



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO 100 OF 2018**

**ALEX NJOROGE.....1<sup>ST</sup> APPELLANT**

**NJOROGE MUNDIA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**FLORENCE NDUKU MUTUA.....RESPONDENT**

**(Being an appeal from the judgement and decree of the Honorable Y. A. Shikanda**

**(Mr.) SRM in Machakos CMCC 618 of 2015 delivered on 19.7.2018)**

**BETWEEN**

**FLORENCE NDUKU MUTUA.....PLAINTIFF**

**VERSUS**

**ALEX NJOROGE.....1<sup>ST</sup> DEFENDANT**

**NJOROGE MUNDIA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. According to the plaint filed in the subordinate court, on or about 16<sup>th</sup> September, 2014 at around 7.30am the Plaintiff/Respondent was travelling aboard motor vehicle registration no. KBR 727D registered in the name of the 2<sup>nd</sup> Appellant in whose actual custody, possession and control the vehicle was but beneficially owned by the 1<sup>st</sup> Appellant, when at Kithimani area the said vehicle was driven, controlled or managed carelessly or negligently that it was caused to lose control, veer off the road, overturn and roll several times causing the Respondent severe injuries, loss and damage. The respondent pleaded particulars of negligence and claimed a total of KShs 5,750.00 whose particulars were disclosed. She therefore sought special, general damages, and costs of the suit.

2. In their defence, the appellants denied ownership of the said vehicle the accident as well as the negligence. They denied the injuries and loss and future medical expenses and pleaded in the alternative that the accident was caused by or substantially contributed to by the Plaintiff's own negligence by failing to wear seatbelt and to take special care and attention for her own safety.

3. After hearing the matter, the learned magistrate found that the accident was caused by the sole negligence of the driver of the said vehicle and held him 100% liable. He also found that there was sufficient evidence on the record to show that the defendants were the owners of the said vehicle at the material time and held them 100% vicariously liable for the accident. He was awarded General Damages of KShs 200,000/- and special damages of KShs 5,550/- together with costs. It was this decision that provoked the instant appeal.

4. In her statement which she adopted as evidence in chief, the Respondent reproduced the contents of the plaint herein that on the said date she was travelling aboard the said vehicle when at Kithimani Area, the driver of the said vehicle drove the vehicle so carelessly and/or

negligently that it was caused to lose control, veer off the road, overturn and roll several times. As a result, she sustained blunt injury to the head, blunt injury to the right hand, blunt injury to the chest, blunt injury to the right hip joint, blunt injury to the back, cut causing the Respondent severe injuries. According to the statement, the Respondent spent more than Kshs 5.750/- in medical related expenses. She blamed the driver of the said vehicle for the accident. She stated that from the search she conducted, she found that the vehicle was registered in the name of the 2<sup>nd</sup> Appellant but the vehicles obtained from the vehicle showed that the beneficial owner was the 1<sup>st</sup> Appellant.

5. In her oral evidence, the Respondent testified that on the said date, she was a passenger in the said vehicle, a Toyota probox. And that after the accident, she was taken to Machakos level 5 hospitals for treatment where she was hospitalized for one day. She was issued with a treatment card and a p3 form. As a result, she incurred medical expenses and produced the payment receipt as exhibit. She also obtained a copy of record which indicated the 2<sup>nd</sup> Appellant as the registered owner and paid Ksh.500 for the search which she exhibited together with the receipt for the same.

6. According to the Respondent, the driver of the said vehicle who was driving at a high speed rammed into the forest and the motor vehicle overturned. She therefore blamed the driver since she fastened her seat belt. As a result, she was injured on the head, right hand, chest, back, hips and both legs and prayed for compensation and costs.

7. In cross-examination, the Respondent stated that the accident occurred at about 730am and that the driver was over speeding and the vehicle veered off the road, which was clear, and she suddenly realized that the motor vehicle was in the forest. It was her evidence that she was seated at the back seat and that there was one passenger on the front. She however only was taken to hospital at about 12:00noon because her brother died in the accident. She testified that the motor vehicle rolled and then overturned. She insisted that the 1<sup>st</sup> Appellant is also the owner of the motor vehicle.

8. In re-examination she explained the police abstract indicated the 1<sup>st</sup> defendant as the owner of the motor vehicle and insisted that the accident was caused by the high speed as a result of which the motor vehicle veered of the road and entered into the forest, rolled and then overturned. However, the road was straight and clear.

9. In support of her case, the Respondent called **PC Robert Tomno**, PW1, who attached to Machakos traffic base. According to him, they received a report of fatal self-involved accident which occurred along Machakos Kitui road near river Thwake Bridge involving motor vehicle KBR 727D Toyota Probox which was being driven from Kitui direction to Machakos by one **Kennedy Koberenge** who lost control while negotiating a bend. The motor vehicle veered off the road and overturned, rolled several times and landed in a ditch.

10. As a result of the accident, passengers were injured while one died. He confirmed that the Respondent was a passenger in the motor vehicle and that she did not contribute to the occurrence of the accident. After recording her statement, the Respondent was issued with a P3 form and later a police abstract on 19/6/2015 which he produced. It was his evidence that **PC Kimanzi** who visited the scene had since been transferred. In his opinion, the driver ought to have slowed down while approaching a bend and that the rolling of the motor vehicle indicated that he was driving at a high speed. He disclosed that he had been paid Kshs 5,000 for court attendance and exhibited the voucher.

11. In cross-examination, he admitted that he was not the investigating officer in respect of the accident and that he only had the initial report from which one person died while **Florence**, **John Mutua** and **David Musyimi** were injured. According to him they don't usually indicate all the witnesses in the police abstract and in this case it indicated 3 witnesses. He stated that the driver lost control while negotiation a corner and that the abstract indicated that the matter was pending under investigation. Since he did not have the police file, he was unable to tell whether the driver was charged.

12. The Respondent also called, as PW2, **Dr. John Mutunga**, who was attached to Machakos level 5 hospital. He stated that **Dr. Judith Kimuyu** was his colleague at the hospital but was expectant and on maternity leave. He confirmed that the signatures on the medical report & P3 form were for **Dr. Kimuyu** and that the medical report was in respect of one **Florence Nduku Mutua** who was examined on 18/6/2015 with a history of involvement in a road traffic accident. According to him, the injuries sustained were blunt injury to the head, blunt injury to the right hand with bruises, blunt injury to the chest, blunt injury to the right hip joint and bruises on both legs. The doctor formed the opinion that **Florence** suffered multiple soft tissue injuries but recovered fully and that there was no permanent incapacitation. He produced the medical report and a receipt for Kshs 3, 000/= for the report. He also produced the treatment card for the same patient which emanated from Machakos level 5 hospitals and produced payment vouched for Kshs 5,000/= being his court attendance fees.

13. In cross-examination he stated that he had worked with **Dr. Kimuyu** for 5 years the patient was treated as outpatient who suffered multiple soft tissue injuries.

14. In support of its case, the defence called **Kennedy Thurair Kaberege** who testified that he knew the Respondent who was the wife to his friend known as **Mutua**. According to him, the accident was on 16/9/2014 while he was from Mutua's house in Masii to Nairobi driving KBR 727D while carrying **Mutua**, **Florence** and another person.

15. It was his evidence that there was on coming *matatu* and that another *matatu* overtook the *matatu* in front and moved onto his lane. He saw the *matatu* when he negotiated a bend. Though he tried to slow down, the overtaking *matatu* did not slow down and to avoid a head on collision, he veered off the road to the extreme left where there were loose ballasts off the road. When I tried to return to the road, the motor vehicle overturned and landed in a ditch. According to him, the plaintiff had not fastened her seat belt. He therefore blamed the overtaking *matatu* for the accident.

16. In cross-examination he admitted that the Respondent was a lawful passenger in the motor vehicle but insisted that she had not fastened her seatbelt. He however admitted that he may not have mentioned the issue of the seat belt in his statement. He admitted that he was the one in control of the motor vehicle but denied that he was driving at a high speed. According to him, the motor vehicle overturned due to the state of the road as he was driving at a speed of below 50km/hr. He however, did not join the overtaking *matatu* whose drivers did not stop. He stated that he did not stop the motor vehicle but just slowed down and insisted that he was not to blame for the accident since he had

negotiated the bend when he saw the *matatu*. He had not seen the loose ballast when he veered off the road. He conceded that the plaintiff did not contribute to the accident but sustained injuries following the accident.

17. In this appeal, it is submitted on behalf of the Appellants that a decision on apportionment of liability being a finding of fact, an appellate court can interfere with a trial court's finding based on the decision in **Ephantus Mwangi and Another vs. Duncan Mwangi Wambugu CA 77 of 1982** and **Mwana Sokoni vs. Kenya Bus Service Limited CA 35 of 1985**. It was submitted that this appeal falls within the above parameters as laid out by the decisions and that this court ought to disturb the trial court's finding on the apportionment of liability at 100% against the Appellants which was unjustified on the totality of the evidence. According to the Appellants, the trial court totally disregarded the evidence tendered by the Appellants witness, **Kennedy Thurairira**. Reliance was placed on the decision in **Wakim Sodas Limited vs. Sammy Aritos [2017] eKLR**, where liability was apportioned in the ratio of 50:50 as the Respondent clearly did not take his safety into consideration when crossing the road. Under the same circumstances the court ignored the evidence of the driver which had indicated that the Plaintiff has not fastened her safety belt a fact that had been indicated in the Appellants Defence.

18. It was further submitted that the Respondent was neither charged with any traffic offence nor blamed for the accident and reliance was placed on **Statpack Industries vs. James Mbithi Munyao Civil Appeal Case No. 152 of 2013**, and it was submitted that the Respondent/Plaintiff should have borne the greater liability but the Appellants were contents with the same being apportioned equally.

19. As regards the general damages, it was submitted that the learned trial Magistrate applied wrong principles in assessing quantum of damages and reliance was placed on the case of **Kenya Tea Development Agency vs. Augustine Gori Makori [2014] eKLR**, where the court relied on **Kipebe Ltd -vs- Moses Kauni Masaki, Kisii High Court Civil Appeal No.127 of 2004**, as well as the decision in **Kemfro Africa Ltd t/a Meru Express and Another -vs- A. M. Lubia and Another (No.2)**. To the Appellants, the learned trial magistrate erred in law by awarding the Respondent inordinately high and excessive damages compared to the laid down principles in awarding damages in such claims. This is based on the evidence tabled before the trial court and failing to put into consideration the evidence adduced by the Appellants. In urging the court to interfere with the award, the Appellants relied on the case of **Butt vs. Khan 1977 1 KAR 1, Joseph Musee Mua v Julius Mbogo Mugi & 3 others [2013] eKLR, Osman Mohammed & Ano. vs. Saluro Bundit Mohammed, Civil Appeal No. 30 of 1997, Rahima Tayab & Others vs. Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90**. It was submitted that the learned trial Magistrate awarded inordinately high amounting to a wholly erroneous estimate of the damages compared to the laid down principals in awarding damages in such claims and that the amount of general damages awarded to the Respondent for pain and suffering at Kshs 200,000/= was manifestly excessive bearing in mind the plaintiff's injuries and the precedents on previous court decisions. In the Appellants' view, the amount of Kshs 100,000/- proposed by the Appellant was more than adequate compensation to the plaintiff and reliance was placed on **PF (Suing as next friend and father of SK (Minor) vs. Victor O Kamadi & Another [2018] eKLR, Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR, Caroline M. Kabae & Another vs. Nancy Muthoni Njoora & another [2010] eKLR**. The Court was therefore urged to allow this appeal and set aside the decision of the trial magistrate on liability and quantum with costs to the Appellant.

20. In opposing the appeal, it was submitted on behalf of the Respondent that this court should not be so keen to disturb the award that was granted by the trial court based on the decision in the case of **Francis Lokadongoy Lokogy vs. Reuben Kiplagat Kiptarus [2020] eKLR**.

21. The Respondent disputed the Appellants' contention that the evidence of **Kennedy Thurairira** was disregarded and not taken into consideration by the court since the trial court in its decision (considered the evidence by stating that "*it is obvious that the defendants lost control*"). The Respondent also took issue with the submission that the Plaintiff testified that she did not have a seat belt on at the time of accident. It was also stated that no traffic offence charge was preferred against the driver motor vehicle.

22. As regards the invitation to interfere with the findings of fact, the Respondent relied on **I. P. Veronica Gitahi & Another -vs- Republic [2017] eKLR, Stapley - vs - Gypsum Mines Ltd (2) (1953) AC 663 at pg. 681**.

23. It was submitted that according to the judgment of the trial court, the appellants at the trial stage told the court that the reason for the accident was that the appellant driver was greatly distracted by an overtaking vehicle. This was attributed as the main cause of the accident at trial stage. The court then granted the appellants opportunity to enjoin third party to the suit. The appellants in a rejoinder submitted that it was not their duty to rescue the Plaintiff case by joining third party and that the plaintiff should bear the consequences of the ill-conceived suit. It therefore comes as a surprise that the appellant would challenge the result of the trial court decision. The Respondent relied on HCCC No. 79 of 2011; **Linus Nganga Kiongo -vs- Town Council of Kikuyu**.

24. According to the Respondent, the evidence that the driver of accident motor vehicle was never charged or convicted which is mentioned in the appellants' submissions is new evidence which was not previously adduced and therefore cannot be admitted at appeal. A keen look at the record of appeal would reveal that this evidence was never presented to the trial court.

25. It was submitted that from the record of appeal, the suit was never adequately defended at trial stage. The Plaintiff provided proof of negligence on the part of the defendants. The proof was enough to convince trial court to make a determination on a balance of probabilities. It is subsequently erroneous for the appellant to decide that the respondent ought to be apportioned blame as a passenger due to the fact that the Plaintiff told the court that she had fastened her seatbelt; the accident was self-involving; it was the evidence of the plaintiff at trial stage that the car was being driven at a high speed; and the driver of the motor vehicle in his evidence on the record of appeal, stated that he did not blame the plaintiff for the accident.

26. The respondent affirmed that the trial court made a proper determination on liability and the same ought to be upheld by this honourable court

27. On Quantum, it was submitted that as a general rule, an appellate court ought to be slow to interfere with awards made by a trial court. The principles which guide the court in deciding whether or not to interfere with awards made by a trial court have now been settled in a long line of authorities such as **Kemfro Africa Limited T/A Meru Express Services & Another vs. Lubia & Another, [1987] KLR 30** and **Butt vs. Khan [1981] eKLR 349**.

28. In support of the award, the Respondent submitted that in Patrick Mwiti Imanene & Another vs. Kevin Mugambi Nkunja [2013] eKLR the appellant suffered Swollen scalp, right side, Tender, swollen and bruised left shoulder, bruised right knee, Tender neck, Tender back, X-rays showed no fractures, Complaints of on and off headaches and lower back pain and had been awarded Kshs 200,000 in the trial court. The High Court, in 2013, refused to revise this award upwards stating it was sufficient for the injuries suffered. It is noteworthy that the appellant had suffered soft tissue injuries just like in our instant case. This matter was decided in the year 2013. She relied on Veronica Mkanjala Mnyapara vs. Charles Kinanga Babu [2020] eKLR where the appellant being dissatisfied with the award of Kshs. 221,620/= as damages for injuries sustained following a road traffic accident filed an appeal in the High Court at Kisii. The respondent in this case had suffered blunt injuries. The court upheld and sustained the award.

29. The Court was therefore urged to dismiss the appellants' appeal with costs to the respondent.

### **Determination**

30. I have considered the foregoing. This being a first appellate court, it was held in Selle vs. Associated Motor Boat Co. [1968] EA 123 that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial 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 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 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.”**

31. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

32. However, in Peters vs. Sunday Post Limited [1958] EA 424, it was held that:

**“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”**

33. Nevertheless, in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 the Court of Appeal held that:

**“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

34. In this case, it is clear that the issue to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved her case that the Appellants were 100% liable and whether the award of damages was justifiable. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

**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.**

35. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

**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.**

**112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

36. The two provisions were dealt with in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

**“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”**

37. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

38. In this case, it was contended that the learned trial magistrate did not consider the evidence of the defence witness. According to the defence witness, as he was taking a bend a motor vehicle was coming from the opposite direction while another one was overtaking it. In an attempt to avoid the collision, he veered off the road onto loose ballast and in his attempt to return onto the road, the vehicle overturned. He admitted that the cause of the accident was the state of the road. In his judgement, the learned trial magistrate found that the involvement of a third party in the accident was never pleaded in the defence and the alleged third party motor vehicle was never joined to the suit. Based on Order 1 rule 15 of the *Civil Procedure Rules*, the learned trial magistrate found that he could not apportion liability against a non-party to the suit. He based his decision on Pauline Wangare Mburu vs. Benedict Raymond Kutondo & Another [2005] eKLR, James Gikonyo Mwangi vs. D M [2016] eKLR, Brian Muchiri Waihenya vs. Jubilee Hauliers Ltd & 2 Others [2017] eKLR, Mary Njeri Murigi vs. Peter Macharia & Another [2016] eKLR and disregarded the said allegations.

39. It is true that the alleged involvement of a third party was never pleaded. a party ought to lead evidence based on his pleadings and ought not to wander away from his pleadings. The Court of Appeal in Dakianga Distributors (K) Ltd vs. Kenya Seed company Limited [2015] eKLR rendered itself as follows:-

**“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob’s precedents of Pleadings, 12<sup>th</sup> Edition, London, Sweet & Maxwell (The common law Library No. 5) where the learned authors declare:-**

**“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”**

40. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on ground on which his evidence has been improperly excluded. (See Esso Petroleum C. Ltd vs. Southport Corporation [1956] AC 218 at 238.)

41. In Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others; Civil Appeal No. 219 of 2013 (2014) eKLR, G. B. M. Kariuki J, P. O Kiage J and K. M’noti J after making reference to authorities cited by Counsel held as follows:-

**“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”**

42. The court of Appeal in Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others; Civil Appeal No. 219 of 2013 (2014) eKLR while quoting with approval an excerpt from an article by Sir Jack Jacob entitled *“The present Importance of pleadings”* restated that:-

**“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part**

of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.... *In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.*"

43. The same position was adopted by the Malawi Supreme Court of Appeal in Malawi Railways Ltd vs. Nyasulu (1998) MWSC 3.

44. In MNM vs. DNMK & 13 others [2017] eKLR it was held that

**"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:**

**"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."**

Later in Kenya Commercial Bank Ltd v. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:

**"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."**

**A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See Odd Jobs v. Mubea [1970] EA 476). However that was clearly not the case in this appeal."**

45. That settled position was re-affirmed by the court of appeal in the case of Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others (2014) eKLR which cited with approval the decision of the supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

**"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."**

46. The death knell for parties who wander away from their pleadings was sounded by the Supreme Court in Raila Amolo Odinga & Another vs. IEBC & 2 Others 92017) eKLR where it expressed itself as follows:-

**"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."**

47. Apart from the fact of non-pleading of the alleged involvement of the third party vehicle, the Appellants did not seek to have him joined as a third party. I agree with **Kimaru, J** in Pauline Wangare Mburu vs. Benedict Raymond Kutondo & Another [2005] eKLR where he expressed himself as hereunder:

**"Having evaluated the evidence I do hold the driver of motor vehicle registration number KAM 466B solely liable for the said accident....The defendants jointly and severally are therefore liable to the plaintiff in damages for the death of the deceased. As stated earlier in this judgment, the defendants did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability."**

48. I also agree with the holding of **Okwany, J** in James Gikonyo Mwangi vs. D M [2016] eKLR, where she expressed herself as hereunder:

**"I further find that the respondent had no reason to enjoin a third party to the suit as the respondent was positive that it was the appellant's driver to blame for the accident and nobody else. On cross-examination PW1 stated as follows:**

**“I blame our driver for speeding and veering off its lane. That is why I did not enjoin the other Motor Vehicle.”**

It is worthy to note that it was the appellant who has introduced the aspect of a third party in this proceeding and I find that under those circumstances it was incumbent upon the appellant, if his case was that a third party was to blame for the accident, to enjoin the said third party as he had already alluded to in his own pleadings (defence) at paragraphs 5 and 7. Order 1 Rule 15 provides for an elaborate procedure to be undertaken by a defendant claiming against a person not already a party to the suit...To my mind, the appellant was under an obligation, if he felt that someone else was responsible for or contributed to his predicament in the case, to enjoin that someone else so that he can claim from him any loss or award that he may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear before it. I find the suggestion or contention by the appellant that the respondent should have sued the third party owner of the unregistered motor vehicle to be erroneous and misguided. This is so because passengers have no contract with third party vehicles on the road. The contract is with the owner and/or driver of the vehicle they are travelling in to drive them safely to their destinations. It is the appellant who had a contract with 3<sup>rd</sup> party vehicles on the road in respect to safe-driving and if the third party acted to his detriment, then I reiterated that the appellant should have called him to account through the third party proceedings. (See *Boniface Klaiti & Another vs Michael Kariuki Kamau* [2007] eKLR). The appellant failed to pursue the third party proceedings and cannot be allowed to evade his responsibilities towards his passengers. I therefore find that the trial court was justified to hold that the appellant was 100% to blame for the accident.”

49. I associate myself with the views expressed by **Mulwa, J** in *Brian Muchiri Waihenya vs. Jubilee Hauliers Ltd & 2 Others* [2017] eKLR that:

**“The defendants failed to enjoin the party it blamed for the accident as a third party or a co-defendant. They did not blame the plaintiff at all, and in any event, being a passenger the plaintiff who had no control of the vehicle he was travelling in can not be held to have contributed to the collision of the two vehicles. It is not enough for the defendants to submit that the plaintiff chose to sue the available party as the party to blame. They too were at liberty to enjoin any other party they deemed was liable.”**

50. **Aburili, J** was of a similar view in *Mary Njeri Murigi vs. Peter Macharia & Another* [2016] eKLR where she held that:

**“Furthermore, if or at all KAY 069X was or contributed to the occurrence of the material accident, this court wonders why the defendants did not issue the owner thereof with a third party notice or notice of claim for indemnity or contributions. In the absence of any such third party proceedings against the owner of KAY 069X this court cannot make any finding on its liability or contribution to the occurrence which contribution is not apparent. I therefore dismiss any shifting of blame to the owner of KAY 069X by the defendants.”**

51. Therefore, the Appellants ought to have joined the owner of the alleged *matatu* as a third party to the said proceedings as provided under Order 1 rule 15 of the *Civil Procedure Rules*. based on the above authorities as well as the decision of **Wambiliangah, J** in *Loyce Anyona Olum vs. Benjamin Kimondo Kisumu HCCC No. 105 of 1993* that a defendant ought to apply for a third party notice if allegations are made against the third party. The failure to do so as well as the state of the pleadings was a barrier in making any findings adverse to the alleged third party.

52. Although, the learned trial magistrate’s finding that it was not clear what led to the vehicle veering off the road, overturning and landing in the ditch, was not entirely correct in light of the evidence of the defence, this court is enjoined to consider the evidence on record and arrive at its own conclusion after evaluating the same. In this case, the Respondent testified that the motor vehicle was over speeding. DW1 testified that the cause of the accident was the state of the road which had loose ballast. It was DW1’s evidence that he was on a bend when the accident occurred. In *Kenya Horticultural Exporters Ltd vs. Julius Munguti Maweu Civil Appeal No. 9 of 2004*, the Court of Appeal held that:

**“On a first appeal the Court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusions of the trial court and bearing in mind that unlike the trial court it neither saw nor heard the witnesses...As regards the cause of the accident, there is evidence on record that the driver was over-speeding and that at some stage he cautioned him to no avail. He negotiated a bend at high speed. That evidence clearly showed the driver was to blame for the accident. It was immaterial that there could have been a tyre burst. If the burst arose while the motor vehicle was being driven at high speed, that can be inferred from the evidence. The accident vehicle was found after the accident with a tyre burst. There is no basis for interfering with the Superior Court judgement on liability.”**

53. Similarly, in this case, there was evidence that DW1 was over speeding. While the road could well have not been in the best state, the fact that he was over speeding on that state of road on a bend, is clearly evidence of negligence on his part. He drove without due care and attention consideration the prevailing circumstances.

54. It was submitted that the Respondent ought to have been found negligent. The plaintiff was a passenger. **Okwengu, J** (as she then was) in *Samuel Mukunya Kamunge vs. John Mwangi Kamuru Nyeri HCCA No. 34 of 2002* held that:

**“Where the deceased was a passive passenger in the motor vehicle and the evidence adduced shows that the accident was caused by a tyre burst and that the driver lost control of the motor vehicle, without an explanation how the accident occurred, the evidence was sufficient to establish on a balance of probabilities that there was negligence on the part of the Respondent’s driver hence his inability to control the vehicle as a rear tyre burst would not ordinarily cause a motor vehicle to overturn if the vehicle is being driven at a reasonable speed with due care and attention.”**

55. This was the position adopted by Trvelyan, J in Gian Singh Panesar and Others vs. Lochab and Another [1966] EA 401 where he held that:

**“...this finding only affects the first plaintiff, who was the driver, for the passengers in the car were not identified with the driver’s negligence. In such circumstances it is no defence for the defendants to prove that someone else contributed to the accident.”**

56. In this case the Respondent insisted that she was wearing her seatbelt. Though DW1 stated that she was not, in cross-examination DW1 admitted that the Respondent was not to blame for the accident. Accordingly, I have no basis for interfering with the findings of the learned trial magistrate on this issue.

57. The issue of lack of evidence showing that DW1 was charged with a traffic offence was raised. This issue however brings into focus the relevancy of traffic proceedings to civil proceedings. In Ochieng vs. Ayieko [1985] KLR 494, O’kubasu, J (as he then was) held that:

**“Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate’s Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored.”**

58. It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken to be conclusive evidence of who between the two drivers is culpable. I therefore do not read too much into the fact that the Appellant was charged and acquitted of the traffic offence. This was the position adopted by the Court of Appeal in Calistus Ochien’g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

59. Therefore, proof of negligence being on a balance of probabilities does not solely depend on the opinion of the investigation officer. 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. In Peter Kanithi Kimunya vs. 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.”**

60. 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.”**

61. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

**“It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim...”**

62. Consequently, the issue whether or not DW1 was charged is neither here nor there as long as there was evidence on record on the basis of which the learned trial magistrate could arrive at the decision he did. I have considered the evidence on record and there is no basis upon which I can interfere with his findings that the Appellants were 100% liable for the accident.

63. As regards the assessment of damages, in Kenya Horticultural Exporters Ltd vs. Julius Munguti Maweu Civil Appeal No. 9 of 2004, the court reiterated that:

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge are that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage. SEE KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE, GATHOGO KARIMI VS. A M LUBIA AND ANOTHER [1982-88] 1 KAR 727; ILANGO VS. MNAYOKA [1961] EA 705 AT 709; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD VS. KAVOLOTO [1970] EA 414, 418, 419. In assessing damages, a judge exercises discretionary jurisdiction and such jurisdiction is always to be exercised on the basis of sound legal principles and the evidence.”**

64. Similarly, 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:

**“It is trite law that the 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.”**

65. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

**“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...”**

66. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

**“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”**

67. I have considered the award made and the authorities relied upon. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

**“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”**

68. In this case, according to the medical report, the Respondent sustained blunt injury to the head, blunt injury to the right hand with bruises, blunt injury to the chest, blunt injury to the right hip joint, blunt injury to the back, bruises on both legs. In Caroline M. Kabae & Another vs. Nancy Muthoni Njoora & another [2010] eKLR, the Respondent suffered blunt injury on the forehead, blunt injury on the interior chest, blunt injury on the lower back, blunt injury on the left hip and blunt injury on the left leg. In my view the injuries sustained by the Plaintiff in the above cases were on fours with those of the Respondent in this case. The decisions relied upon by the learned trial magistrate were with due respect not entirely similar to the instant case. I agree with the position of Court of appeal in Cecilia W. Mwangi & Another -vs- Ruth W. Mwangi [1997] eKLR, as follows:

**“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees...we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd -vs- Shephard [1964] AC 326 at page 345:**

**‘But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded**

are to a considerable extent conventional.’

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in *Lim Pho Choo v Camden and Islington Area Heath Authority* [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of *Tayab v Kinanu* [1982-88] 1 KAR 90.

Lord Denning MR said:

‘In considering damages in personal injury claims, it is often said: “the defendants are wrongdoers so make them pay in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one may have been due to a pardonable error much as may befall any of us. I stress this so to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.’

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant.”

69. The decision in *Caroline M. Kabae & Another vs. Nancy Muthoni Njoora & another* [2010] eKLR was delivered in 2010 and the Court awarded Kshs 100,000/- in general damages. While the present decision was delivered in 2018, 8 years later, I am not convinced that the inflation would by then have pushed the awards to by 100%. Accordingly, I allow the appeal in so far as the assessment of damages are concerned, set aside the award of Kshs 200,000/- in respect thereof and substitute therefor an award of Kshs 150,000.00.

70. Save for the foregoing, the appeal fails.

71. There will be no order as to the costs of this appeal.

72. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 22<sup>nd</sup> day of February, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Ms Loko for Mr Philip for the Respondent

CA Geoffrey