Mwaka v Nthenya (Civil Appeal 1 of 2018)
[2023] KEHC 23923 (KLR) (26 September 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 1 OF 2018

MW MUIGAI, J

SEPTEMBER 26, 2023

BETWEEN

NICHOLAS MWAKA ..... APPELLANT

AND

CAROLINE NTHENYA ..... RESPONDENT

(An appeal against the judgment dated 22nd December,2017 delivered by Honorable CA Ocharo (PM) Civil suit No. 133 of 2010)

JUDGMENT

Background

Proceedings In The Trial Court

The Plaint

1. In the Court record is a Plaint dated 23rd January,2010 against the Appellant in which the Respondent claimed that at all material times to the suit, the Appellant was the registered owner and/ or driver of motor vehicle registration number KAB 133M. Contending that on 14th February,2009 along Nairobi-Mombasa Road the Respondent was a lawful passenger in motor vehicle Registration Number KAB 133M when the Appellant, his driver, servant, agent and/or employee so negligently drove, managed and/ or controlled the said motor vehicle such that it lost control, left the road and rolled several times thus occasioned bodily injuries to the Respondent. Particulars of the injuries to Respondent were:
    a. Deep cut on the forehead.
    b. Multiple frictional burns on right hand, right thigh, buttocks and right breast.
    c. Injury on the right leg.
2. The Respondent claimed special damages and the particulars of damages were:

a. Medical report- 3,000/=

b. Medical expenses-2,380/=

c. Police abstract -200/=

d. Copy of records-500/=

3. Respondents prayed for judgment to be entered against the Appellant for:

a. General damages

b. Special damages

c. Cost of the suit

d. Interest on (a), (b) and (c) above at court rates.

The Defence

4. The Appellant in his defense dated 21st June,2011 opposed the Respondent's claims denying the registered owner and/or driver of Motor vehicle registration number KAB 133M as alleged in the plaint.

5. The Appellant further denied that an accident occurred on the said date and place involving the said motor vehicle as alleged in the plaint. Appellant denied that Respondent was a lawfully travelling passenger in the said motor vehicle and placed the Respondent to strict proof thereof.

6. Appellant denied all the particulars of negligence as enumerated in the plaint in toto.

7. Respondent averred that in the alternative and without prejudice, if such accident occurred which he denied, the same was an inevitable accident, that it was caused by circumstances beyond the control of the driver of motor vehicle registration number KAB 133M and that it could not have been avoided.

8. The Appellant denied in entirety the contents of the plaint including particulars of injuries and special damages save for the jurisdiction the Honorable Court which was admitted and prayed that the Respondent's suit against him be dismissed with costs and interest thereon.

Reply To The Appellant's Defence

9. The Respondent, in her reply to defence dated 19th August, 2011 denied the allegations contained in the defence and reiterated all the contents of the plaint and averred that the Appellant's defence was not only untenable but the same was frivolous, vexatious and grave abuse of the court's process, purely meant to delay the cause of justice, and urged the same to be dismissed with costs and judgment be entered against the Respondent in terms of the plaint.

Hearing In The Trial Court

10. PW1 Rider Kiboi Ibrahim stated he had the police abstract for Caroline Nthenya who was in the same vehicle as Ester Wamaitha and that she was issued with an abstract on the 24/9/2009. He testified the nature of the injuries is shown in the abstract; that the driver was Alex Muzeshe who was fined Kshs 3,000/=

11. In cross-examination by Mr. Otieno, PW1 testified that P3 form cannot be issued at the same time as an abstract and that the list of the injured is all inclusive.

12. PW2 Caroline Nthenya gave her sworn statement and testified that she was a passenger in a motor vehicle registration number KAB 133M when the accident happened on 14/2/200 and the owner of the vehicle was Nicholas Mwaka. She testified further that the driver was moving at a high speed; that after the accident she was taken to Mutunguni hospital then moved to KNH. She told the trial court that she was injured on the head and had a cut from the forehead to the middle of the head which was stitched. PW2 had bruises on the whole of her left side and buttocks and she was issued with P3 form at Athi River Police Station. Testifying that she was transferred from KNH to Kangundo District Hospital which she claimed was close to home. She stated further that she was issued with a police abstract in 2009 and her medical report was prepared on 30/6/2011 by Dr. Mutisya which report she produced as exhibit in the trial court. She told the trial court that she recovered but cannot stay on the sun for long. She cannot carry anything on her head. PW2 prayed for compensation, costs of suit and interest.

13. In cross-examination, PW2 told trial court the exhibit 3 does not show the name of the hospital and that she knew it was from Kangundo District Hospital; that it is dated 16/2/2009. She testified that it was written by a doctor but it is not signed neither does it have the name of the doctor. Testifying that there was and attachment and that she was 19 years old at the time; that she was issued with the P3 form on 14/7/2009 which shows that she was sent to hospital on the same day. Further that she went for P3 filing one month after leaving the hospital. She told trial court that she wore the torn blood stained clothes so that the doctor could confirm that she was indeed in the accident. She claimed that the cut wound on the head was not completely healed five months later; and she still had bruises five months after the accident. She testified that the deep cut was caused by a sharp object. She claimed that Dr. Mutisya was a consultant Psychiatrist. She further told court that she went to see the doctor two years after the accident and that she was 22 years old; that the doctor was to check if she had any problem on her head.

14. The respondent closed her case and the Appellant adopted the evidence as recorded in CMC NO. 132/2010 which was basically to the extent that he had employed one Alex Musee as his driver to do deliveries of spare parts to his customers and he had no authority to carry passengers.

15. The matter was canvassed by written submissions in the Trial Court.

Trial Court Judgment

16. By Trial Court's judgment dated 22nd December,2017, the court found that special damages though pleaded only Kshs 500/= was proved. The Trial Court further entered judgment in favor of the Respondent at Kshs 300,000/= plus costs of the suit and interest at court rate.

The Application For Stay Of Execution

17. In the Court records is a notice of motion dated 3rd December,2018 and filed in this court on 4th December,2018 and supported by an affidavit sworn by Nicholas Mwaka. In the said application, the Appellant herein sought orders that: the application be certified urgent and service whereof be dispensed with in the first instance and it be heard expert; pending the hearing and determination of the application a temporary order of stay of execution of the decree in CMCC 133 of 2010 arising from the judgment delivered on 22nd December,2017 do issue; further that pending the hearing and determination of the Appeal an order of stay of execution of the decree in CMCC 133 of 2010 arising from the judgmentdelivered on 22nd December,2017 do issue.

18. The first two orders sought by the Applicant were dispensed vide this court order dated 5th December,2018.

19. The said application was opposed by the Respondent vide her Replying Affidavit dated 21st January,2019 and filed in court on 22nd January,2019.

20. The application was disposed vide written submissions.

21. Vide a ruling dated 18th July,2019 Kemei J found that the application had merit and the same was allowed in the terms that pending the hearing and determination of this appeal, an order of stay of execution of the decree in CMCC 133 of 2010 arising from the judgment delivered on 22nd December,2017 was granted; the Appellant further ordered to surrender L.R Matungulu/Katine/3058 together with its valuation report for authentication to the Deputy Registrar within 30 days from the date of the ruling and upon authentication be deposited in court as security with a corresponding entry being made on the Register at Lands Offices; court further ordered that in the event the title is found not to be authentic, the orders of stay would automatically lapse; lastly the cost of the Application would abide in the Appeal

Application By Interested Party

22. The interested party by his application dated 19th December,2019 and filed in court on 20th December,2019. The said Application was supported by an affidavit sworn by James Kimani Ndarangu T/A Cash Gate Auctioneers. In the body of the Application, the Applicant inter alia sought orders that: the application be certified urgent and be heard exparte in the first instance; leave be granted for the Applicant to be enjoined in the suit as an interested party; orders made on 5th December,2018 by this Honorable Court be reviewed and set aside as to where is prejudicial to the parties involved.

23. The said application was opposed by notice of preliminary objection dated 5th June,2020 by the Appellant herein. In which the Appellant averred that the orders issued on 5th December,2018 were interim orders in civil Appeals 1 and 2 of 2018 which according to the Appellant were superseded by orders granted on 18th July,2019 in civil Appeal 1 of 2018, and were also superseded by orders granted on 1st August,2019.

24. The said application was disposed by written submissions.

25. This court upon considering the application and submissions by the parties and by its ruling dated 4th November,2020 found that the Applicant's application lacked merit and the same was dismissed with costs to the Appellant.

The Appeal

26. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 5th January,2018 sought orders that:

    a. The Appeal allowed.

    b. This Honorable Court do set aside the judgment entered in the Lower Court and dismiss the suit.

    c. In the alternative to paragraph (b), this Honorable Court do set aside and substitute the award made in the lower Court or revise the judgement in the Lower Court on liability and quantum.

    d. Cost of this appeal be awarded to the Appellant.

27. The Appeal is brought on the grounds that:

i. The Learned Trial Magistrate erred in law and in fact in finding the Appellant guilty of negligence yet the Respondent did not produce any evidence that she used the vehicle in which she was injured.

ii. The Learned Trial Magistrate erred in law and in fact in finding the Appellant liable for the injuries sustained by Respondent yet there was no evidence to contradict the Appellant's sworn Statement that the driver of the vehicle acted outside the scope of his authority.

iii. The Learned Trial Magistrate erred in law and in fact in finding favor of the Respondent yet the Respondent failed to prove her case on a balance of probabilities that the injuries she sustained arose from the accident which occurred on 14th February,2009.

iv. The Learned Trial Magistrate erred in law and in fact in condemning the Appellant to pay Kshs. 300,000/= to the Respondent despite the Respondent's failure to prove her cases on a balance of probabilities.

v. The Learned Trial Magistrate erred in law and in fact by finding that the Appellant did not object to the production of documents as this is contrary to the Defendant's Statement in the pre-trial filed herein.

vi. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the P3 Form relied on did not support the Respondent's claim that the injuries arose from the accident of 14th February,2009.

vii. The Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's written submissions dated and filed on 13th October,2017.

viii. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Respondent did not adduce sufficient evidence to prove her case and the Appellant was therefore under no obligation to compensate the Respondent.

ix. The Learned Trial Magistrate erred in law and in fact in failing to critically examine the factual issues brought out in cross examination of the Respondent which established that the Respondent did not have a valid case against the Appellant.

28. The appeal was canvassed by way of written submissions.

Submissions

The Appellant's Submission

29. The Appellants in his submissions dated and filed on 13th April,2023, in which Mr. Othieno, counsel for the Appellant submitted on the following issues sequentially:

30. On inadmissible documents, Counsel averred that pursuant to the Memorandum of Appeal and with reference to the trial court's judgment in Paragraph 2&3 at pages 53 of the record, the trial court was factually incorrect when it stated that the Appellant never objected to these documents at the time of hearing. According to the counsel the Appellant Objected to the admission of the P3 Form. Reliance was made on (page 13 of the record), the report from Kangundo Hospital, reference was made to (page 15 of the Record) and the report from Dr. Catherine Mutisya dated 30th June,2011 at (page 16 of the record).

31. Counsel contended that the Appellant in the Pre-trial Questionnaire (page 29 of the Record) at question 12 that it required the "maker of Medical Reports, Maker of P3 Forms, Makers of Police

Abstract" further counsel opined that in the Respondent's Pre-trial questionnaire (page 27 of the record) he stated in answer to question 12 that he needed a "Medical Expert"

32. It was submitted by counsel for the Appellant that both parties requested for the attendance of "Medical Experts" and therefore it was erroneous for the trial court to hold as it did in the Paragraphs quoted above (being paragraph 2&3 of the trial court's judgement). It was submitted by the counsel that the evidence from which the trial court made the awards in its judgments was inadmissible and following therefrom there was no evidence before the court as regards the Respondent's injuries and therefore no basis to make an award for any injury, medical report fees and treatment expenses related thereto.

33. Regarding general damages, counsel contended while making reference to grounds 3,4,6,7 &8 of the Memorandum of Appeal that the injuries pleaded in the plaint were not proved or established by the medical report produced to the trial court. counsel averred that the first medical report was P3 Form (at page 13 of the record) was obtained on 14th July,2009 approximately 5 months after the accident occurred on 14th February,2009. Counsel submitted further that the Respondent attended the medical officer, the medical officer noted against the remarks as regards state of clothing "blood stained and torn clothes" reference was made to (paragraph 2 of page 43 of the Record). Counsel relied on the case of Karugi & Another Vs Kabiya & Others (1987) Klr 347, to buttress his point the need for prove of a case by the plaintiff.

34. According to counsel for the Appellant the P3 report lacked credibility and therefore did not establish that the Respondent suffered the injuries particularized in the plaint as a result of the accident which occurred on 14th February,2009.

35. Counsel had issue with the second Medical Report produced by the Respondent supposedly from Kangundo District Hospital found at (page 15 of the record) in which counsel contended that the said document had the Respondent's name but was not signed by the doctor who made the report and the doctor's name is not indicated on the report. Reliance was made on Section 35 of the *Evidence Act* which provides for the maker of a document need not to be called to present his/her document and the court may proceed to admit a document in their absence. Counsel submitted that Sections 64-70 of *Evidence Act* does not provide for the admission of the document whose maker is unknown and not identified.

36. It was submitted that the court was misguided and erroneously applied the law as regards a claimant's duty to prove a claim. Reliance was made on Sections 107,108,109 & 110 of the *Evidence Act* and the case of Karugi & Another Vs Kabiya & Others (1987) KLR 347, to buttress the point on burden of proof.

37. Counsel urged that the award of Kshs 300,000/= general damages which was based on dubious P3 medical report should be set aside and that the trial court did not place reliance on the Medical Report by Dr. Catherine Syengo (page 16 of the record) and the Appellant has addressed the unreliability of this report made 2 ½ years after the accident.

38. Counsel further prayed that this Appeal be allowed, judgement entered against the Appellant be set aside in toto or alternatively be substituted or revised and Appellant be awarded costs.

Respondents' Submissions

39. Respondents vide her submissions dated 8th May,2023 and filed on 5th May,2023, Mr. Muttisya, Counsel for the Respondent submitted that on liability, the Appellant was 100% liable for the accident

on the doctrine of vicarious liability and support the lower court finding on liability. Counsel opined that grounds 1,2 and 3 of Memorandum of Appeal therefore fails.

40. On quantum counsel averred that Respondent sustained injuries by fracturing right femur and cuts and foreign bodies (glasses) on the scalp. Contending that the Respondent was admitted in an orthopedic ward for 5 weeks at Kenyatta National Hospital and was put on traction for one month and eventually taken to theatre for open reduction and internal fixation of the fracture and a plate was inserted.

41. Counsel submitted that the Respondent presently complains of poor bladder control, loss of smell and there is a surgical scar on the right thigh extending to the knee. It was contended that the Respondent testified on 23rd February,2017 confirming the foregoing and also produced the P3 Form, treatment records from Kenyatta National Hospital and Medical Report dated 30th June,2011 confirming the injuries. According to the counsel, the said injuries were not controverted and/ or denied by the Appellant.

42. It was submitted by the counsel that the award of Ksh. 300,000 was very lenient and on the lower side hence as per the counsel the Respondent proved her case on a balance of probabilities.

43. Counsel averred that the trial court critically examined the factual issues and properly established that the Respondent had a valid case against the Appellant and that grounds 4,5.6,7,8 and 9 of the Memorandum of Appeal therefore fail.

44. Reliance was placed on the case of Joseph Wabukho Mbayi Vs Frida Lwile Onyango (2019) eklr, to buttress a point that the suit motor the vehicle belonged to the Appellant and it was driven by someone in the lawful employment of the Appellant hence vicarious liability.

45. Counsel averred that the Respondent proved negligence on the issue of liability and the appellant was vicariously liable further that the Respondent proved that she sustained injuries as a result of the Appellant's negligence and submitted documents in support of the injuries. It was urged that finding of the court both on liability and quantum should not be disturbed.

Determination/analysis

46. The Court has considered the Appeal, Trial Court proceedings and judgment and written submissions by parties through Counsel and the issue subject of determination is liability and quantum.

47. It is trite law that the legal burden of proof lies with the person who alleges as outlined in Section 107 (1) -112 of the *Evidence Act*, Cap 80 Laws of Kenya.

48. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court 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;-
>
> "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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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 lose because the requisite standard will not have been attained."

49. In William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 the Court stated that:-

> " 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."

50. This being the first appeal court, its duty as in Selle vs. Associated Motor Boat Co [1986] EA 123 is as follows:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

51. The thrust of Appellant's appeal is that the Respondent failed to prove her claim and did not discharge the burden of proof; that she was injured as per injuries outlined in the Plaint, and it was from the accident that occurred on 14/2/2009 and that the Appellant was responsible for the accident and liable for negligence as particularized in the Plaint.

52. The Appellant took issue with the fact that The Respondent did not produce documents to prove that she was in the vehicle and was injured from the accident and also failed to prove the injuries from the accident. The P3 Form did not support the fact that the Respondent was injured from the accident.

53. The Appellant submitted that the Trial Court did not consider their submissions, critically examine the factual circumstances that the driver acted outside the scope of his authority, the vehicle was for ferrying spares not for ferrying fare-paying/hiring vehicle passengers.

54. The burden and standard of proof are discharged by either direct or indirect evidence by the witness. The direct or indirect evidence may include documentary evidence that may be produced by the author or any other lawful witness.

55. Blacks Law Dictionary defines direct evidence to mean;

> Evidence in form of testimony from a witness who actually saw, heard or touched the subject of questioning.

56. Section 63 (2) of the *Evidence Act* provides;

> " direct evidence" means—
>
> (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

.....

State v. Baker, 249 Or. 549, 438 P.2d 978 (1968) in this case it was observed that:

" Direct evidence includes what is heard as well as what is seen; indeed, what is perceived by the senses. Without looking to defendant's admissions about riding with his relatives to Portland to sell wire, there was evidence from which the jury could find guilt."

57. The burden/standard of proof maybe established through indirect and/or documentary evidence in form of primary or secondary evidence as provided by Sections 64-48 of the *Evidence Act*.

58. In the instant case, on appeal the Appellant submitted that the the Trial Court was factually incorrect when it stated that the Appellant never objected to these documents at the time of hearing. According to the counsel the Appellant Objected to the admission of the P3 Form. Reliance was made on (page 13 of the record), the report from Kangundo Hospital, reference was made to (page 15 of the Record) and the report from Dr. Catherine Mutisya dated 30th June,2011 at (page 16 of the record).

59. The Appellant required the "maker of Medical Reports, Maker of P3 Forms, Makers of Police Abstract" further counsel opined that in the Respondent's Pre-trial questionnaire (page 27 of the record) he stated in answer to question 12 that he needed a "Medical Expert"

60. It was submitted by counsel for the Appellant that both parties requested for the attendance of "Medical Experts" and therefore it was erroneous for the trial court to hold as it did in the Paragraphs quoted above (being paragraph 2&3 of the trial court's judgment).

61. This Court on perusing the Record of Appeal finds that there are 2 copies of Pre-Trial Questionnaires filed on 26/5/2016 at Pg 27 Clause 12-13 it is written a medical expert will e required and experts agreed on their respective reports. The other Pre-Trial Questionnaire was filed on7/10/2016 and at Clause 12 it is typed experts required are Maker of Medical Reports, Maker of P3 Forms and Makers of Police Abstract.

62. Trial Court typed proceedings, the matter was fixed for Pre-Trial Conference on 25/8/2016.The hearing did not take off as there were related matters similar to this case 131 of 2010 and adjournments were sought and granted to allow compliance with Order 11 CPR and hearing commenced on 23/2/2017,PW1& PW2 were cross- examined no objection was raised with regard to production of Police Abstract by PW1it is not clear from the record if he was the maker or not.

63. PW2 stated in her testimony she was a passenger in motor vehicle Reg KAB 133M and was involved in an accident on 14/2/2009 where the driver drove at high speed. PW 2 was taken to Mutunguni Hospital and then transferred to Kenyatta National Hospital. She was injured on the head and had a cut from the forehead to the middle of the head which was stitched. She sustained bruises on her whole left side and buttocks.

64. PW2 was issued with P3 Form at Athi River Police Station P.EXB 2. She was transferred from KNH to Kangundo District Hospital -The Treatment Notes Pexb3 .She was issued with Police Abstract in 2009. The Medical Report prepared by Dr. Mutisya on 30/6/2011.

65. In cross examination Pexb3 did not show the name of the hospital, the doctor did not sign and the name of the doctor is not indicated. but Pw2 stated it was from Kangundo District Hospital.

66. P3 Form was signed on 14/7/2009 and she was sent to hospital the same day and P3 Form was filled I month leaving hospital. She wore torn blood stained clothes so that the doctor could confirm she was indeed in the accident. The cut wound on the head was not completely healed 5 months later and she still had bruises. She saw Dr. Mutisya a Consultant Psychiatrist 2 years after the accident and the doctor was to check if she had in her head.

67. The Trial Court proceedings outlined above confirm that the Appellant did not object to the production of the Police Abstract, The P3 Form, Treatment Notes and Medical Report. At no point in the proceedings was the issue of the Maker of the Reports/Documents to be availed. The Appellant and/or advocate did not issue Notice to produce under Section 69 of *Evidence Act* to the Makers of these documents to appear in Court and produce the documents during the proceedings. Secondly, the Appellant would have raised the issue of having the makers produce the documents at the subsequent hearing date and the documents marked for identification (MFI). The only concern was/with the contents of the Reports that were subjected to cross examination not the production of the Reports which was not challenged and they were produced as exhibits in Court.

68. Was the production of medical reports not by Makers illegal/unlawful or cause prejudice to the Appellant?

    Section 35 (2) of *Evidence Act* provides;

    In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

    (a) notwithstanding that the maker of the statement is available but is not called as a witness;

    (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

69. The Trial Court noted in the judgment that the defendant submitted that the treatment notes do not support injuries sustained by the Plaintiff are inadmissible as the Plaintiff did not call makers. The Defendant further argued that some of the documents from Kangundo Hospital are indelible and bear no name of the patient or the doctor. Whereas this was/is true, the Trial Court found the Defendant did not raise an objection to production of documents by Plaintiff at the hearing. He was therefore barred from doing so at the submission stage more so when they were present at the hearing and cross examined the Plaintiff. This Court finds the Trial Court's finding is established by the record, that there was no objection to production of documents/Reports but there was contest on the contents of the reports/Documents.

Liability

70. The Trial Court found that the accident was self- involving and the defendant/Appellant pleaded ignorance to the negligence pleaded by the Plaintiff, yet the Appellant did not call the driver to explain what the inevitable occurrences that caused the vehicle to loose control and veer off the road. The Trial Court went on and observed that even if the vehicle was in perfect working condition a driver may handle a perfect vehicle recklessly. The Trial Court submitted that there being no explanation as to what caused the driver to lose control The Trial Court found that the Defendant was negligent and wholly to blame for the injuries suffered by the Plaintiff [liability] at 100%.

71. The burden of proof is established by the party that seeks judgment in its favour. He who alleges must prove. The Plaintiff testified, produced documents/reports and was subjected to cross examination to test veracity of the evidence and credibility of the witness. The Plaintiff/Respondent's evidence was not controverted by any evidence from the Defendant/Appellant except reliance on Defense witness testimony as recorded in CC12/2010 that the Defendant employed one Alex Musee as his driver to do deliveries of spare parts to his customers and he had no authority to carry passengers.

72. PW2 was recalled and she produced Copy of Records & Receipt PExh 5 (a) & 5 (b) that confirmed the Defendant/Appellant as owner of the subject motor vehicle Reg KAB 133 M.

73. The Police Abstract produced by PW1 is dated 24/8/2009 from Athi River accident occurred on 14/2/2009 on Nairobi-Mombasa Road near Prima Rosa at 10.30 pm of motor vehicle Reg KAB 133 M insured y Kenya Orient Ins Co and driven by Alex Mureshe who was charged with careless driving and fined Ksh 3000/-. 6 people are named as injured passengers among them PW2 Caroline Nthenya.

74. Pursuant to Order 1, Rule 3, 4 & 15 Civil Procedure Rules 2010, the Appellant ought to have joined the driver of motor vehicle Reg KAB 133M either as 3rd Party to the proceedings so as to have liability determined between the defendant owner of the vehicle and the 3rd Party driver of the vehicle and who caused the accident. it is the Trial Court could not legally bind a party not joined to these proceedings either as 3rd Party or interested party.

75. In the case of Zephir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014) eKLR, the Court held that:

> " A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties."

76. In the case of Joseph Wabukho Mbayi v Frida Lwile Onyango [2019] eKLR, at paragraph 30;

> " 30. It is my finding that an accident did occur on 14th May 2014 involving the appellant, who sustained injuries on the head, chest, face and lacerations on both lower and upper limbs as indicated in the P3 form. It is also my finding that the suit motor vehicle registration mark and number KAR 531V belonged to the respondent at the time of the accident and

the said motor vehicle was being driven by someone who was in lawful employment of the respondent."

77. Therefore, since the Appellant was/is the registered owner of motor vehicle Reg KAB 133M and hired/ employed the driver Alex Musee/ Mureshe as driver to ferry spare parts and not authorized to carry passengers, that allegation ought to have been tested through his testimony as a witness of joined as party to the Trial Court proceedings. In the absence of such eventuality, the Appellant is held 100% liable for the road accident that resulted in injuring the Respondent. The Appellant is vicariously liable for the accident.

78. In the case of Rentco East Africa Limited v Dominic Mutua Ngonzi [2021] eKLR Odunga J (as he then was) in Paragraph 61 and 62 and 63 observed that;

> 61. As regards the issue of vicarious liability, it was held in Kansa vs. Solanki [1969] EA 318 that;
>
> "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

Quantum

79. The P3 Form is of 14/7/2009 in the name of Caroline Nthenya, the Police Report is of road accident which the Plaintiff was involved that occurred on 14/2/2009 and signed by Dominic N. Mbindyo for Medical Superintendent Kangundo Hospital.

80. The treatment Notes from District hospital not legible not signed or Doctor's name written, Hospital name not clear. The treatment Notes are not reliable. However, there is the Doctor's Medical Report by Dr. Mutisya. The Report is/was filled in using Athi River Services Notes, Kangundo District Hospital & P3 Form. The Examination of the Plaintiff/Respondent was on 30/6/2011

81. The Plaint set out Plaintiff's particulars of the injuries from the road traffic accident were; deep cut on the forehead, multiple frictional burns on right hand, right thigh, buttocks and right breast and Injury on the right leg. During examination by the Doctor, bruise scars on the face, right breast, right chest, right abdomen, right thigh, right arm the right elbow and right hand and left leg arterially. The doctor's opinion is that the Respondent was involved in a traffic accident and she sustained severe soft tissue injuries and has scars on the face and whole of the right side and left leg.

82. The detailed medical Report is exhaustive of the Respondent's injuries from the accident and contrary to the Appellant the Trial Court considered the Appellant's submissions.

83. The Court of Appeal case of Kivati v Coastal Bottlers Limited Civil Appeal No. 69 of 1984 where it was stated that;

> " The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

84. In the case of Stanley Maore v Geoffrey Mwenda [2004] eKLR the Court of Appeal stated: -

> "……Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

85. The Appellant contended that the injuries pleaded in the plaint were not proved or established by the medical report produced to the Trial Court. Counsel averred that the first medical report was P3 Form (at page 13 of the record) was obtained on 14th July, 2009 approximately 5 months after the accident occurred on 14th February, 2009.

86. Counsel submitted further that the Respondent attended the medical officer, the medical officer noted against the remarks as regards state of clothing "blood stained and torn clothes" reference was made to (paragraph 2 of page 43 of the Record). The Court considered the allegation and finds that a P3 Form is filled on the basis of the incident reported and the condition of the Plaintiff at the time, clearly, the Plaintiff had the P3 Form filled in after she went for treatment at Mutunguni Hospital moved to Kenyatta Hospital and then transferred to Kangundo District Hospital as she testified before the Trial Court.

87. By the time she went to have the P3 Form filled in she was interviewed and she must have explained at the time of the accident she had blood stained and torn clothes and she stated in cross examination she wore the blood stained clothes so that the doctor could confirm that she was injured in an accident and the cut wound on the head was not completely healed.

88. The time of taking P3 Form, does not vitiate that PW2 was involved in an accident by motor vehicle Reg KAB 133M as per the Police Abstract that contains details of the driver found guilty of careless driving and 6 passengers listed as injured in the accident. Secondly, the Plaintiff/Respondent was rushed for treatment and admitted in hospital for treatment and it is reasonable and logical that when she felt better is when she went to get the P3Form. There is no anomaly or any thing sinister. Thirdly, the Medical Report is a culmination of all treatments that the Plaintiff obtained upto examination by the doctor and rendered her expert opinion. This medical evidence if challenged ought to have been through similar expert evidence a 2nd Medical examination Report obtained by the Appellant.

89. From the injuries sustained treatment social support financial strain and emotional impact sustained by the Respondent from and due to the accident and the inflationary trends 15 years on, this Court finds no basis to interfere with liability and quantum Ksh 300,000/- general damages and special damages pleaded and proved Ksh 500/- in favour of the Respondent is upheld against the Appellant.

Disposition

1. The Appeal is dismissed with costs to the Respondent by the Appellant.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN OPEN COURT IN MACHAKOS ON 26TH SEPT 2023(PHYSICAL/ VIRTUAL CONFERENCE).

M.W.MUIGAI

JUDGE

IN THE PRESENCE/ABCENCE OF:

MS OIGARA - FOR THE APPELLANT

MS MUTTISYA - FOR THE RESPONDENTS

GEOFFREY/PATRICK - COURT ASSISTANT (S)