Warutumo v Kinyua & another (Civil Appeal E058 of 2022)
[2024] KEHC 16257 (KLR) (20 December 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E058 OF 2022

DKN MAGARE, J

DECEMBER 20, 2024

BETWEEN

DANIEL MAINA WARUTUMO ..... APPELLANT

AND

ANNE MARGARET KINYUA ..... 1ST RESPONDENT

ANN WAMUYU MWAI ..... 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. Mathias Okuche (PM) on 15.09.2022 in Nyeri CMCC 99 of 2019. The Appellant as the Plaintiff in the lower court. The Appellant was involved with an accident with Motor Vehicle Registration Number KBY 034E (the Motor Vehicle), owned by the first Respondent. He was a pillion passenger aboard Motor Cycle Registration Number KMEB 772N (the Motor Cycle) owned by the second Respondent.

Pleadings

2. The Appellant filed suit on 10/4/2019 against the first Respondent over the said accident of 23/07/2018. The Appellant set forth several particulars of negligence of the driver of the motor vehicle. The Appellant set forth the following particulars of injuries:

    a. Spinal injury

    b. Loss of sensation of the left leg

3. The Appellant pleaded the following special damages:

    a. Police Abstract – Ksh. 200/=

    b. Medical report – Ksh. 4,000/=

c. Medical expenses – Ksh. 143,288/=

Total Ksh. 143,288/=

4. The first Respondent filed defence on 20/9/2019. They blamed the Appellant and the rider of the motor cycle. They sought to enjoin (it appears to have been to join) the motor cycle owner to the suit as third parties. True to their word, the first Respondent filed an application dated 8/11/2019 for leave to issue a Third-Party Notice to the second Respondent. The said notice was filed on 13/12/2019.

5. The Third Party entered appearance and filed a short defence on 10/8/2021. They denied negligence on part of their agent in the rider of the motor cycle. The said defence was unimpressive and in breach of several rules of practice and tenets of the Civil Procedure Rules. However, the saving grace was that the Third Party, now the second Respondent, adopted the particulars of negligence in the plaint. Order 2 rule 4(1) of the Civil Procedure Rules provide as follows:

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

6. The lower court dismissed the Appellant's suit for failure to prove the case to the required standard, that is, on a balance of probabilities. The Appellant being aggrieved filed this appeal vide a Memorandum of Appeal dated 11/10/2022 and set out 5 grounds of appeal:

a. The learned trial magistrate erred in law in failing to assess damages he would have otherwise awarded the Appellant.

b. The learned trial magistrate erred in law in failing to take into account the Appellant's evidence and submissions.

c. The learned trial magistrate erred in law in failing to consider the Appellant had joined issues in the reply to defence.

d. The learned trial magistrate erred in law in stating the whole of the plaintiff's claim failed without addressing all the evidence adduced by the Appellant by the Appellant even when the Respondent was a mere passenger.

e. The learned trial magistrate erred in law in failing to consider all the evidence, pleadings, facts and law before him and in failing to make a finding on each and every issue raised by the parties.

7. The matter proceeded by way of submissions which were filed by the parties, pursuant to directions issued by the court

Evidence

8. The Appellant testified and adopted the statement filed as evidence in chief. He produced a P3 form, receipt for special damages, demand letter and statutory notice to the Respondents' insurance company. He stated that an accident did occur on 23/7/2018 at around 8.30 involving the motor vehicle and motor cycle. The motor vehicle is said to have suddenly hit the motor cycle, resulting in the injuries the motor vehicle sustained. He was rushed to Mathari hospital for treatment. He later

recorded a statement. The police issued the Appellant with a P3 form and a police abstract. The P3 form was duly filed. On cross examination he stated that he was a passenger on the motor cycle but could not recall the registration number. The witness stated that the accident occurred at around Wambugu farm. The motor vehicle hit the boda boda from the left side. His evidence was that the motor vehicle was not hit on the front. He thereafter became unconscious.

9. The second witness was No. 82433, Pc Antony Opiyo (Pc Opiyo) testified that he was attached to Nyeri performing traffic duties. He testified that an accident was reported on 23/7/2018 involving the motor vehicle and motor cycle, which were driven from opposite direction one facing Nyeri and the other Gatitu direction. He stated that the records indicated that the Appellant was injured and was issued with a police abstract.

10. On cross examination, Pc Opiyo, stated there had to be someone on the wrong. However, the investigating officer did not indicate who was to blame. On further cross examination, the witness stated that the driver of the motor vehicle was not charged.

11. PW3 was Dr. Francis Maina who examined the Appellant and found that he had spinal decompression. He produced the medical report as exhibit 1. Surprisingly, he was not examined by both respondents, beating the very logic why Order 11 of the Civil Procedure Rules requires parties to indicate documents that the parties have no objection to. The document ought to have been produced without calling the makers to avoid unnecessary costs.

12. The first Respondent testified on 8/3/2022, that she was the owner of the motor vehicle. She recalled that on 23/7/2018, she was driving the said motor vehicle when an accident occurred involving the vehicle and the motor cycle. According to her, the motor cycle veered off the road and hit the front right headlight and bumper. According to her the rider was drunk. The said rider declined to visit the scene of the accident. She stated that none was charged. She was cross examined and stated that she bought the motor vehicle in 2017 and had been given a license in 2016. She stated that the motor cycle hit her while on her lane. She blamed the motor cyclist for the accident.

13. She stated that the motor cyclist was drunk and it was included in the abstract. She stated that she was hit on the front bumper. On cross examination by the advocate for the second Respondent, she stated that she was not reversing and she was hit on front. According to her it is the police officer (unnamed) who said that the cyclist was drunk. The question of being drunk is of no probative value as it is hearsay. In Kinyatti v Republic [1984] eKLR, the Court of Appeal (Kneller JA, Chesoni & Nyarangi Ag JJA) on Nairobi November 23, 1984 posited as follows in regard to hearsay.

    As stated in cases and materials on evidence ibid at p 311[1] the rule against hearsay is that express or implied assertions which are not made at the trial by the witness who is not testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted "(cross on Evidence 1975 p 387: Cowen and Carter Essays in the Law of Evidence, p 1). That is the general rule.

14. The Third-Party recalled PW2 to testify as TPW1. He produced an abstract issued to the third party as TPD Exhibit 1. The said police abstract blamed the motor vehicle. On cross examination, the witness indicated that he did not have a sketch plan. He stated that the abstract produced was issued in August 2018.

[1] Cases and materials on evidence by JD Heydon, 1975 p 5 London Butterworths

Submissions

15. The Appellant submitted that the trial court erred in dismissing the suit despite the overwhelming evidence tendered in support of the Appellant's suit. The Appellant cited Section 107(1) of the *Evidence Act* in support of the appeal. Further, it was submitted for the Appellant that contributory negligence could not be found as liability could not be traced to the Appellant. They submitted that the lower court ought to have awarded 100% liability instead of dismissing the suit.

16. On quantum, it was submitted that general damages of Kshs. 3,000,000 submitted in the lower court would be appropriate compensation to the Appellant if the Appeal was allowed. This was based inter alia on William Kitoto Andere versus Easy Coach Ltd HCCC No. 3 of 2018 and Naftali Njoroge Njau vs Polypipes Ltd (2016) eKLR.

17. On their part, the Respondents submitted that the lower court correctly appraised itself with the case and evidence before it and arrived at the correct decision when it dismissed the Appellant's suit.

18. To this end, it was submitted that the Appellant failed to discharge their burden of proof on a balance of probabilities. On quantum, it was the view of the first Respondent that without liability there was no fault and the appeal was as such unmerited. If liability were to be established the first Respondent's view was that compensation of Kshs. 500,000/- would be adequate in the circumstances.

Analysis

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This Court will not interfere with the exercise of judicial discretion by the lower court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

20. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

21. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read

into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

22. Parole evidence is not admissible to contradict, vary or alter the terms of any written instrument. In the case of Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

23. It is a strong thing for an appellate court to differ from the findings on a question of fact of the lower court, which had the advantage of seeing and hearing the witnesses as stated in the case of Peters vs Sunday Post Limited [1958] EA 424, where the court rendered itself as follows:

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

24. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the Appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

25. The court in a short judgment dismissed the suit. I have gone through the judgment and I am unable to know the basis of the decision by the court. The court created its own scenario and arrived at a conclusion that is strained and not based on the facts and evidence before the court. The duty of a plaintiff is not to prove the case beyond doubt. It is on a balance of probability.

26. The duty of the parties is set out in sections 107-109 of the *Evidence act* as follows:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

27. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

28. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
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> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

29. There were only two eye witnesses to the accident. Their stories differed in major details and what they saw. The third witness was a hearsay witness. The police officer was neither the investigating officer nor a person perusing the records. He was a collector of police abstracts. He found absolutely nothing wrong in producing contradicting police abstracts. He produced documents for the Plaintiff and third parties.

30. The court left out the clear chronology of events that could have solved the imbroglio. The evidence by the first Respondent was that the rider refused to go to the scene of accident. This means, if we have to believe first Respondent that the evidence on how the accident occurred came only from her. The

Appellant was already unconscious and in hospital. It is therefore expected that the police evidence would be similar as the source is one. A police abstract, really does not show who is to blame. It is the police officer's preliminary view on the cause of accident. A sketch plan gives a more succinct view of the accident.

31. However, in the absence of the evidence of the sketch plan, the court must make do with available evidence. In the case of Techard Steam & Power Limited v Mutio Muli & Mutua Ngao [2019] eKLR Odunga J held as follows in relation to proving negligence.

> " Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In Peter Kanithi Kimunya v. Aden Guyo Haro [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 police station."

32. It is not lost on this court that a party who alleges must prove. Negligence is a question of facts to be called out from the circumstances of the case. The Court of Appeal discussed legal burden of proof in the case of Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, 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 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."

33. The accident can therefore not be said to have occurred by magic or unidentified flying object. In a court room situation, we deal with empirical evidence on what is more probable than the other. The court can possibly get it wrong but if better still 51:49. PW2 constable Antony Opiyo while being cross examined by the second Respondent, stated that the Investigating Officer did not state who was blame for the accident. The evidence was different when testifying for the second Respondent.

34. The Appellant submitted that contributory negligence was not proved and the Appellant proved his case 100% against the first Respondent. Was this true position in the circumstances?

35. The two police abstracts tendered in the lower court were contradictory. It is the view of this court that Traffic Police Officers as civil servants need not necessarily find for the Plaintiff or Defendant in a case. They may testify in court as witnesses of the Plaintiff but produce a report that does not support the Plaintiff's case. They may also testify in court for the Defendant but produce a report that does not support the defendant's case. Their duty is to present as accurately as possible a report on the circumstances that led to the accident. It does not matter that the report will support one or the other case. The report might as well find no one to blame. Such a report is also not necessarily binding to the Court.

36. The defence and evidence of the second Respondent as Third Party in the lower court attributed negligence to the first Respondent. The fact that the driver of the accident motor vehicle was a new

driver would not be conclusive proof that she was negligent. It was her case that the accident occurred on the left lane facing Nyeri direction and she was not reversing the motor vehicle and so the motorcycle could have hit the rear of the motor vehicle. The Appellant's case was that the motor vehicle was reversing and accident occurred on the side heading to Karatina and the motorcycle did not hit the motor vehicle on the front.

37. The first Respondent's account was that she was driving the motor vehicle when the motor cycle veered off the road and hit the motor vehicle from right headlight and bumper. According to her the rider was drunk and was unable to control the vehicle. The said rider declined to visit the scene of the accident. The certificate of examination of the motor vehicle showed that the motor vehicle suffered damage to the front bumper. In my view, the only plausible explanation is that the motorcycle collided with the motor vehicle. What is clear in this case is that there is nothing the Appellant would have done to avoid the accident. He was a mere pillion passenger on the motorbike. He proved that the accident occurred and it occurred with no fault of his own.

38. The first Respondent blamed the second Respondent. On the other hand, the second Respondent blamed the first Respondent. No blame was apportioned to the Appellant. Ipso facto, the question before the court below, was who between the respondents was to blame. It is thus disingenuous to eschew making such a decision. The Respondents had a duty to prove contributory negligence. There was no duty on part of the Appellant to prove the degrees of culpability between the tortfeasors. In Dormakaba Limited v Arcitectural Supplies Kenya Limited (Civil Suit 136 of 2020) [2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment), Mativo J, as he then was stated as doth:

> The Plaintiff 'is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.'18 A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.

39. Negligence is defined in R.A. Percy, Charlesworth & Percy on Negligence, 8th Edition, London: Sweet & Maxwell, (1990), as: -

> " In current forensic speech, negligence had three meanings, they are: (a state of mind, in which it is opposed to intention; (2) careless conduct; and (3) the breach of a duty to take care that is imposed by either common law or statute. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings."

40. Halsbury's Laws of England, 4th Ed at Para 662 (page 476) posits as doth regarding the burden of proof in an action for damages:

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established."

41. In the case of Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), Mativo J, as he then was, stated as follows:

> " Whereas it is true that where a party fails to adduce evidence, its pleadings remain mere allegations is correct, this proposition is not a statement of general application to be applied blindly and without due regard to the facts and circumstances of the facts at hand. The peculiar facts of each case must be considered. As we all know, in both criminal and civil cases, the phrase 'burden of proof' is commonly said to be used in two quite distinct senses. In one sense it means 'The peculiar duty of him who has the risk of any given proposition on which the parties are at issue — who will lose the case if he does not make this proposition out, when all has been said and done.'
>
> 23 A basic test for determining which party has the burden of proof is contained in the judgment of Walsh JA in Currie v Dempsey.24 His Honour stated "in my opinion [the legal burden of proof] lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, e.g. if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, prima facie, the plaintiff has."

42. There must be cogent evidence tendered to prove either negligence or contributory negligence. The court dealt with the issue of contributory negligence in the case of Cadama Builders Limited v Mutamba (Suing as the administrators of the Estate of Philip Musei Ndolo) (Deceased)) (Civil Appeal E093 of 2021) [2022] KEHC 11029 (KLR) (27 July 2022) (Judgment), Kasango J stated as follows: -

> " No evidence at all was adduced which proved negligence on the part of the appellant. I venture to state that just as much as the trial court found the appellant's pleadings, not supported by oral evidence, remained mere allegations, similarly the respondent's pleadings remained mere allegations so long as the evidence that was adduced did not prove those pleadings. The Court of Appeal expressed itself in those terms in the case of Charterhouse Bank Limited (under statutory management) vs Frank Kamau (2016) eKLR, as follows:-
>
> > " We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination

and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in Karugi & Another v. Kabiya & 3 Others (supra) is totally different from the proposition advanced by theAppellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgment, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis."

43. What constitutes evidence is set out in Section 35 of the *Evidence Act* as follows:

1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

44. Evidence is as good as the source. The evidence of the police did not settle on who could have caused the accident. The police officer was also not at the scene of the accident and no sketch map was produced. The police evidence was based on a false assumption that the 1st Respondent's evidence reported the truth. However, the 1st Respondent did not give a detailed account on what could led her to swerve in a manner that finally led to the collision. There is no evidence on record, even based on the evidence of the first Respondent alone to show how the 2nd Respondent was to blame.

45. The evidence on record, does not support, the postulation by the Second Respondent. The lower court erred, on the face of evidence in finding that the Appellant, did not discharge the burden of proof. The Appellant discharged his duty, that is, the accident occurred and he was injured as a result of the injury. It was also proved that the accident occurred without any fault on his part. He also proved that, and the Respondents agreed in their evidence, that either of the respondents were to blame. The onus of

proof is on he who alleges. In matters where e negligence is alleged the position was enunciated in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991, as doth:

> " There is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

46. The above applies equally to the Plaintiffs and defendants. The Respondents bore the blame which they failed to extricate themselves from. Where there is doubt as to which of two tortfeasors is to blame, then the most prudent holding is to find both of them equally liable. In the case of Embu Road Services V Riimi (1968) EA 22, the court held inter alia as doth; -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

47. Further, lower court was incorrect in finding no liability and so no fault. In the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 the determinants of negligence were stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."

In Caparo case (supra) the Court stated:

> " What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

48. In this case, the first Respondent's evidence does not explain how she got injured on the head light. Her evidence is that, the motor cycle veered off the road and hit the front right headlight and bumper. Veering off the road, as stated, will have actually, avoided the accident. The accident could have only occurred, if parties met on the road. There was no evidence to show, how the Second respondent tried to avoid the accident. Whereas there was no evidence of primary negligence, the second Respondent did show steps the rider took not avoid the accident.

49. In the circumstances, I find that the 1st Respondent was largely to blame. The second respondent was to blame to a certain extent. Doing the best I can, the evidence on record shows that the first Respondent was 70% to blame. The rider was 30% to blame. I therefore set aside the judgment on liability and in

lieu, thereof enter judgment for the Appellant at 70% against the first Respondent and 30% against the second Respondent.

50. I now turn to the question of quantum of damages. This first Appellate Court will not interfere with the exercise of judicial discretion by the lower court, unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

51. It is in this contest that it must be understood that assessment of general damages is at the discretion of the trial. The question of quantum of damages was addressed by the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55, set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " Assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

52. An appellate court is only entitled to increase an award of damages by the lower Court, if it is so inordinately low that it represents an entirely erroneous estimate. The converse is also true. The appellate court is only entitled to decrease an award of damages by the lower Court if it is so inordinately high that it represents an entirely erroneous estimate of damages. In the case of Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457, the Court of Appeal postulated as follows:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect... A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own... The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

53. However, this is not possible in a situation where the court decides that it does not want to assess damages. The court loses the essential element of the demeanor of witnesses as observed in the lower court. The court of appeal pronounced itself succinctly on the principles for disturbing award of

damages in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

54. For the appellate court to interfere with the award, it is not enough to show that the award is high or low or that had this court handled the case in the subordinate court, it would have awarded a different figure.

55. It has been held time and again by the Court of Appeal that the court of first instance assesses damages even if it finds that liability has not been established as correctly stated by the Appellant, in Ngonze v Ng'ang'a (Civil Suit 82 of 2017) [2024] KEHC 11261 (KLR) (26 September 2024) (Judgment), where this court stated as doth:

> " 46. Assessment of damages is exercise in discretion. In the case of Butler –V- Butler (1984) KLR 225 the court held: -"The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision."
>
> 47. Nevertheless, the court is duty bound to assess damages even when the suit is dismissed. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -"It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

56. The court will thus have to proceed as if it is the trial court. In that respect it will have the same discretion as the trial court. Unfortunately, the court did not have the advantage of seeing the Appellant. The court will have more discretion given the lapses by the court below. In the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA

> 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

57. Having taken up the mantle of assessing for the first time, the court will note that the proved injuries were spine injuries. The P3 referred to the injuries as grievous harm. There was loss of sensation of the left leg. The x-ray MRI showed lumbar spine body injuries, first and second spine unstable spinal injuries. The report from the Consolata Hospital Mathari, indicated that the Magnetic Resonance Imaging (MRI) of 27/7/2018 showed severe spinal stenosis, fracture of superior end plate of vertebra No. 2(L2) and bone contusion of L1 vertebra. The Appellant reported to have gradually gained movement and sensation of the lower limbs. He was bedridden for 2 months.

58. The Respondents did not deal with the issue of damages in submissions. The Appellant sought to rely on submissions in the lower court. They had submitted for 3,000,000/= while the first Respondent submitted on Kshs. 500,000/=. They relied on several authorities but on the question of assessment of damages. One of the authorities they submitted on was Makala Mailu Mumende v Nyali Golf & Country Club [1989] eKLR, where [Gachuhi, Nyarangi & Gicheru JJ A] posited as follows:

> On the question of the dismissal of the plaintiff's suit by the judge I would say that on the day fixed for assessment of damages the judge was seized with powers to assess the damages and not otherwise. An interlocutory judgment had already been entered. There was no application before him to set it aside. The judge, having refused an application for an adjournment to enable an application to be made for setting aside the ex parte judgment, was bound by the judgment. He was bound to assess the ex parte judgment, was bound by the judgment. He was bound to assess the damages. Even if he was inclined not to award damages, he was bound to assess it for the purpose of an appeal, if one was filed as did happen.

59. The foregoing is still good law. In that respect the lower court fell into a fatal error by failing to assess damages in spite of a wide gamut of authorities directing that the court does assess damages. The court should not be dealing with this issue in this time and age.

60. The first Respondent had through their submissions dated 2/7/2022 submitted that Kshs. 500,000/= was to be adequate since the plaintiff gradually gained movement and sensation. No evidence was led to other consequences. They also stated that no percentage of disability was given.

61. On the other hand, the Appellant had submitted through submissions dated 17/6/2022 claiming Ksh 42,000/=, being the days, he could not work on the basis of Ksh 700,000 for 60 days. They also claimed Ksh 3,000,000/= for general damages for pain, suffering and loss of amenities. The Appellant used fairly old authorities in support of the claim. Reliance had been placed on William Kitoto Andere v Easy Coach Limited [2019] eKLR, where Ochieng, J, as he then was awarded Ksh 2,000,000/= for fairly serious injuries with grave consequences, including use of walking aid. The claimant in that case had developed paraplegia with unstable spine vertebrae. He also had stool and urine incontinence. Further after the Plaintiff suffered the said injury, he was taken to theatre and a spinal cord decompression and fusion was performed. He was then able to walk, with the help of physiotherapy.

62. In this case the Appellant was conservatively managed and physiotherapy. The spine required decompression at a spine hospital. No serious evidence was led to this end. There is no indication of permanent injuries. He started regaining sensation after two months. The evidence of PW3 shed more darkness than light. The Respondents did not cross examine and neither did the Appellant get out of him evidence on permanent injuries.]

63. In Subati Flowers Limited v Walter Wanyonyi Wekesa [2019] eKLR, the court maintained an award of Kshs. 1,500,000/= for fracture L2 of the lumbar together with 1; fracture of the right tibia and fibula; fracture of the left tibia and fibula and blunt injury to the right side of the chest. These were more serious injuries for a case decided in 2019.

64. In Abdi Haji Gulleid v. Auto Selection (K) Ltd & Another [2015] eKLR the Plaintiff sustained grievous injuries to the spine, serious injuries to the upper limbs and wedge compression fracture at the back of L1 spine, permanent incapacity was assessed at 25%. General damages were assessed and awarded at Ksh. 750,000/= 8.10.2015 by Justice Nyamweya.

65. The doctor herein diagnosed fracture of the superior end plate of the lumber vertebra L2 and bone contusion of L1 vertebra. The injuries in Abdi Haji Gulleid (supra) are in my view comparable to the injuries herein. He did not assess the permanent incapacity. I find and hold that though the injuries were serious, they did not have any residual effect. Consequently, an award of Ksh 1,000,000/= will suffice, also bearing in mind inflation. I award the same to the Appellant

66. As for special damages, they must be both pleaded and proved, before they can be awarded by the court as posited in the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, where Justice Luka Kimaru, as then he was, pronounced himself as thus:

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
>
> > " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

67. The Court of Appeal has maintained and guided that those special damages, in addition to being pleaded, must be strictly proved as stated in the locus classicus case of David Bagine V Martin Bundi [1997] eKLR:

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> > " Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak,

throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

68. The Appellant in this case specifically pleaded special damages. They were unable to prove that a police abstract was paid for. Though they pleaded that the medical report cost 4,000/=, they produced a receipt for payment of Kshs. 3,000/= vide M-pesa mobile money transfer service. The Appellant pleaded a sum of Ksh 143,288/= as medical expenses. He produced in evidence a receipt from Consolata Hospital Mathari together with a bank transfer for a sum of Ksh 143,288/=. The payment was indeed for medical expenses. I am satisfied that a total sum of Kshs. 146,288/= was proved out of the pleaded sum of Ksh.147,488/=.

69. Consequent upon the foregoing, I award the said sum of Kshs. 146,288/= as special damages. The special damages shall be shared by the Respondents in the ratio of liability entered earlier. The special damages shall attract interest at court rates from the date of filing, 10/4/2019.

70. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

71. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

72. Having found that the appeal is merited in all its aspects, costs must follow the event. In the circumstances the Respondents ought to bear costs of Kshs. 75,000/=.

Determination

73. In the circumstances, I make the following orders: -

a. The appeal is merited and is allowed.

b. Judgment of the lower court is set aside in its entirety and substituted with the following orders:

   i. The liability is apportioned at 70% against the first Respondent 2nd 30% against Respondents.

   ii. General damages of Ksh. 1,000,000/= are awarded to the Appellant.

   iii. Special damages of Ksh. 146,288/- are awarded for the Appellant.

   iv. The Appellant shall have costs of the appeal assessed at Kshs. 75,000/=.

   v. The Appellant shall have costs in the lower court.

c. 30 days stay of execution.

d. 14 days right of appeal.

e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF DECEMBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by:-

Gathiga Mwangi & Co. Advocates for the Appellant

Muhoho Gichimu & Co. Advocates for the first Respondent

Patricks Law Associates for the second Respondent

Court Assistant – Jedidah