REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 45 OF 2020

RENTCO EAST AFRICA LIMITED.....APPELLANT

-VERSUS-

DOMINIC MUTUA NGONZI.....RESPONDENT

(Being an appeal against the judgement delivered by Hon M. Opanga (SRM)

on 23rd June, 2020 in Kangundo SPMCC No. 90 of 2018)

BETWEEN

DOMINIC MUTUA NGONZI.....PLAINTIFF

VERSUS

RENTCO EAST AFRICA LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 12th April, 2018, the Respondent as the Plaintiff sued the Appellant as the Defendant claiming special damages, general damages, costs and interests.

2. The cause of action, according to the plaint, arose on or about 23rd October, 2017 along Kangundo-Kathiani Road. According to the Respondent, he was a pillion passenger aboard motor cycle registration no. KMCZ 012H when motor vehicle registration number GKB 376J registered in the name of the Appellant was so negligently driven that the same was allowed to hit the said motor cycle as a result of which the Respondent sustained severe bodily injuries. Both the of negligence, injuries and special damages were pleaded. As a result, the Plaintiff claimed damages.

3. The Appellant's defence was that the accident was caused by the negligence of the plaintiff particulars whereof were pleaded. It was further pleaded that the said motor cycle lost control and hit the said vehicle which was on its rightful lane.

4. The Respondent who testified as PW2, adopted his witness statement in which he stated that on 23rd October, 2017, at around 5pm, he was riding as a pillion passenger aboard the said motor cycle along Kangundo-Kathiani Road. The said motor cycle was heading to Kathiani from Kyevaluki while the said vehicle was from the opposite direction. Upon reaching Kyando area, the said vehicle which was being negligently driven lost control, veered off its lane and encroached onto the lane of the motor cycle thereby hitting the motor cycle.

5. According to the Respondent, he was then taken to Kathiani but was transferred to Shalom due to doctor's strike from where he was transferred to Machakos Level 5 Hospital. He stated that as a result of the accident he sustained fracture of the neck of the right Femur; double fractures of shaft of right Femur; deep cut wound on the left foot; fracture of the right ulna styloid process; and fracture of the distal right radius.

6. It was his evidence that the driver of the motor vehicle was to blame for the accident and that had the driver ben careful and on the lookout the accident would not have occurred.

7. It was his evidence that he was still on treatment and was last in hospital in November, 2019. It was his evidence that though he used to sell livestock from which he was earning Kshs 20,000/- per month, the accident left him on crutches. He exhibited his discharge summary, x-ray report, p3form, medical report, bundle of receipts, treatment notes and claimed Kshs 150,000/- for removal of implants. According to him, though the implants were removed from his hand, they were yet to be removed from his legs.

8. In cross-examination, he stated that they were two pillion passengers but he had a helmet on and was sitting at the far edge of the motor cycle. He stated that he saw the motor vehicle before it knocked them down. It was his evidence that the driver of the vehicle was **Kiplagat**.

9. The Respondent called **Cpl. Gladys Kamuren** from Kangundo Police Station who testified s PW1. According to her, a fatal accident occurred on 23rd October, 2017 at 16.45 hours at Kiambu area along Kathiani Road involving motor vehicle reg. no. GK 376J Ford Ranger Double Cabin and motor cycle reg. no. KMCZ 012H Skygo driven by **John Kamunjeru**, a police officer attached to Kathiani AP headquarters was driving from Kathiani to Kangundo. On reaching the location of the accident, the said vehicle got a tyre burst and the driver lost control hitting the on-coming motor cycle which had two pillion passengers, **Mwongeli Makau** and **Dominic Mutua Ngozi** both of whom suffered serious injuries and was rushed to Kathiani Hospital and were later referred to Level 5 Machakos.

10. According to the witness, the vehicle was towed to Kangundo Police Station. However, the following day, **Mwongeli Makau** died while undergoing treatment. He produced a police abstract and stated that the motor vecle was to blame as the point of impact was on the side of the motor cycle.

11. In cross-examination, he stated that he was not the investigating officer ad did not visit the scene. She however admitted that the motor cycle had two pillion passengers which was unlawful.

12. At the close of the Respondent's case the Appellant called **PC John Kamunjeru**, a police officer attached to Central Police Station, Kamukunji. In his statement, which he adopted, he stated that at the time of the accident, he was an Administration Police Constable attached to Kathiani Sub-County headquarters as the driver to Deputy County Commissioner's Driver. According to him, on the material day, he was driving motor vehicle reg. no. GKB 376J from Kathiani towards Kangundo at around 5.20pm along the road which was under construction with lose chips. With him was the Deputy County Commissioner.

13. On approaching a place called Chavaluki, the vehicle had a tyre burst but he managed to control the vehicle to stop at the extreme left side of the road. However, just as he was parking the vehicle a motor cycle reg. no. KMCZ 012H came riding from the opposite side of the road at a very high speed. Lost control and hit his car, rolling into a ditch. According to him the motor cycle had two passengers who had no protective gears at the time of the accident. The said two passengers were then taken to the Hospital though the rider was not injured. According to him, he was not charged with a traffic offence. He blamed the Respondent and the rider of the said motor cycle for the accident. It was his evidence that he did not know Rentco East Africa Limited as he had never worked for them.

14. In cross-examination, he stated that the police abstract was issued after the inspection and that the vehicle he was driving was a GK belonging to the Government. According to him the rider was not charged. He confirmed that he was from Kathiani towards Kyevaluki and that the road was hilly and bent.

15. In her judgement, the learned trial magistrate found that from the evidence the accident did occur and that the defendant's driver was negligent when he drove at high speed which made him unable to control the vehicle after the tyre burst causing him to lose control and veer off onto the opposite lane and in the process knocking the oncoming motor cycle causing injuries to the pillion passengers. According to the learned trial magistrate the driver was assigned the duty of driving the said vehicle which was registered in the name of Rentco East Africa Limited with due care and attention but in breach of his duty to do so drove the same at a high speed making him unable to control the vehicle. She found that the owner of the said vehicle was vicariously liable for his actions. She therefore found the Appellant 100% liable.

16. Regarding the quantum of damages, she assessed the same in the sum of Kshs 2,500,000/- general damages, Kshs 150,000/- as future medical expenses and Kshs 285,590/- special damages plus costs and interests.

17. In this appeal, the following grounds have been raised:

a. The learned magistrate erred in law and in fact in finding that the Appellant was vicariously liable for negligence;

b. The learned magistrate erred in law and in fact in not finding that the Respondent failed to prove liability on the part of the Appellant;

c. The learned magistrate erred in law and in fact in disregarding the evidence of the Appellant;

d. The learned magistrate erred in law and in fact in failing to analyse the evidence adduced;

e. The learned magistrate erred in law and in fact in awarding excessive and exorbitant damages to the plaintiff.

Appellant's Submissions

18. It was submitted on behalf of the Appellant that it is not in dispute that an accident occurred on 23rd October 2017 between motor vehicle

registration GKB 376J and motorcycle registration number KMCZ 012H. According to the Appellant, the motor vehicle involved in the accident was a registered GK vehicle and it is a matter of public notoriety that a vehicle bearing GK number plates is under the use and control of the Government. It was further submitted that the driver at the time of the accident was police constable **John Kamenju** S. No. 231655 attached to Kamukunji Police Station which essentially means that the driver was at the time of the accident an employee of the Government through the National Police Service and assigned to discharge his duties in that capacity. It was submitted that the Appellant is not vicariously or otherwise liable for the act and/or omissions of the driver of the said motor vehicle.

19. According to the Appellant, it is a private company incorporated under the laws of Kenya and whose primary objects of incorporation are providing asset-finance, logistics and insurance business solutions to both the private and public sector and one of the business solutions that the Appellant provides is leasing of equipment such as Motor Vehicles under various Lease options. However, maintenance of a leased asset is solely the duty of the Lessee during the Lease period and the Lessor is only obligated to undertake major and substantial asset maintenance. It was further submitted that another obligation of the Lessee is being responsible over the users of the asset being its agents and employees and bearing any liability where the users occasion any damage to the asset or persons.

20. According to the Appellant, at the time of the accident, the Motor Vehicle registration number GKB 376J had been leased by Kathiani Sub-County for use by the Deputy County Commissioner of the said sub-county and at the time of the accident, the driver to Motor Vehicle registration number GKB 376J was **John Kamenju**, a police constable S. No. 231655 attached to Kamukunji Police Station and assigned as the driver to the Deputy County Commissioner.

21. Submitting on the doctrine of vicarious liability, the appellant relied on the case of **Securicor Kenya Ltd –vs- Kyumba Holdings Ltd [2005] eKLR**, **Joseph Wabukho Mbayi vs. Frida Lwile Onyango [2019] eKLR** which cited **Vincent Okello vs Attorney General [1995] III KALR 129** and based on the above, it was submitted that vicarious liability imposes liability on employers for the wrongful acts of their employees as such an employer will be held liable for torts committed while an employee is conducting their duties. *In order for the Respondent to rely on the principle of Vicarious Liability, it was contended that he has to prove that the driver to Motor Vehicle registration number GKB 376J at the time of the accident was in the employment of the Appellant which the Respondent has failed to prove. It was the Appellant's case that t*he Appellant is an independent company conducting its business within the Republic of Kenya as such and under no control or authority of the Government while the driver is a police officer employed by government through the National Police Service and assigned as the driver to the Deputy County Commissioner of Kathiani Sub-County and at the time of the accident, the vehicle was being driven under instructions from his employer being the Government through the National Police Service. To the Appellant, without any further interrogation, there is no employer-employee relationship between the Appellant and the driver and therefore, any act/omission of negligence by the driver does not make the Appellant vicariously liable. The Appellants relied on ***Tabitha Nduhi Kinyua vs. Francis Mutua Mbuvi & Another [2014] eKLR*** *in which* ***Ormrod & Another –vs- Crossville Motor Services Ltd 7 Another 1953 (2) AER 753 CA.***

22. The said motor vehicle, the Appellant submitted, was clearly leased to the Government for purposes in which the Appellant had no interest or concern therefore there is clearly no aspect of liability on the part of the Appellant. Therefore, the trial court indeed erred in fact and the Appellant is not an employer of the driver and cannot in that case be found to be vicariously liable for the accident.

23. It was further submitted that the learned magistrate erred in finding that the respondent had proved negligence on the part of the driver since the plaintiff failed to proof the particulars of negligence pleaded in his pleadings. Other than the averments in his pleadings, the plaintiff did not give evidence to prove negligence of the part of the driver and did not call another witness to corroborate his weak evidence. Reliance was placed on the case of **Samuel Kimani & Another vs. Mary Wanjiku Kamau & Another [2019] eKLR,** where the court cited with approval the case of **Kiema Muthungu –vs- Kenya Cargo Handling Service Ltd (1991)2,** and **Statpack Industries –vs- James Mbithi Munyao Nairobi H.C. Appeal No. 1152 of 2003.**

24. Furthermore, the Appellant submitted, the plaintiff, being the affected party has a duty to place before court evidence to sustain the averments made in his plaint. On the other hand, the driver testified that the respondent was travelling in a motorcycle carrying more than one passenger and did not have protective gears on him. The learned magistrate ignored wholly this piece of evidence and failed to find the that the respondent contributed to the accident. As testified by the driver, the respondent was at fault because he chose to travel on a motor cycle carrying two passengers which is against the law. He was also not wearing protective gears. Therefore, it was submitted that the accident was substantially contributed to by negligence on the part of the respondent and this court was urged to find as much in the unlikely event it finds the appellant vicariously liable.

25. According to the Appellant, in the unlikely event that this court finds the Appellant to be liable, the award by Trial court was excessive and exorbitant in the circumstances. It was contended that the Trial Court in its assessment considered the medical report by **Dr. Wokabi** which assessed the following injuries as fracture of the neck of the right femur; double fractures of the shaft of the right femur; deep cut wound on the left foot; fracture of the right ulna styloid process and; permanent disability of 30%. He classified the degree of injury as grievous harm and the court awarded general damages of Kshs. 2,500,000/, special damages of Kshs. 285,590/ and future medical expenses at Kshs. 150,000/- a total of Kshs. 2,935,590/-. Reference was made to **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, **Odinga Jacktone Ouma vs. Moureen Achieng Odera [2016] eKLR**, **Denshire Muteti Wambua vs. Kenya Power and Lighting Co. Ltd [2013] eKLR** and **Richard Ngetich & another v Francis Vosena Kidiga [2020] eKLR** and it was submitted that based on the medical report, the injuries sustained by the Respondent were assessed to be at 30% permanent disability.

26. According to the Appellants, in overturning the decision by the trial court and revising the award from Kshs. 350,000/- to Kshs. 600,000/-, the court in **Mulandi David Kole vs. George Odhiambo Obiewe & Another [2019] eKLR** quoted **Kenyatta University vs Isaac Kamma Nyuthe (2014) eKLR** for fracture of right femur, soft tissue injuries to head and bruises of right knee and with a permanent incapacitation of 20%, the court of appeal reduced an award of Kshs. 700,000/- to Kshs. 350,000. The Appellant also referred to **Continental Hauliers Ltd & 2 Others vs. Isack Kipkemei Bitok [2019] eKLR** and **Rachael Mihaki Kiragu v Karimi Simon Mwihaki & another [2015] eKLR, Gitau Peris v Gerald Njoroge Chege [2020] eKLR** and based on the foregoing the Appellants submitted that it is clear that where injuries sustained to the degree of 30% or thereabouts, the appropriate award to be issued ranges between Kshs. 300,000/- and Kshs. 800,000/-. The due considerations to be made by the court are effluxion of time from the time of the occurrence of the cause of action to the time of institution of the suit and the economy i.e. possible inflation. Therefore, the amount awarded by the trial court was excessive and exorbitant and simply harsh to the Appellant.

27. In the Appellant's submissions, the Appellant is not liable for any injuries sustained by the Respondent and that the Respondent is not entitled to claim any damages from the Appellant. In the event the court finds that the Appellant liable for the accident to consider previous awards made in the past in similar cases and make a comparable award which is just and fair to the Appellant. Accordingly, this court was urged to allow this Appeal with costs to the Respondent.

Respondent's Submissions

28. On behalf of the Respondent it was submitted that the appellant herein was vicariously or otherwise liable for negligence for the accident which occurred on 23rd October 2017 involving Motor Vehicle Number GKB 376J since it is the registered and the beneficial owner and/or had beneficial interest as at the time of the said accident. It was submitted that the appellant did not adduce any evidence as to the fact that the said Motor Vehicle Number GKB 376J exonerating it from being liable for the accident. Further it is not in dispute that the appellant was the registered and the beneficial owner of the said motor vehicle.

29. According to the Respondent, he proved his case behold reasonable doubt by calling PW1, the police officer who produced a police abstract which indicated that the driver of Motor Vehicle Number GKB 376J was blamed for the accident. Since the respondent herein was a fare paying passenger this Court was urged to be guided by the case of **Peres Wambui Kinuthia & Another vs. S.S Mehta & Sons Limited [2015] eKLR** and it was submitted that the defendant is 100% liable for the accident involving motor vehicle registration number GKB 376J that occurred on 23rd October, 2017.

30. On vicarious liability, the court was urged to rely on the case of **Kenya Bus Services Ltd vs. Humphrey** where the Court of Appeal cited **Kansa V Solanki [1969] EA 318** and **Ormrod v. Crosville Motor Services Ltd. (1954) 2 All ER 753.** According to the Respondent since, he was a pillion passenger, there is no way he contributed to the occurrence of the accident and therefore it was the duty of the appellant herein to file proceedings against third party and which in this circumstance they failed to.

31. As regards the award, the Respondent submitted that based on the medical report, treatment notes and the injuries sustained by the respondent this court should uphold the award by the trial court as the same was sufficient given the nature of the injuries. According to the Respondent, the Learned Magistrate did consider the evidence adduced by both parties in making in making his award. This Court was therefore urged to uphold the lower court decision that the amount awarded was sufficient by the following authorities to wit;

a) CM (A MINOR SUING THROUGH MOTHER AND NEXT FRIEND MNV JOSEPH MWANGANGI MAINA [2018] eKLR where the Plaintiff was awarded **Kshs. 2,000,000/=** for serious injuries.

b) SABINA NYAKENYA MWANGA V PATRICK KIGORO & ANOTHER (2015) eKLR where the Court awarded a sum of **Kshs. 3,000,000/=** to a Plaintiff with similar injuries.

32. The Appellant urged the Court to factor in the inflationary trends and the extent of the injuries along with the degree of disability suffered by the respondent before he completely heals.

Determination

33. Having considered the submissions of the parties in this appeal, this is the view I form of this matter. This being a first appellate court, as was held in **Selle –vs- Associated Motor Boat Co. [1968] EA 123**:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon 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."**

34. In **Coghlan vs. Cumberland (1898) 1 Ch. 704**, the Court of Appeal (of England) stated as follows -

> **"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."**

35. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present 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.

36. However, as was appreciated in **Peters –vs- Sunday Post Limited [1958] EA 424**:

"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 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 circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court 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, and 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 form 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 be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment 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 show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

37. It was therefore held by the Court of Appeal in **Ephantus Mwangi & Another –vs- Duncan Mwangi, Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** 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."

38. In this appeal, it is clear that the determination of the appeal revolves around the question of liability and what ought to have been the quantum of damages. That the burden of proof was on the appellant to prove his case is in doubt. 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 dependant on the existence of facts which he asserts must prove that those facts exist.

39. 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 the 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 the fact is upon him.

40. 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 case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

41. It follows that the general rule is that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the respondents, the appellant in this appeal depending on the circumstances of the case.

42. In **Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail fi no evidence at all were given as either side."

43. I agree that the Court of Appeal's position in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** espouses the correct legal position that:

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."**

44. The question then is what amounts to proof on a balance of probabilities**. Kimaru, J** in **William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

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

45. Similarly, **Lord Nicholls** of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

> **"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."**

46. In **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

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

47. However, as held by the Court of Appeal in **Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR**:

> **"The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:**
>
> **'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it…The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally…'"**

48. In this case, the evidence by the Respondent was that while he was riding on Motor Cycle no. KMCZ 012H motor vehicle registration number GKB 376J was so negligently driven that it left its lane, veered to the lane of the motor cycle and collided with it. That there was a collision is not denied. It is also mot denied that the motor vehicle veered towards the other lane where the accident occurred. What is disputed is how the accident occurred. While the Respondent contended that the vehicle collided with them after veering off its lane, the Appellant contended that the collision took place after the vehicle had stopped. It was contended that what caused the accident was a tyre burst. 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."**

49. The Court of Appeal in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004** opined that:

> **"If a "*matatu*" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle…Vehicles, when normally driven at reasonable speed, do not just do certain things. Though the vehicle is being driven on a wet road by itself would not make the vehicle swerve onto the path of on-coming vehicle. If something of the kind happens there must be an explanation as to the reason for the particular event happening. Vehicles when normally driven on the correct side of the road and at reasonable speed do not run into each other."**

50. It was similarly held in **Chao vs. Dhanjal Brothers Ltd & 4 Others [1990] KLR 482** that:

> **"Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence. Where the defendant relies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred inspite of the defendant having taken all reasonable care to prevent it. The defendant is not required to prove how and why the accident occurred, but in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point out such cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that the defendant was not negligent, the plaintiff's case must fail."**

51. Therefore, if the accident occurred due to a tyre burst as indicated by DW1, then the failure by the Appellant to explain the steps taken in the management of the said tyre must mean that the Respondents failed in their obligation under sections 109 and 112 of the ***Evidence Act***. In this case, there was evidence that the accident was caused by the negligence of the driver of the motor vehicle registration number GKB 376J. Whereas the driver of the said vehicle blamed the rider of the motor cycle, the trial Court considered the two versions and believed the version given by the Respondent. This is not a case where there was no evidence at all to support the findings of the learned trial magistrate. Accordingly, this Court cannot interfere with her decision attributing negligence to the driver of the said vehicle.

52. The issue is however whether the said driver ought to have been found 100% liable. In this case this court is being called upon to interfere with the trial court's finding of liability. In **Khambi and Another vs. Mahithi and Another [1968] EA 70**, it was held that:

> **"It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."**

53. That seems to have been the position in **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142** and **Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981**, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

54. It was not disputed that the Respondent and another person were pillion passengers on the said motor cycle. The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law, the Respondent exposed himself to danger. Such conduct cannot go un-condemned and it should not be rewarded. Accordingly, the Respondent ought to shoulder some blame for such reckless conduct. Accordingly, I find that the Appellant ought not to have been found 100% liable. I set aside that finding and substitute therefore 70% liability for the driver of the motor vehicle and find the Respondent 30% liable.

55. As regards quantum, in **Woodruff vs. Dupont [1964] EA 404** it was held by the East African court of appeal that:

> **"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."**

56. 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."**

57. 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…"**

58. 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."**

59. In this case, the Respondent sustained fracture of the neck of the right Femur; double fractures of shaft of right Femur; deep cut wound on the left foot; fracture of the right ulna styloid process; and fracture of the distal right radius. Clearly the Respondent suffered multiple fractures. I have considered the authorities relied upon by the respective parties. The appellant seems to be emphasising on the assessment made in terms of percentage as the basis for an award. With due respect, in assessing damages, it is not the opinion as regards percentages that determines the award. That percentage is mostly relevant when one seeks compensation under legislation dealing with workmen compensation as opposed to general damages. In fact, in certain cases, the assessment is 100% notwithstanding the fact that the plaintiff is still alive.

60. In this case I have considered the decisions cited and it is my view that the case that comes closest to the instant one is that of **Sabina Nyakenya Mwanga vs. Patrick Kigoro & Another (2015) eKLR** where the Court awarded a sum of Kshs. 3,000,000/= to a Plaintiff with similar injuries. Accordingly, I do not find any basis for interfering with the award.

61. As regards the issue of vicarious liability, it was held in **Kansa vs. Solanki [1969] EA 318** that ;

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

62. In this case the vehicle was registered in the name of the appellant. Though it had a GK registration plate, it is submitted that the vehicle was leased to the Government. That evidence was however not brought out at the hearing. No evidence was led to explain the circumstances under which a privately owned vehicle was being driven by a government agent. Evidence cannot be adduced by way of submissions. In light of the above authority, there is no basis upon which the finding of vicarious liability by the learned trial magistrate can be faulted.

63. In the premises, I set aside the finding of liability against the appellant at 100% and substitute therefore 70%. Apart from that the decision appealed against is confirmed.

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

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 21ST DAY OF DECEMBER, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Ms Chepkorir for the Appellant

Mr Maingi for the Respondent

CA Susan