



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CIVIL APPEAL NO. 4 OF 2020

JUDITH KAARI MBAKA.....APPELLANT

VERSUS

NYAMU REWA (Suing as the legal representative of the estate of

JAMES MUTEMBEI NYAMU - Deceased).....RESPONDENT

(Being an appeal from the judgment of Hon. J. M. Njoroge (Chief Magistrate)

delivered on 20th May 2020 in Chuka CMCC No. 26 of 2019)

J U D G M E N T

Summary

1. This is an appeal against the judgment of the Chief Magistrate,(CM) delivered on 20/05/2020 in Chuka CMCC No. 26 of 2019. The Respondent had sued the Appellant for general damages, special damages as well as costs and interest of the suit following fatal injuries sustained by one James Mutembei Nyamu as a result of a road traffic accident that occurred on 22/12/2018. The deceased was a pedestrian along Ikuu-Chuka road on the material day and was knocked down by motor vehicle registration number KBF 398S, Mitstubishi Pajero allegedly owned by the Appellant.

2. The initial defendant was Eliphas Mbaka who was the driver of the subject motor vehicle on the material day. He unfortunately passed away while the suit was ongoing. His wife, the Appellant herein, was consequently substituted as the defendant.

3. The trial court entered judgment in favour of the Respondent as follows:

i. Liability – 100%

ii. Damages:

i. Pain and Suffering – Kshs. 30,000/=

ii. Loss of Expectation – Kshs. 100,000/=

iii. Loss of Dependency – Kshs. 1,344,000/=

iv. Special Damages – Kshs. 58,000/=

Less double entitlement – Kshs. 100,000/=

Total Kshs. 1,432,000/=

v. Costs and interest

4. This appeal relates to the above determination by the trial court. On 04/11/2020, the parties herein were directed to canvass the appeal by

way of written submissions. The Appellant filed their written submissions on 01/02/2021 and the Respondent filed their written submissions on 22/02/2021.

Grounds of Appeal

5. In the amended Memorandum of Appeal dated 25/06/2020, the Appellant raises the following grounds of appeal:

- i. THAT the Learned Magistrate erred in law by finding the Appellant 100% liable in negligence in disregard of the sum of evidence at the hearing in regard to Respondent's evident contributory role in the accident.
- ii. THAT the Learned Magistrate erred in law in failing to consider the submissions of the counsel for the Defendant, the evidence and witness testimonies presented at the hearing and find that the Respondent herein contributed to the accident.
- iii. THAT the Learned Magistrate erred in law and fact by entering judgment against the Appellant, Judith Kaari Mbaka, whom does not have the locus standi in the suit having not been granted Letters of Administration to the Estate of the deceased defendant.
- iv. THAT the Learned Magistrate erred in law in awarding General Damages for loss of dependency at Kshs. 1,344,000/- which amount is manifestly excessive and high considering the Learned Magistrate adopted a multiplier of Kshs. 10,000 per month and 14 years.
- v. THAT the Learned Magistrate erred in law and in fact in failing to consider the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellant's case.
- vi. THAT the judgment of the Learned trial Magistrate is against the law and weight of the evidence.

The appellant therefore seeks orders that the appeal be allowed, the judgment of the lower court be set aside and he be awarded costs.

Appellant's Submissions

6. The Appellant submitted that the trial court erred in finding her liable as she was neither the driver of the subject motor vehicle at the time of accident nor was she the registered or beneficial owner of the vehicle. She further submitted that since she was not the legal representative of her late husband's estate, it was improper for the trial court to allow the application for substitution of the defendant. Finally, it was the Appellant's submission that the lower court failed to consider the Appellant's submissions and that the award of general damages was too high in the circumstances. **Respondent's Submissions**

7. The Respondent submitted that the witnesses called in support of their case proved that the driver of the subject motor vehicle was to blame for the accident and that the Appellant never adduced any evidence to prove that the Respondent contributed to the cause of the accident. It was the Respondent's submission that the Appellant never opposed the application for substitution of the defendant and that since the said application was allowed, the Appellant ought to have appealed against it or have it reviewed if she was aggrieved and/or prejudiced by it. On the issue of ownership of the subject motor vehicle which the Appellant raised in her written submissions, the Respondent responded by submitting that the Appellant cannot escape liability for the accident on that ground as there was proof that the subject vehicle was in Appellant's possession and being used by her and her late husband. Finally, the Respondent submitted that the award by the trial court was not manifestly high as the learned magistrate used the minimum wage proposed by the Appellant and a multiplier of 14 years instead of 19 years as the deceased would have worked until he was 60 years or even more. The Respondent thus prayed for the appeal to be dismissed with costs.

Issues for Determination

8. The appeal is both on liability and quantum. There are three main issues for determination by this court are as follows:

- i. Whether the Appellant was vicariously liable for the accident; and
- ii. Locus standi
- iii. Whether the general damages awarded were high.

Analysis of Issues

9. This being a first appeal, it is trite law that this Court is under a duty to reconsider the evidence adduced in the trial court, re-evaluate the evidence and draw its own conclusions. The principles upon which this Court acts in such an appeal are well settled as was aptly stated in the cases of **Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123** and **Williamson Diamonds Ltd. V. Brown [1970] E.A.L.R.**

a. Whether the Appellant was vicariously liable for the accident

10. It is not in dispute that on the material day, the Appellant's late husband, Eliphias Mbaka Njoka, was the driver of the subject motor vehicle at the time the accident occurred. In his witness statement dated 18/06/2019, the said Eliphias Mbaka Njoka admitted that he was driving the subject motor vehicle from his rural home in Tharaka Nithi destined to Chuka town. He further stated that he was driving at a

speed of about 30-40 kph when he suddenly noticed someone lying in the middle of the road. It was his statement that he immediately swerved to the right to avoid hitting the pedestrian, but the deceased was unfortunately hit with the front bumper of the vehicle.

11. PW1, a police officer who rushed to the scene after the accident testified that the deceased was a pedestrian who was walking on the far left side of the road when the driver knocked him. According to PW1, the road where the accident took place was dusty and the driver did not see the pedestrian hence the accident. He therefore blamed the driver of the subject motor vehicle. In finding the driver of the subject vehicle 100% responsible for causing the accident, the trial court observed as follows:

“...due to pre-existing conditions including darkness and dust, the driver ought to have exercised extra caution, including slowing down, stopping, braking or any other way avoiding the accident. The driver knocked the pedestrian off the road. This clearly shows that he must have lost control and veered off the road; which connotes negligence on his part. On the other hand, even if the court was to assume that the driver was driving at slow speed of 30-40kph, then he ought to have noticed the presence of the pedestrian in time so as to brake, swerve sufficiently or stop to avoid causing the accident.”

12. The testimony of PW1 as supported by the police abstract produced in evidence is prima facie evidence of causation solely attributed to the said Eliphias Mbaka Njoka. I agree with the trial court that if the driver was indeed driving at 30kph, he would have been in a position to brake and in case of an accident, the impact would have been minimal. The most logical conclusion, in my view, is that the subject vehicle was being driven at a high speed and negligently immediately before it veered off the road and knocked the deceased.

13. **Sections 46, 47 and 49 of the Traffic Act (Cap 403 of the Laws of Kenya)** imposes a duty of care on drivers that while in control and driving any motor vehicles should do so without being reckless, careless or drive in a manner which is dangerous to other road users having regard to all the circumstances and surrounding of the road, including the nature, condition, the amount of traffic which might be reasonably or actually be expected on the aforesaid road at the time of the accident. Based on the evidence the trial court rightly found the driver to be 100% responsible for causing the accident.

14. The trial court proceeded to find the Appellant vicariously liable for being the beneficial owner of the motor vehicle. The Appellant has however challenged ownership of the accident motor vehicle. It is the Appellant's submission that it was not correct for the trial Court was to substitute the deceased defendant with his wife, the Appellant, on the ground that she was a beneficial owner. This has been raised as the appellants 3rd ground of appeal and specifically the issue of locus standi. This court is under a legal obligation to consider it. for purposes of laying the correct legal position on the issue. Furthermore, as stated earlier this being the first appellate court, it has a duty to review all the evidence adduced before the lower court and draw its own conclusions. In ***Selle -v- Associated Motor Boat***, the court stated:

“.....”this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which the court acts in such appeal are well settled. Briefly put they are that that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

The 1st appellate court therefore conducts proceedings akin to a retrial and has to deal with all issues which a party raises in its appeal.

The evidential burden is the burden cast on any party to prove a particular fact which he desires the court to believe in its existence.

It is submitted by the appellant that the trial magistrate entered judgment against a party without locus standi. It is submitted that the application to substitute the defendant was filed by the respondent who was the plaintiff in the lower court. The application for substitution was made under **Order 24 Rule 8 of the Civil Rules** and it is the respondent who informed the court that the defendant had passed away and prayed for leave to substitute the defendant. The appellant submits that the substitution was void *ab initio* as the application was brought under the wrong provisions of the law.

It is submitted that under the rule the procedure to be followed is that upon application, the court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased to proceed with the case. To this end he relies on the definition of legal representative given under **Section 2 of the Civil procedure Act** which provides that a legal representative is a person who in law represents the estate of the deceased. It is submitted that no evidence was tabled before court to show that the appellant was the person contemplated by the above definition that is to say, the legal representative of the Estate of Eliphias Mbaka.

15. The appellant further relies on the case of ***Mary Wanjela -v- Ambrose Kipruto (2014) eKLR*** and ***Esther Wangari Kihara -v- Samuel Ntiba Senior & Another (20123) eKLR*** where the court stated that the appellants had no capacity to be sued and enjoined in the proceedings at the lower court since these are strangers to the proceedings. The appellant submits that no proper substitution was done as the appellant is not the legal representative of the estate of Eliphias Mbaka. It is also the contention by the applicant that the applicant is not the beneficial owner of the motor vehicle and as such Judgment cannot be entered against her.

16. The application for substitution of the defendant was filed by the plaintiff. The application is at page 25-28. The application is dated 2/12/2019 and was filed in court on 3/12/2019. The application was allowed as prayed as it was not opposed. It could not have been opposed as there was no defendant and the person being joined in the proceedings was not a party. There is no evidence in the record of appeal to show that the appellant was ever served with the application to substitute the defendant. The order to substitute the appellant and join her in a suit as a defendant contravened the rules of natural justice and fairness as enshrined under **Article 50 of the Constitution** as she was not given an opportunity to be heard.

LOCUS STANDI

The correct procedure for the substitution of a sole defendant in the event of the death, as was the case herein, is provided under Order 24,

Rule 4 of the Civil Procedure Rules which provide as follows:

“(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

17. The Respondent’s application for substitution of the original defendant (deceased) with the Appellant dated 02/12/2019 was thus wrongly brought under the provisions of **Order 24 Rule 8** of the **Civil Procedure Rules** as the correct rule is rule Order 24 rule 4 of which I have quoted above. This is a technicality and I will nevertheless proceed to make a determination as guided by **Article 159 (2) (d) of the Constitution**.

18. **Order 24 Rule 4(3) of the Civil Procedure Rules** provides that a suit should abate as against a deceased defendant if an application for substitution of the deceased defendant with the legal representative of the deceased defendant is not done within one year. This provision is however not applicable in this case. While it is not clear when the original defendant (deceased) died, the accident took place on 22/12/2018 and the witness statement of the deceased’s defendant is dated 18/06/2019. Thus, since the application for substitution of the defendants was filed on 03/12/2019, the same was not made in default of the one-year statutory requirement of filing such applications. It thus follows that the suit did not abate by operation of law.

19. **Order 24, Rule 4(1) of the Civil Procedure Rules** provides where a cause of action survives or continues after the death of a sole defendant, the court shall, upon an application made, cause the legal representative of the deceased to be substituted as the defendant in order to proceed with the suit.

20. It is the Appellant’s submission that she is not the legal representative of the deceased’s estate and should therefore not have been substituted in the suit in place of the deceased defendant. **Order 24 Rule 5** of the **Civil Procedure Act** provides as follows with regards to the determination of question as to legal representative:

“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.”

21. Although the trial court had power under **Order 24, Rule 4(1)** of the **Civil Procedure Rules** to substitute the legal representative of the deceased defendant as the defendant in the suit, such a person should have been a legal representative within the meaning of the applicable law. In this regard, **Section 2** of the **Civil Procedure Act** defines a legal representative as:

“a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”

22. The applicable law contemplated by **Section 2** of the **Civil Procedure Act** is the Law of Succession Act. Section 3 of the Law of Succession Act defines a “personal representative” to mean:

“the executor or administrator, as the case may be, of a deceased person.”

23. From the above provisions, it follows that if a person has not been issued with a grant of representation in accordance with the Law of Succession, such a person cannot lawfully be substituted in place of a deceased party to a suit for lack of capacity. If the Appellant was to implement the order of the court by disposing off any of the assets of the deceased’s estate without taking out letters of administration on behalf of the said estate it would amount to the offence of intermeddling within the meaning of Section 45 of the Law of Succession Act which provides that:

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

24. The power of the Court under **Order 24 Rule 4 of the Civil Procedure Rules** is to cause, on an application made in that behalf, “*the Legal Representatives of the deceased defendant to be made a party....*” The person to join as a party to the suit must be “*the Legal Representatives of the deceased defendant*”. It has long been held as the correct position since the Court of Appeal decision in **Trouistik Union International & Anor. v. Jane Mbeyu & Anor Civil Appeal No. 145 of 1990** [1993] KLR 230 that the Legal Representative of the deceased is the person appointed as such by a Succession Court in accordance with the provisions of the Law of Succession Act.

25. The power of the court under **Order 24 Rule 5 of the Civil Procedure Rules** to determine a question as to whether any person is or is not the legal representative of a deceased defendant must be exercised in accordance with the law and the court is not at liberty to appoint a person who is not a legal representative in accordance with the provisions of the Law of Succession Act. It follows that the Appellant should not have been appointed to substitute the deceased defendant as there is no evidence to prove that she had been legally appointed as the legal representative of the deceased. I agree with the counsel for the appellant that she had no locus standi in the suit.

26. **Section 8 of the Traffic Act (Cap 403 of the Laws of Kenya)** provide that:

“The person in whose name a vehicle registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

27. It is not accurate, as submitted by the Appellant, that as per Section 8 of the Traffic Act, liability could only be found against the person in whose name a motor vehicle is registered. There are several authorities which agree that Section 8 of the Traffic Act recognizes the fact that the often times, motor vehicles change hands but the records are not amended to reflect the change. This is mainly because there is usually a time lag between the sale and transfer of the motor vehicle and the registration of the motor vehicle.

28. **Section 8 of the Traffic Act** contemplates that there may be actual, possessory or beneficial ownership of a motor vehicle which can exist independent of registration. In **Securicor Kenya Limited v. Kyumba Holdings Limited [2005] 1KLR 748**, the Court of Appeal found as follows:

“It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the Traffic Act when she states that the true owner of the motor vehicle was the appellant.”

29. It is therefore crucial for this court to determine from the evidence on record whether the Appellant was a beneficial owner of the accident motor vehicle and as such whether liability for the accident should attach to her. It is the Appellant’s submission that at the time of the accident, she was not the driver, or the registered or beneficial owner of the subject vehicle. According to the Appellant, the Respondent failed to prove that the Appellant was the beneficial owner of the motor vehicle as no proof was tendered in support of such an allegation. It was the Appellant’s submission that the motor vehicle search indicated that the vehicle was registered in the name of SHAHIM TRADING CO. LTD. I however note that the said motor vehicle search was not produced in evidence but was attached to the list of documents to be produced in the trial court by the Respondent. The only document that was produced in the trial court as proof of ownership of the accident motor vehicle was the police abstract dated 23/01/2019 produced by PW1 as P.Exhibit 1. The said police abstract indicates that Elias Mbaka Njoka was the owner of the subject motor vehicle at the time of the accident. The production of the police abstract in evidence was neither challenged in cross examination nor rebutted by the Appellant.

30. In **Wellington Nganga Muthiora vs. Akamba Public Road Services and Another [2010] eKLR**, the Court of Appeal held that:

“where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it is challenged by evidence or in cross examination the plaintiff would need to produce certificate from the registrar of motor vehicles or any other proof such as an agreement for sale of the motor vehicle which would be conclusive evidence in the absence of proof to the contrary.”

31. The Court of Appeal in the case of **Joel Muga Opija vs. East African Sea Food Limited [2013] eKLR** held inter alia that:

“...we agree that the best way to prove ownership would be to produce to the court a document from the Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied”.

32. From the record, the evidence adduced by the Respondent in the trial court did not prove on a balance of probabilities that the Appellant was the registered or beneficial owner of the motor vehicle at the time of the accident.

33. **Section 107 and 109 of Evidence Act** places the evidential burden of proof upon the person who desires the court to give judgment as to his legal rights or liabilities. He has to prove existence of facts which he asserts. The Section provides:

“ Burden of proof(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.108. Incidence of burdenThe burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

— **Consolata Anyango Ouma -vs- South Nyanza Sugar Co. Ltd (2015) e KLR**. In this aspect, it is my view that there is no persuasive evidence, oral or documentary, that the Appellant was indeed the owner, or had any beneficial interest in the accident vehicle at the date of the accident. It is my view that the trial magistrate did not consider the evidence in totality in making a finding that the Appellant was vicariously liable for the accident.

VICARIOUSLY LIABILITY

34. In Securicor Kenya Ltd. –vs- Kyumba Holdings Ltd.,- Civil Appeal No. 73 of 2002, the Court of Appeal defined the doctrine of vicarious liability by quoting with approval a passage from Winfield and Jolowicz on Tort 14th Ed. which states:-

“The doctrine may be stated as follows:-

Where A, the owner of a vehicle expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A will be vicariously liable for B’s negligence in the operation of the vehicle.”

35. In the case of Messina Associated Carriers –vs- Kleinhaus, [2001] 3 All SA 285 (SCA), which was cited as an authority by the Court of Appeal in the case of Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another [2014], the court in noting that vicarious liability is not limited to employment relationships stated as follows:

“The law will permit the recovery of damages from one person for delict committed by another where the relationship between them and the interest of the one in the conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or, ... where ‘in the eye of the law’ the one was in the position of the other’s servant.”

36. The Court of Appeal in the Tabitha Nduhi Kinyua (supra) case further cited with approval Ormrod & Another vs Cross Ville Motor Services Ltd & Another 1953 (2) AER 753 CA where Lord Denning L.J stated:

“The law puts a special responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner’s business or for the owner’s purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to third party to be used for purposes in which the owner has no interest or concern.”

37. Applying the above principles to this case, it is my view that the Appellant was not responsible for the negligent acts of the driver as there was no evidence that the Appellant was the owner of the accident motor vehicle on the material day or that the motor vehicle was being used for her benefit.

38. In any event, the Appellant was introduced to the suit under an application for substitution brought under **Order 24** of the **Civil Procedure Rules** which deemed her to be the legal representative of the estate of the deceased defendant when she was not.

Whether the damages awarded were high in the circumstances

39. In the celebrated case of Butt v Khan [1978] eKLR, Law JA stated the principle that governs an appellate court in considering a request to review an award of general damages:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which as either inordinately high or low.’

40. The same principle was set out in the case of KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE GATHOGO KANINI – VS- A M LUBIA & OLIVE LUBIA [1982-88] KLR 727 where the Court of Appeal held as follows:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that 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 a wholly erroneous estimate of the damage.

41. The general scope on assessment of damages was considered in the case of Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988 Ringera J, as he then was, stated:

“The principles applicable to an assessment of damages under the Fatal Accidents Acts are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

42. On the issue of quantum, the Appellant has only challenged the award of Kshs.1,344,000/= under the ‘Loss of dependency’ head. The trial court adapted the minimum wage of Kshs.10,000/= and found that the dependency ratio of 2/3 was reasonable in the circumstances. According to the Appellant, the trial court should have adopted a dependency ratio of 1/3 because the deceased only supported one person, who is his father.

43. It is clear from the letter of the locational chief of Mwonge dated 30/01/2019 that the deceased did not have a family of his own. His

mother is now deceased and the Respondent was the only dependent. As the father of the deceased, the Respondent constitute a dependent within within the definition conferred by **Section 4(1)** of the **Fatal Accidents Act** which provides that:

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused...”

44. The Respondent suffered loss of dependency arising out of the fatal injuries sustained as a result of the accident. At this stage I will not interfere with the issue of the award of damages in view of the orders I intend to make.

Conclusion

45. In view of the above, I opine that the appeal succeeds as the Appellant should not have been found vicariously liable for the subject accident.

The appellant was not properly joined as a defendant in this suit.

I therefore order that the Judgment entered against the appellant and all the consequential orders is set aside. The matter is referred back to the lower court for a retrial before a magistrate with jurisdiction other than J.M. Njoroge, (Chief Magistrate).

I award the appellant the costs of the appeal and in the lower court from the date she was wrongly joined in the suit.

Dated, signed and delivered at Chuka this 25th day of May 2021.

L.W GITARI

JUDGE

25/5/2021

Judgment has been read online through virtual proceedings.

L.W. GITARI

JUDGE

25/5/2021