

**REPUBLIC OF KENYA**  
**IN HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL APPEAL NO. E017 OF 2022**

**NICODEMUS NYANDORO**

**GWAKA.....APPELLANT**

**VERSUS**

**HILLSPARK INVESTMENT COMPANY LTD.....1<sup>ST</sup>**

**RESPONDENT**

**JOHN GICHUMBA NGANGA.....2<sup>ND</sup>**

**RESPONDENT**

**(Being an appeal from the Judgment of Hon.E.Kelly (SRM) delivered  
in Naivasha CMCC No.402 of 2016 on 8th February 2022)**

**JUDGMENT**

1. The appellant who was the Plaintiff in the lower court filed a suit against the 1<sup>st</sup> respondent who was the defendant claiming special and general damages for injuries suffered as a result of an accident which occurred on 6th February, 2016. The accident involved motor vehicle (bus) registration No. KBT 693G in which he was a passenger. The 1<sup>st</sup> respondent was the owner of the said motor vehicle.
2. The 1<sup>st</sup> respondent filed a defence denying the claim and blaming the appellant for negligence. The 1<sup>st</sup> respondent was later granted leave to issue a 3<sup>rd</sup> Party Notice to the 2<sup>nd</sup>

respondent, being owner of motor vehicle registration No. KCA 943G which had been involved in the accident of 6th February 2016. The 2nd respondent never entered appearance though served. Judgment was entered against him on 12th October 2018. The matter proceeded to full hearing and finally Judgment was delivered on 8th February 2021, dismissing the appellants' case against the 1st respondent. She indicated what awards she would give had the appellant succeeded.

3. Being aggrieved by the Judgment the appellant filed this appeal dated 23<sup>rd</sup> February, 2022 on the following grounds:

(i) **THAT** the learned Magistrate erred in fact and in law in failing to find that the appellant had not proved her case on a balance of probabilities against the 1st respondent despite there being overwhelming evidence.

(ii) **THAT** the Learned Magistrate erred in fact and in law in disregarding the appellant's testimony and in disregarding the evidence tendered by the appellant during the hearing of the above suit.

(iii) **THAT** the Learned Magistrate erred in fact and law in basing her findings on irrelevant issues not supported by evidence adduced or the applicable law.

3. A summary of the case is that on 6th February 2016 the

appellant was travelling in motor vehicle registration No. KBT 693G along Mai Mahiu-Narok road at Suswa when an accident occurred involving this motor vehicle and motor vehicle registration No.KCA 943G. The owner of KBT 693G is the 1st respondent while KCA 933 G is owned by the 2nd respondent. In his evidence the appellant told the court that the Lorry (KCA 933G) which was ahead of the bus (KBT 093 G) indicated that it was turning into a feeder road but the bus hit it hard from behind causing the accident.

4. He called one witness No.70423-CPI Vincent Obare(PW2) who said it was the Lorry (KCA 933 G) which hit the bus from the rear.

5. The 1<sup>st</sup> respondent (defendant) called one witness No. 91912 P.C

Sirere Letoya (DW1) who blamed the driver of the Lorry for the accident. He said the Lorry hit the bus from the rear.

6. The appeal was canvassed by written submissions.

### **Appellant's submissions**

The same are dated 8th August 2024 and were filed by Gekonga & Co. Advocates. Counsel while referring to the evidence on

record submitted that the accident was confirmed as having occurred on 6th February 2016, and the Police abstract showed the matter was still pending investigations. That the trial court relied on the testimony of police officers who neither produced the police file nor sketch plans. Counsel cited the case of **David Kajogi M'Mugara V Francis Muthoni {2012} eKLR** where the court held that the evidence of the investigating officer alone can not be conclusive as to who is to blame for an accident. And in this case DW1 was not the investigating officer and so the court should not have relied on this evidence.

7. Counsel submitted that the trial court erred by dismissing the appellant's suit despite finding the 2<sup>nd</sup> respondent 100% liable.

That the trial court asserted that the appellant never sued the 2<sup>nd</sup>

respondent and so the appellant could not enjoy the Judgment.

He cited the case of **Boniface Klaiti and Another V Michael Kariuki Kamau {2007} eKLR**.

8. On quantum counsel submitted that the appellant has sought for

Kshs.400,000/= as general damages, while the 1<sup>st</sup> respondent submitted that Kshs.40,000/= was sufficient. He relied on the case of **Devki Steel Mills Limited V James Makau Kisuli {2012} eKLR** where the plaintiff was awarded Kshs.250,000/= and so he asked for Kshs. 400,000/= for the appellant. That

the award Kshs.100,000/= was too low and this court should interfere with it. Reliance was placed on the cases of: **Tridev Construction V Charles Wekesa Kasembeli Appeal No.121 of 2022** and **Kemfro Africa LTD t/a Meru express Service Gathongo Kanini A.M Lubia and Olive Lubia (1982-88) L KAR KAR 727.**

### **1<sup>st</sup> Respondent's submissions**

9. These were filed by Kimondo Gachoka & Co.Advocates and are dated 20<sup>th</sup> November 2024. Counsel submitted that police officer (DW1) produced an OB showing motor vehicle KCA 943 G

to blame for the accident. That from the testimonies of PW2 and

DW1, it was clear that the driver of KCA 943G was to blame for the accident. Thus, the appellant did not establish liability against the 1<sup>st</sup> respondent as required under section 107 of the Evidence Act. Reliance was also placed on the case of **Bwire V Wayo and Sailoki(Civil Appeal No.032 of 2021)KEHC 7 (KLR)(24th January 2022)(Judgment)** where it was stated:

***“The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting***

***it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate (sic) court reasonably make (sic) a finding that liability had been established on 100% basis as against the appellant.”***

10. On quantum counsel submitted that the trial court would have awarded Kshs.100,000/= as general damages had the appellant

proved his case. Counsel submitted that an award of Kshs.80,000 would be adequate compensation, if the court is less inclined to dismiss the appeal. Counsel cited two cases where parties suffered similar injuries and lower awards were made. These are:

- i. **Ndungu Dennis V Ann Wangari Ndirangu and Another [2018] eKLR** where an award of Kshs.100,000/= was made.
- ii. **HB (Minor suing through mother and next DKM) V Jasper Nchonga Magari and Another [2021] eKLR** where an award of Kshs.60,000/= was made for one who had sustained blunt object injury to the head and neck, thorax, abdomen and limbs.

## **Analysis and Determination**

11. As a first appellate court, this court has a duty to re-evaluate, and re-assess the evidence tendered before the trial court and arrive at its own independent conclusion. It must also bear in mind that unlike the trial court it did not hear nor see the witnesses testifying, and so give an allowance for that.

In the case of **Selle V Associated Motor Boat company** {1968} E.A 1123 the court stated

***“.....An appeal to this court from a trial by the High court is by way of retrial and the principles upon which this court acts in such appeal are well settled. Briefly put, they are that this court must re-consider the evidence evaluate it itself and draw its own conclusions though it should bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this court is not bound necessarily to follow the Judge’s findings of fact if it appears either that he has clearly failed on some points to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”***

Also see (i) **Gitobu Manyara and 2 others versus Attorney General {2016} eKLR** (ii) **Peter Versus Sunday Post Limited [1958] E. A 424**, (iii) **Akok James Odera T/A A.J Odera and Associates Versus John Patrick Machira and Co. Advocates {2013} eKLR**

12. I have carefully considered the record of appeal, submissions by

both parties, cited authorities and the Law. The main issues for

determination are as follows:

- i. Whether the trial court erred in dismissing the appellant's suit against the 1<sup>st</sup> respondent.
- ii. Whether the finding on liability by the trial court should be interfered with by this court.
- iii. Whether the trial court's proposal on the awards should be interfered with by this court.

## **Liability**

13. It was not disputed that the appellant was a passenger in the 1<sup>st</sup>

respondent's vehicle which collided with the 2<sup>nd</sup> respondent's vehicle. It was also not disputed that the 2<sup>nd</sup> respondent though



served with the 3<sup>rd</sup> party Notice did not enter appearance nor file

any defence. Judgment was entered against him on 12<sup>th</sup> October

2018.

14. Three Witnesses testified in this case i.e the appellant, PW2 and DW1. The appellant stated that it was the 1<sup>st</sup> respondent's driver who drove carelessly and hit the lorry from the rear. On the other hand, the appellant's witness (PW2) told the court that as per the Occurrence Book (OB) it was the lorry driver who was to blame for the accident. The O.B extract was however not produced as evidence. The investigating officer was also not called as a witness by the appellant. PW2 was a police officer from Mai Mahiu police station. He did not support the appellant's claims. DW1, also a police officer testified that the bus in which the passenger was on board was hit by the 2<sup>nd</sup> respondent's lorry. The witness claimed to have had the O.B in court but he never produced it. The 1st respondent was directed by the trial court on request to annex the O.B extract on his submissions.

15. From the submissions filed by the 1<sup>st</sup> respondent before the trial

court there is a blurred document annexed. It's not legible.

Even the trial court did not refer to it in her Judgment most

likely for the same reason. Both PW2 and DW1 referred to the

same O.B extract saying the 3rd party (2<sup>nd</sup> respondent) was to blame for the accident. The trial court found the 2<sup>nd</sup> respondent

to be 100% to blame for the accident.

16. Upon analyzing the evidence before the court, I am satisfied with the trial court's findings of liability. The plaintiff failed to adduce evidence, on liability against the 1st respondent. I therefore find that the trial court did not err in dismissing the appellant's claim against the 1st respondent. This answers the

1st and 2<sup>nd</sup> issues.

17. On the 3rd issue on whether the trial court's proposed awards should be interfered with my first question is why the trial court did not enter Judgment against the 2nd respondent after finding him 100% liable for the accident.

Order 1 Rule 15 of the Civil Procedure Rules is clear that it is only a defendant who can seek for a third party notice to enjoin

a third party. A third party notice is brought at the instance of the defendant who has a claim against him for indemnity, contribution or other connected with the plaintiff's claim

against the defendant.

18. The court of Appeal in **Yafesi Walusimbi versus Attorney General of Uganda 1959 EA 223** stated this:

“In order to join a third party the subject matter between the 3rd party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same.”

A perusal of the chamber summons dated 2<sup>nd</sup> July 2018 seeking leave for joinder of the 2nd respondent as a third party clearly sets out the reasons for the same. The main reason being that the accident involved both the respondent's vehicles. The claim being that the 2nd respondent's vehicle solely caused and/or substantially contributed to the occurrence of the alleged accident.

19. The learned trial magistrate said the following on this in her judgment at page 66 lines 22-26 of the record of appeal.

***“The plaintiff hence failed to discharge his burden of proof of negligence against the defendant on a balance of probability. It's the defendant that introduced the party and not the plaintiff and hence the plaintiff who did not at all blame anyone else but the defendant for the accident and injuries sustained***

***there-from cannot take advantage of any determination against the third party or anyone else”***

20. I find this to be absurd because once leave was granted for joinder of the third party the third party became a party to the said proceedings. Once found liable then the consequences have to follow otherwise there would be no need for determining liability.

21. In the case of **Kemfro Africa limited t/a Meru express services Gathogo Kanini Versus A,M.Lukia & Olive Lukia**

**(1982-88) KAR727** the court of Appeal reiterated the principles

to be observed by appellate courts and stated as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a third Judge were held by the former court of Appeal of East Africa to be that it must be satisfied that either the Judge, in assessing 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 how

or so inordinately high that it must be a wholly erroneous estimate of the damages”

Due to the manner in which the trial court handled the issue of the third party, I find it important to deal with the issues of quantum afresh.

22. The injuries pleaded by the appellant were:

- i. Blunt injuries to the neck-severe soft tissues injuries.
- ii. Blunt injuries to the anterior of chest wall-soft tissue injuries
- iii. Severe soft tissues injuries of the left shoulder joint.

23. The P3 form -Page 11 of the record shows that the injuries were

assessed as “harm” Dr.Obed Omuyoma examined the appellant

on 22<sup>nd</sup> March 2016 and assessed the degree of injury as ‘harm

infact there is nothing serious revealed in the examination:

save for the chest pain. This was about 16 days after the said accident.

24. The trial court considered the authorities cited by the parties alongside others namely:

- i. **HB (suing through -mother and next friend DKM**  
supra where an award of Kshs.60,000 was made.
- ii. **Nyambati Nyaswabu Erick versus Toyota Kenya Limited and 2 others {2019} eKLR** - Kshs.90,000 award.
- iii. **Mokaya Mochama versus Julius Momanyi Nyokwoyo [2013] KEHC 3799 KLR** - Kshs.70,000 award.

25. In his submissions counsel for the appellant proposed an award

of Kshs.400,000/= while counsel for 1st respondent proposed one of Kshs.80,000/=

26. I have considered some other decisions with almost similar injuries like;

- i. **James Gikonyo mwangi V D.M (Mwangi suing through his mother and next friend IMO [2016] eKLR** whose injuries were: deep cut wound on the scalp, bruises on the face, cerebral concussion and the award of Kshs.100,000/= was upheld.
- ii. **Devki steel mills limited versus James Makau Kiseili [2012] eKLR**-The injuries were: severe soft tissues injuries to the left side of the pelvis-award of Kshs.250,000/= was made.

- iii. **Ndungu Dennis V Ann Wangari Ndirangu** and Another (supra) where an award of Kshs.60,000 was made (injuries stated at paragraph 10 of this Judgment)

In my assessment of the injuries suffered I find an award of Kshs.150,000/= to be adequate compensation. Proved expenses relate to the medical report (Kshs.7000/=) plus search certificate NTSA (Kshs.550/=) = Kshs.7,550/=.

27. The upshot is that the appeal has merit and is partially allowed

and the judgment of the lower court is set aside and is substituted with this court's Judgment in the following terms:

- i. The appellant's claim against the 1st respondent stands dismissed
- ii. The 2nd respondent is found liable for the accident at 100%.
- iii. An award of damages at Kshs.150,000/=
- iv. Special damages allowed at Ksh.7,550/=
- v. Half costs and interest at court rates in the lower court to the appellant.
- vi. Each party to bear his costs for the Appeal.

28. Orders accordingly.

Judgment delivered virtually dated and signed this 6<sup>th</sup> day of August, 2025 in open court at Nakuru.

**H.I. ONG'UDI**  
**JUDGE**