cross-Appellant was of the view that the award was inordinately low and instead proposed a sum of Kshs. 4,500,000/- as reasonable and adequate.

64. This Court has carefully gone through the decisions relied upon by the parties herein among others. The Cross-Appellant referred to *Kipkoskei Tangus Tesot -vs- Julius Kiprono Tanui (2018) eKLR*, *Crown Bus services Ltd. & 2 Others -vs- BM (minor suing through his mother & next of friend) SMA*



- (2020) eKLR as well as the decision in John Kipkemboi & Another -vs- Morris Kedolo (2019) eKLR. In the said cases, the extent of injuries sustained were similar to those sustained by the Cross-Appellant.
65. The damages awarded in many decisions with injuries more or less similar to those sustained by the Cross-Appellant range from Kshs. 2,000,000/- to Kshs. 2,500,000/-. Most of these decisions were delivered in or before 2020.
 66. The Cross-Appellant's justification for the award of Kshs. 4,500,000/- was, among other reasons, comparable cases and the aspect of inflation over the years.
 67. Given the passage of time and on the basis of the comparable awards for similar injuries, this Court is persuaded that this is a case where this Court ought to interfere with the discretion of the trial Court.
 68. This Court, once again and respectfully so, hereby substitutes the award by the trial Court of damages at Kshs. 1,500,000/- with the sum of Kshs. 2,200,000/-.

Loss of future earning capacity:

69. Under this head, the Cross-Appellant made its case that at the time of the accident he was 23 years of age, in good health and the breadwinner of his family. He pleaded that from his daily ventures (boda-boda riding and farming) he earned about Kshs.20,000/- monthly.
70. The Cross-Appellant did not adduce any evidence to this end. However, the trial Court, on the understanding that the Cross-Appellant must have been doing some work for himself, and being guided by the decision in Michael W. Malenya -vs- Matunda Bus Ltd (2022) eKLR awarded a global sum of Kshs. 500,000/-.
71. The Court has painstakingly gone through the evidence and the rival submissions and is persuaded that indeed the trial Court was right in the manner it handled this aspect.
72. The invitation to use the multiplier approach in this case is, respectfully, without any basis since that is a method applied in damages under the Law Reform Act, Cap. 26 of the Laws of Kenya.
73. The Cross-Appellant's contention is, hence, for rejection.

Future medical expenses:

74. The Cross-Appellant was of the contention that he was wrongfully denied an award under this head yet it was pleaded and proved.
75. The trial Court made a finding that the Cross-Appellant neither pleaded nor proved future medical expenses and as such declined to make any award.
76. To the contrary, however, the Cross-Appellant did plead future medical expenses in paragraph 11 of the Plaintiff.
77. In Kenya Bus Services Ltd. -vs- Gituma, (2004) EA 91, the Court of Appeal had the following to say on this subject: -

.... And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does



contemplate as arising naturally from the infringement of a person's legal rights should be pleaded.

78. It can be discerned from the foregoing that an award for future medical expenses is a special damage, a person must plead and specifically prove it.
79. The Court of Appeal in Civil Appeal 26 of 2013, *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR spoke further to the foregoing as follows: -
- we are of the view that taking into account the 100% disability on the part of the respondent and the injuries sustained, we make an award of Kshs. 3,500,000/= which we consider is not inordinately excessive as general damages for pain and suffering and loss of amenities. No award is made for future medical care as the same was neither pleaded nor proved as special damages. (underline mine)
80. It, therefore, follows from the foregoing that, the failure to lead hard evidence on future medication fell short the requirement for its award. PW1's evidence that the Cross-Appellant may need further treatment was not definitive. He stated in his evidence as follows: -
- He may need further treatment at anticipated cost of Kshs. 350,000/-
- ...he may need further treatment at Moi Teaching and Referral Hospital.
- It can even go up to Kshs. 2,000,000/- depending on quality.
81. It can be gathered from PW1's language that future medical costs for the Respondent were not mandatory. It seemed to be discretionary and PW1 simply gave an anticipated range of Kshs. 350,000/- and Kshs. 2,000,000/-.
82. That said, the award cannot be granted.
83. Having dealt with all the issues raised in these appeals, this matter is now ready for disposition.

Disposition:

84. Coming to the end of this judgment, this Court wishes to profusely apologize to the parties for the late delivery of this decision. The delay is attributed to the cumulative heavy workload in the two High Court stations under yours truly docket.
85. In the end, having regard to the foregoing findings the following reliefs hereby issue: -
- a. Both the Appeal and the Cross-Appeal succeed partially.
 - b. Liability is apportioned equally between the Appellants and the Respondent.
 - c. The following awards are made: -
 - i. Kshs. 2,200,000/= for pain, suffering and loss of amenities.
 - ii. Kshs. 500,000/= for loss of future earning capacity.
 - iii. Kshs. 6,550/= for Special damages.Total Kshs. 2,706,550/=
- Less 50% contribution.....Kshs. 1,353,275/=
- Net Total Kshs.1,353,275/=
- d. Parties do bear their own costs.



It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF APRIL, 2024.

A. C. MRIMA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment virtually delivered in the presence of:

No appearance for Mr. Cheruiyot, Counsel for the Appellants.

No appearance for Mr. Savatia, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

