Gathoga v Kangara & another (Civil Appeal 135 of 2018)
[2022] KEHC 14921 (KLR) (Civ) (28 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14921 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 135 OF 2018

CW MEOLI, J

OCTOBER 28, 2022

BETWEEN

JOSEPH GATHOGA ..... APPELLANT

AND

LILLIAN NINI KANGARA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

(Being an appeal from the judgment of A.M Obura,SPM. Delivered on 13th February 2018 in Nairobi Milimani CMCC No. 7250 of 2014)

JUDGMENT

1. This appeal emanates from the judgment delivered on 13th February 2018 in Nairobi Milimani CMCC No. 7250 of 2014. The suit was commenced by way of a plaint filed on 3rd December 2014 by Lillian Nini Kangara the plaintiff in the lower court (hereafter the 1st Respondent) against Joseph Gathoga (hereafter the Appellant) and the Attorney General (hereafter the 2nd Respondent) the latter two being the 1st and 2nd defendants respectively in the lower court. The 1st Respondent's claim was for damages on account injuries sustained in a road traffic accident that occurred on 8th November 2012.

2. It was averred in that regard that the Appellant was the registered owner of the motor vehicle registration no. KAN 476A while the 2nd Respondent's "client" was the registered owner of motor vehicle registration no. GK A953F ; that the said motor vehicles were under the control, and or direction of the authorized drivers, servants and or agents of the respective owners; that while the 1st Respondent was lawfully travelling as a fare paying passenger in motor vehicle registration no. KAN 476A along Nairobi- Naivasha Highway on 8th November 2012, the Appellant's and 2nd Respondent's

drivers, servants and or agents so negligently drove, managed and or controlled the motor vehicles, that they lost control and collided ; and that 1st Respondent sustained serious injuries as a result.

3. The Appellant filed a statement of defence denying the key averments in the plaint or liability and attributed negligence to the driver of motor vehicle registration no. GK A953F. The 2nd Respondent equally filed a statement of defence denying the key averments in the plaint or liability and attributed negligence to the driver, of motor vehicle registration no. KAN 476A. The suit proceeded to full hearing during which only the 1st Respondent adduced evidence. In its judgment, the trial court found in favour of the 1st Respondent thus proceeded to apportion liability at the ratio of 50:50 as between the Appellant and 2nd Respondent. Judgment was entered against them for a sum of Kshs. 6,077,834.10/- made up as follows:

   a. General damages Kshs. 5,000,000 /-.

   b. Loss of earning capacity Kshs. 1,000,000/-.

   c. Special Damages: Kshs. 77,834.10/-.

4. Aggrieved with the outcome, the Appellant preferred this appeal which is based on the following grounds: -

> " 1. Thatthe Learned Magistrate erred in law and fact by awarding the Plaintiff general damages that were manifestly high in the circumstance.
>
> 2. Thatthe Learned Magistrate erred in law and fact in awarding the Plaintiff loss of earning capacity when there was no proof and evidence to support that the Plaintiff was earning any income.
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> 3. Thatthe Learned Magistrate erred in law and fact by apportioning liability in the ratio 50%:50% between the 1st and 2nd Defendants.
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> 4. Thatthe Learned Magistrate misdirected herself by failing to consider the submissions of the 1st Defendant while arriving at the judgment.
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> 5. Thatthe Learned Magistrate misdirected herself by disregarding the evidence of a police officer who is an expert witness and based her judgment on the Plaintiff's testimony who was asleep and did not witness the accident unfold." (sic)

5. The appeal was canvassed by way of written submissions. The Appellant anchored his submissions on the decisions in Selle v Associated Motor Boat Co. Ltd (1968) EA 123, Peters v Sunday Post Limited (1958) EA 424 concerning the principles and duty of the appellate court on a first appeal. Counsel condensed the grounds of appeal into four issues which revolve around liability and quantum. On the first issue counsel cited a host of decisions including, Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR, D.T Dobie (K) Ltd v Wanyonyi Wafula Chebukati [2014] eKLR, East Produce (K) Limited v Christopher Astiado Osiro – Civil Appeal No. 143 of 2001, and Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko – Civil Appeal No. 203 of 2001 [2007] 1 EA 139 to contend that the 1st Respondent did not discharge the burden of proof on a balance of probabilities. On that score, he reiterated the evidence of the police officer which he said exonerated the Appellant of any blame and the fact that the 1st Respondent did not witness how the accident occurred or blame the owner of the vehicle she was travelling in. Hence, he complained that the trial court's finding on liability was based on no evidence or was based on a misapprehension of the same.

6. Concerning the trial court's apportionment on liability counsel called to aid the decisions in Charles Munyeki Kimiti v Joel Mwenda & 3 Others [2010] eKLR, Chemwolo & Another v Kubende (1986) KLR 492, among others, to argue that 1st Respondent having failed to discharge her burden of proof, the Appellant's failure to tender evidence was inconsequential. Further that the inquest proceedings with respect to the accident was equally of no consequence as the trial court was obligated to independently weigh the evidence before it.

7. On quantum, counsel submitted that it is trite law that an award on damages must be based on awards made for comparable or similar injuries. That the learned magistrate did not cite any authority relied on as a basis for the award of general damages. Citing the decisions in, Kemfro Africa Limited t/a Meru Express Services & Another v A.M Lubia and Another (1982-88) 1 KAR 727, Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & Another [2014] eKLR, Mwaura Muiruri v Suera Flowers Limited & Another [2014] eKLR, James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Another [2015] eKLR and others, counsel asserted that the award on general damages by the trial court was inordinately high and ought to be interfered with. He urged this court to review the award to a sum between Kshs 1,500,000/- to 2,000,000/-.

8. Submitting on the issue of loss of earning capacity counsel placed reliance on the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 as cited in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR to argue that the claim was not pleaded by the 1st Respondent and the trial court misdirected itself in awarding damages the under the said head. He asserted that it is settled that such award is treated as a general damage claim which though not required to be specifically proved, must be proved on a balance of probabilities. He stated that the trial court therefore misdirected itself as no proof was tendered in that regard. To support the submission, counsel cited Mumias Sugar Company Ltd v Francis Wanalo [2007] eKLR, Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR and S.J v Francis Di Nello & Another [2015] eKLR. In conclusion, while citing the decisions in Tayab v Kinanu (1982-88) 1 KAR 90 and Kigaragari v Aya (1982-88) 1 KAR 768 counsel asserted that the learned magistrate failed to take into account relevant factors, resulting in an erroneous decision consequently the appeal ought to be allowed.

9. The 1st Respondent naturally defended the trial court's findings. Submitting on grounds 1, 2, 3 and 5 of the memorandum of appeal counsel for the 1st Respondent pointed out that the 2nd Respondent did not file an appeal to challenge the decision of the lower court. He therefore took the view that the Appellant could not canvass the said grounds of appeal in a general manner on behalf of the said party. On the issue of liability it was argued that the Appellant did not controvert the 1st Respondent's evidence at the trial and that neither the 2nd Respondent nor the Appellant tendered evidence to prove particulars of negligence in their respective pleadings, and hence the trial court did not err in holding them equally liable for the accident.

10. Concerning the award on general damages counsel cited Hellen Waruguru Waweru v Kiarie Shoe Stores Ltd [2015] eKLR to assert that the Appellants have not demonstrated reasons why this court should interfere therewith. He reiterated the severity of the 1st Respondent's injuries that incapacitated her for over a year. With respect to the award for loss of earning capacity, he relied on the decision in Jacob Ayiga Maruja & Francis Karani v Simeon Obayo [2005] eKLR to assert that such award was not based on actual employment, and therefore the learned magistrate was under no obligation to insist on evidence of employment. In conclusion, he asserted that the trial court cannot be blamed for failing to consider submissions of the Appellant that were not on record. The court was urged to dismiss the appeal.

11. The 2nd Respondent by his submissions conceded the award on general damages by the trial court but citing the case of SJ (supra) opposed the award of damages for lost earning capacity which claim, according to the said Respondent was not pleaded or supported by evidence, and therefore the trial court erred in awarding it.

12. Concerning apportionment of liability counsel pointed out that there was no eyewitness account on how the accident occurred and none of the drivers was blamed by police for causing the accident, and the trial court was therefore entitled to apportion liability in the manner it did. The case of Eliud Papoi Papa v Jigneshkumar Rameshbhai Patel & Another [2017] eKLR was cited in support of that submission.

13. With respect to the complaint by the Appellant that the trial court failed to consider the Appellant's submissions, the 2nd Respondent cited Silas Tiren & Another v Simon Ombati Omiambo [2014] eKLR and Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR to assert that the Appellant failed to file his submissions despite being given opportunity and could not introduce these on appeal through the record of appeal as he has purported to do

14. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular this 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 demeanor of a witness is inconsistent with the evidence in the case generally." (Emphasis added)

15. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

16. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view that the appeal turns on the key issue whether the finding of the trial court on liability was well founded, and if so, whether the award on general damages and loss of earning capacity was justified. However, before delving into the merits of the appeal, it is pertinent to note that, as rightly observed by the 1st Respondent, the 2nd Respondent did not appeal the learned magistrate's decision. He however supported the Appellant's challenge on damages for loss of earning capacity while conceding the award of general damages and defending the apportionment of liability.

17. Nevertheless, Order 42 Rule 32 of the Civil Procedure Rules echoes section 78 of the *Civil Procedure Act*, by providing that:

> " The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal"..

18. In civil matters, the pleadings form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

19. The 1st Respondent by her plaint averred at paragraphs 5 and 6 that:

> " 5. On or about 8th November 2012, the plaintiff was lawfully travelling as a fare paying passenger in motor vehicle registration KAN 476A along Nairobi Naivasha highway near Ngararigа when the 1st and 2nd defendants drivers, servants and/or agents drove or/and managed and/or controlled the two motor vehicles registration number KAN 476A and GK A953F that they lost control and collided with each other and as a result thereof occasioning her with serious injuries.
>
> Particulars of Negligence of the 1st Defendant's Drivers, Servant and or Agents
>
> a. Driving at a speed that was too fast in the circumstance.
>
> b. Failing to maintain any or any adequate or effective control of motor vehicle registration no. KAN 476A.
>
> c. Driving motor vehicle registration no. KAN 476A, without due regard to the safety of the passengers the plaintiff inclusive.
>
> d. Failing to adhere to the provisions of the *Traffic Act* Cap 403, Laws of Kenya and thereby driving the said motor vehicle carelessly.
>
> e. Driving carelessly and without regards to the terrain of the road.

f. Failing to stop, slow down, swerve or in any other way to manage control the said motor vehicle so as to avoid the accident.

g. Failing to take adequate precautions for the safety of the Plaintiff.

h. Failing to have any proper lookout.

Particulars of Negligence of the 2nd Defendant's Drivers, Servant and or Agents

a. Driving at a speed that was too fast in the circumstance.

b. Failing to maintain any or any adequate or effective control of motor vehicle registration no. GK A953F.

c. Driving motor vehicle registration no. GK A953F, without due regard to the safety of the passengers the plaintiff inclusive.

d. Failing to adhere to the provisions of the *Traffic Act* Cap 403, Laws of Kenya and thereby driving the said motor vehicle carelessly.

e. Driving carelessly and without regards to the terrain of the road.

f. Failing to stop, slow down, swerve or in any other way to manage control the said motor vehicle so as to avoid the accident.

g. Failing to take adequate precautions for the safety of the Plaintiff.

h. Failing to have any proper lookout.

6. As a result of the matter aforesaid, the plaintiff suffer loss and damage." (sic)

20. The Appellant filed a statement of defence denying the key averments in the plaint or liability and attributed negligence on the part of the driver, servant and or agents of motor vehicle registration no. GK A 953F by stating at paragraphs 5, 6, 7 and 8 that:

"

" 5. Further, the 1st Defendant denies all and singular the allegation of negligence attributed to his driver, servant or agent as pleaded in paragraph 5(a)-(h) of the Plaint and puts the Plaintiff to strict proof thereof.

6. Further and without prejudice to the foregoing the 1st Defendant avers that the accident was caused by negligence of the driver of motor vehicle registration No. GK A953F.

Particulars of Negligence of the Driver of GK A953F

a. Driving on the wrong side of the road.

b. Driving in the designated path of travel of m/v reg. number KAN 476A.

c. Blocking the path of motor vehicle registration no. KAN 476A.

d. Ramming into motor vehicle registration no. KAN 476A.

e. Driving without due care and attention.

f. Driving in excessive speed in the circumstance.

g. Causing the accident.

7. The 1st Defendant further avers that the accident was inevitable in all the circumstances.

8. Further the Plaintiff avers that the driver of motor vehicle registration number GK A953F contributed to the accident by failing to execute any evasive maneuver to avoid the accident." (sic)

21. The 2nd Respondent filed a statement of defence denying the key averments in the plaint or liability and attributed negligence on the part of the driver, servant and or agents of motor vehicle registration no. GK A 953F by stating at paragraphs 4 and 5 that:

"

"4. The 2nd Defendant denies the contents of paragraph 5 of the plaint and further denies the particulars of negligence set out in paragraph 5(a)-(e) and the Plaintiff is put to strict proof thereof.

5. In the alternative and without prejudice to paragraph 4 above, the 2nd Defendant aver that if the said accident did occur, which is denied, then it was solely caused and or substantially contributed by the negligence and carelessness of the 1st Defendant.

Particulars of the 1st Defedant's Negligence

a. Failure to swerve or brake.

b. Driving at high speed.

c. Failure to take due care of other road users.

d. Failure to observe traffic rules by using the wrong side of the road." (sic)

22. The Appellant's chief grouse is that the trial court's apportionment of liability as against him went against the weight of evidence. While there is no dispute that a collision indeed occurred on the material date along the Nairobi/Naivasha road between the Appellant's vehicle KAN 476A in which the 1st Responded was a fare paying passenger, and the vehicle GK A 953F , neither the Appellant nor the Respondents by themselves witnessed the accident or called an eye witness to the accident. The respective drivers of the two vehicles died in the accident. The trial court after restating and examining the evidence on record highlighted this fact in its judgment before stating concerning liability that:

"I have carefully considered the evidence on record and the written submissions and authorities cited by all the parties through their advocates on record.....

Clearly there was no eye witness who testified as to how the accident unfolded. PW 2 relied on records which were not availed to the court. No extract of the OB record was produced

for the court's verification. She only produced a police abstract which is silent on who was blamed. PW3 said she blamed the driver of the matatu since she did not witness the accident unfold and did not see the GK vehicle but heard of it later. The court was also told of an inquest which was to be concluded or had been concluded by the time this hearing was finalized. However, neither the proceedings nor the ruling in the inquest were availed despite an opportunity to do so. In the circumstance, I apportion liability at 50%:50% as against the Defendants." (sic).

23. Counsel for the Appellant correctly cited the applicable law as to the burden of proof as found in Section 107, 108, 109 and 112 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely on the 1st Respondent. In Karugi & Another V. Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. 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 defendants' 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...--. 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." (Emphasis added)

24. The mere occurrence, of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd V. Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of Kiema Mutuku V. Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

> " 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."

25. As earlier stated, there was no eye witness to the accident herein. In her evidence-in-chief, PC. Jacqueline Mariera (PW2) relied on details contained in the Police Abstract (PExh.2) and the Occurrence Book (O.B), the latter which was not produced as an exhibit. Although she did not witness the accident and was not the scene visiting or investigating officer, she claimed that the driver of motor vehicle GK A 953F was to blame for the accident, having lost control of his motor and proceeded to hit motor vehicle KAN 476A at Ngarariga Stage. And while she asserted that an Inquest No. 3 of 2013 was subsequently held concerning the accident, she did not tender evidence of the outcome therein before the trial court. She clarified that the Police Abstract (PExh.2) had been issued before the inquest was concluded hence the entry therein did not show that blame had been assigned to any party. The investigating officer of the case according to the Abstract was a Cpl. Mbeche who was not called as a witness. Neither the O.B extract which PW2 relied on, nor the police file were exhibited before the trial Court. Not even a sketch plan of the accident scene was produced at the trial. Clearly, the substance of PW2's evidence consisted of inadmissible hearsay so far as the manner of occurrence of the accident and liability is concerned. At best her evidence confirmed the undisputed fact of the collision between the two vehicles

26. For her part, the 1st Respondent testifying as PW3 stated in her evidence-in-chief inter alia that:

> " I sat on the rear seat in the middle. We were four passengers behind. On reaching Ngarariga Stage, before we stopped, I heard a very loud bang. It was as if there was a collusion. I lost consciousness thereafter" ...

27. She asserted, without elaborating, that the driver of the matatu vehicle in which she was travelling (KAN 476A) was to blame for the accident. Under cross-examination she confirmed that from her position in the matatu she could not see what was happening ahead of the vehicle and retreated from her earlier attribution of blame upon the matatu driver to state that the matatu was not speeding. She also stated that the said vehicle was prior to the loud bang proceeding at a slow speed while moving from the road into the shoulder lane, leading to the Ngarariga stage. She confirmed that she never saw the GK (GK A 953F) vehicle and learned about its involvement in the accident from other people much later. Evidently therefore, apart from hearing the loud bang following which she lost consciousness, the 1st Respondent did not witness the accident.

28. Reviewing the 1st Respondent's evidence in its totality, it is the court's considered view that though uncontroverted, the evidence did not at all establish negligence against any of the drivers of the two accident motor vehicles. There is neither direct evidence of negligence nor indirect evidence of some circumstantial facts from which an inference of negligence can properly be made.

29. In defending the trial court's apportionment of liability, Counsel for the 2nd Respondent cited several decisions including this court's decision in Eliud Papoi Papa v Jigneshkumar & Another (2017) eKLR. With respect, the facts of that case differ from those herein the former involving as it did two conflicting versions offered by the respective parties in the case concerning the occurrence of the accident.

30. To my mind, the facts of this case appear to approximate to the facts in Abbay Abubakar Haji & Fatuma Ali Abdulla v Marair Freight Agencies (1984)eKLR where both drivers of the two accident vehicles and their passengers died, and the court concluded that there was hardly any evidence upon which a finding of negligence, or indeed concerning the collision itself could be made. The High Court (Aragon J as he then was) therefore dismissed the claim brought by the widows of Ahmed Maow Farah, the driver of one of the accident vehicles. Dissatisfied, the widows appealed to the Court of Appeal.

31. In its judgment, that Court cited the decision of Spry J in Lakhamshi v Attorney General (1971) E.A 118, 120 as follows:

> " It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty

of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. (Emphasis added).

32. In his judgment, Hancox JA (as he then was), emphasized the distinction between a situation where parties' evidence of negligence regarding an accident is conflicting and where there was no evidence of negligence , or the evidence tendered was too scanty. This is what the learned Judge of Appeal stated:

> " The trial judge, Aragon, J. refused to follow the line of authorities cited to him, in which there was scant evidence, if any, of that which had taken place, and the tenor of which was that, in such circumstances, if it was clear that both drivers were to blame for the accident, I emphasise those words, and it was impossible to distinguish between them, then liability should be cast equally on each....
>
> The leading case appears to be Baker v Market Hardborough Industrial Co-operative Society in (1953) 1 WLR, 1472, in which the widow of each deceased driver sued the other's employers, and the respective appeals were heard together. That was the case in which Denning L J, as he then was, enunciated the principle to which I have just referred. Similar results occurred in the East African cases of Welch v Standard Bank Co. (1970) E A 115 (Madan, J, as he then was,) and Lakhamshi v Attorney General (1971) E A 118, (Court of Appeal for East Africa). Accordingly, Mr Satchu, on behalf of the appellants and former plaintiffs, whow ere the widows of the driver of the DATSUN, submits that this court should follow those decisions, reverse Aragon J's decision that they had failed to prove negligence, and apportion liability for this tragedy equally between the parties. He says that it was manifest from all the evidence, as depicted in the sketch plan, and the presence of the tyre marks on the roof of the cab of the Datsun, that there had, in fact been a collision between the two vehicles. Moreover, the learned Judge should not have excluded, as he did, the evidence of the second police officer, C/I WAIGWA, who attempted to give his opinion as to what had happened based on his 22 years' experience as a police officer (see Ground 3 of the Memorandum of Appeal).
>
> There can be no doubt that it is the clear duty of a court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible. The court cannot, as Denning LJ. Wash its hands of the case and shrink from arriving at a conclusion simply because the evidence is deficient in some respects. This is clearly recognized by SPRY V-P in the Lakhmshi case (supra) where, at p. 120, he accepted that in relation to most traffic accidents it is possible to conclude on a balance of probability that one or other, or both, of the parties were guilty of negligence. But he expressly said that it was not settled law that where the evidence is insufficient to establish the negligence of any party, the court must find both equally to blame, and he left open the situation where, as in my opinion is the case here, there is a lack of evidence as opposed to a conflict thereof. He said, at p.121:
>
> "I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is not evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. This problem does not arise on the present appeal and it is unnecessary for us to decide it." (Emphasis added)

It is apparent, then, that SPRY V-P's remarks were obiter, but that passage is in my judgment apposite to the present case. Even in the Market Harborough case, Romer L J was prepared to envisage that circumstances could exist where the evidence was so meager that any explanation would be purely speculative, and thus that the plaintiff's case could not be said to have been proved".

33. Applying the above dicta to the present case it appears that the trial Court in this case when confronted with the absence of evidence on the manner in which the accident occurred and therefore finding itself unable to attribute negligence, clearly fell into error by proceeding to apportion liability equally between the two drivers. Recently in the case of Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited [2022] KECA 477 (KLR) the Court of Appeal stated: -

> " The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? The mere fact that an accident involving the two vehicles occurred does not per se translate into the respondent's driver being culpable. It was the duty of the appellants to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden.

34. The Court concluded that:-

> " As already stated, there was no eyewitness to the accident as would have shed light as to how it occurred. The police abstract on record showed that the accident was under investigation. The accident involved two motor vehicles and from the evidence adduced, there is nothing to show that the respondent was culpable."

35. Similarly in this case, the 1st Respondent's evidence was too scanty to support a finding of negligence on the part of any or both drivers of the accident vehicles. That said, it is not lost on the Court, and indeed the court is not without sympathy for the 1st Respondent on account of the severe injuries she suffered in the accident. However, a court of law is obligated to base its decisions on the facts before it and the law. The evidence in this case failed to rise to the standard of balance of probabilities. Or stated another way, under section 107 of the *Evidence Act*, the burden of proof lay with the 1st Respondent and if her evidence did not support the facts pleaded, she failed as the party with the burden of proof. See the case of Wareham t/a A.F. Wareham (supra).

36. In the result, the appeal must succeed and is hereby allowed on the issue of liability. In the circumstances, no useful purpose will be served by a consideration of the question of quantum of damages. The judgment of the lower court is hereby set aside in its entirety and this court substitutes therefor an order dismissing the 1st Respondent's suit in the lower court. Parties will however bear their own costs on this appeal and in the lower court.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 28TH DAY OF OCTOBER, 2022

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A*

For the 1st Respondent: Ms. Muhanda

For the 2nd Respondent: N/A

C/A: Carol