



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 27 OF 2017

NYOTA TISSUE PRODUCTS.....APPELLANT

=VERSUS=

LAWRENCE LAWI KUBOKA.....1ST RESPONDENT

THE BOARD OF GOVERNORS

NAMBALE SECONDARY.....2ND RESPONDENT

NAMBALE SECONDARY SCHOOL.....3RD RESPONDENT

PASCAL DINDI OMUSA.....4TH RESPONDENT

LYDIA GATURUHU.....5TH RESPONDENT

[Being an appeal from the Judgment of the Principal Magistrate's Court at Eldama Ravine CMCC. No. 22 of 2013 delivered on the 3rd day of November, 2013 by Hon. R. Yator, RM]

JUDGMENT

Introduction

1. This is an appeal from the trial court's determination on liability and quantum in a test suit involving a personal claim arising from motor vehicle accident in which the 1st respondent together with others allegedly suffered injuries. The background of the appeal is set out briefly in the submissions of the appellant before this court as follows:

2.0 BACKGROUND OF THE APPEAL

2.1 This Appeal arises from the Judgment of the Honourable R. Yator Senior Resident Magistrate delivered on 3rd November 2015 in which the learned magistrate entered Judgment for the plaintiffs, found the 1st, 2nd & 3rd Defendants 20% liable & Appellants 80% liable.

2.2 The 1st Respondent filed this suit among 30 others in a series of claims arising out of the same cause of action, in the lower court at Eldama Ravine vide a Complaint dated 20th June 2013 filed in court on 24th June 2013. The Appellant herein filed Memorandum of Appearance and statement of Defence dated 30th September 2013 filed in court on 01st October 2013. (See pages 29 – 34 of the Record of Appeal)

2.3 The claim in the said suit was that on or about the 26th day of April, the plaintiff was lawfully travelling in Motor vehicle registration no. KBG 200C along Nakuru-Marigat road near Kimose shopping centre when the 3rd defendant (4th Respondent) so recklessly and negligently drove controlled and/or managed the said motor vehicle registration no. KBG 200C that he caused it to ram behind motor vehicle registration number KBU 186H from behind thus causing the accident.”

Pleadings before the trial Court

2. The plaintiff's claim against the defendants in the suit subject of this appeal was set out in the Complaint dated 20th June 2013 as follows:

“PLAINT (FAST TRACK)”

7 At all times material to this suit the 2nd defendant was the registered owner of motor vehicle registration No. KBG 200C driven by the 3rd defendant as its authorized driver, employee and/or servant whereas the 4th defendant was registered owner of motor vehicle Registration No. KBU 186 H and the 5th defendant being the insured of the said Motor Vehicle Registration No. KBU 186 H.

8 On or about the 26th day of April 2013 the plaintiff was lawfully travelling in Motor Vehicle registration No. KBG 200 C along Nakuru-Marigat road near Kimose shopping Centre when the 3rd defendant so recklessly and negligently drove controlled and/or managed the said Motor Vehicle registration No. KBG 200C that he caused it to ram behind motor vehicle Registration No. KBU 186 H from behind thus causing an accident.

9 Further to the averment made under paragraph 7 above the plaintiff further states that the 4th defendant by herself her driver, servant and/or employee also recklessly and negligently drove, controlled and/or managed motor vehicle Registration No. KBU 186 H that he permitted it to come onto the path or side of Motor Vehicle Registration No. KBG 200C thus causing an accident.

10 The plaintiff will contend during the hearing here of that as a result of the accident he sustained serious injuries and has suffered loss and damage which is attributable to the actions and/or omissions of the 3rd and 4th defendants of which the 2nd and the 5th defendants are held vicariously liable.

PARTICULARS OF NEGLIGENCE OF THE 3RD DEFENDANT

- i. Driving at an excessive speed in the circumstances
- ii. Failing to follow traffic rules
- iii. Failing to slow down swerve, drive, and/or control motor vehicle Registration No. KBG 200C in any other way or manner in order to avert the accident
- iv. Driving without due regard to the safety of passengers he was carrying or other road users.
- v. Overtaking or trying to overtake Motor Vehicle Registration No. KBU 186H without due care
- vi. Driving a defective Motor vehicle

PARTICULARS OF NEGLIGENCE OF THE 4TH DEFENDANT

- i. Driving at an excessive speed in the circumstance
- ii. Driving on the path or way of Motor vehicle registration No. KBG 200 C
- iii. Causing obstruction to Motor vehicle Registration KBG 200C
- iv. Failing to observe the highway code
- v. Driving in a manner or way that is injurious to other road users more so the plaintiff
- vi. Driving under the influence of alcohol and/or drugs

PARTICULARS OF INJURIES TO THE PLAINTIFF

- i. Severe soft tissue injury of the right leg
- ii. Blunt injury to the chest

PARTICULARS OF SPECIAL DAMAGES

- i. Medical Report Ksh 5,000/=
- ii. Police Abstract Ksh ...200/=

- Total** **Ksh 5,200/=**

3. The 1st 2nd and 3rd Defendants filed their answer to the Plaintiff by a defence dated 2nd August 2013 materially as follows:

1ST, 2ND AND 3RD DEFENDANTS STATEMENT OF DEFENCE

4 The 1st, 2nd and 3rd defendants denies that the accident did occur on the date and in the manner specified in paragraphs 8, 9 and 10 of the plaint and the particulars of negligence set out thereunder on the part of the 3rd defendant are denied in toto and puts the plaintiff to strict proof thereof. In any event the whole issue of vicarious liability on the part of the 2nd defendant is denied in toto.

5 Further and in the alternative and without prejudice to the foregoing, the 1st, 2nd and 3rd avers that if the alleged accident did occur (which is denied), then the same was solely caused and/or substantially contributed to by the negligence on the part of the 4th defendant and thereby the 5th defendant is vicariously liable.

PARTICULARS OF NEGLIGENCE ON THE PART OF THE 4TH DEFENDANT

(a) Driving at an excessive speed circumstances.

(b) Driving on the path or way of the motor vehicle registration number KBL 200C.

(c) Failing to observe the Traffic Act and the Highway Code.

(d) Causing obstruction to motor vehicle registration KBG 200C.

(e) Driving without due care and attention.

(f) Driving in a manner that was injurious to other road users, more so the driver to the motor vehicle registration No. KBG 200C.

(g) Causing the accident.”

4. The 5th defendant filed a defence dated 30th September 2013 alleging negligence on the part of the 1st, 2nd and 3rd defendants and the plaintiff as follows:

“5TH DEFENDANTS’ STATEMENT OF DEFENCE

3 The 5th Defendant denies the contents of paragraphs 7 of the plaint in particular that the 5th Defendant was the insured of motor vehicle registration number KBU 186H; either as alleged therein or at all and the plaintiff is put to strict proof.

4 The 5th Defendant denies that an accident occurred at the date, place in the manner alleged in paragraph 8 of the plaint involving the Plaintiff, motor vehicles registration numbers KBU 186H and KBG 200C and shall insist on strict proof.

5 The 5th Defendant further denies the contents of paragraph 8 of the plaint and in particular deny that the plaintiff was travelling in motor vehicle registration number KBG 200C and shall insist on strict proof.

6 The 5th Defendant denies the contents of paragraph 9 of the plaint and shall insist on strict proof.

7 The 5th Defendant denies the contents of paragraph 10 of the plaint and in particular denies that the plaintiff sustained serious injuries and has suffered loss and damage, and avers that the doctrine of vicarious liability is not applicable herein. All the particulars of injuries, special damages and general damages set out therein are denied and the plaintiff put on strict proof

8 In the alternative and without prejudice to the foregoing, the 5th Defendant avers that if the alleged accident occurred, which is hereby denied then the same was caused by or substantially contributed to by the negligence of the 1st, 2nd and 3rd Defendants and/or owners of motor vehicle registration number KBG 200C.

PARTICULARS OF NEGLIGENCE OF THE 1ST, 2ND AND 3RD DEFENDANTS, DRIVERS AND/OR OWNERS OF MOTOR VEHICLE REGISTRATION NUMBER KBG 200C

a. Driving at an excessive speed in the circumstances,

b. Driving without any due care and attention,

c. Failing to keep any or proper look out or to have any sufficient regard for traffic that was/might be reasonably expected to be on the said road,

d. Ramming onto motor vehicle registration number KBU 186H,

e. Failing to see motor vehicle registration number KBU 186H in sufficient time so as to avoid the said collision,

- f. Failing to maintain safe distance,
- g. Failing to drive on its designated path,
- h. Permitting a defective motor vehicle to be used on the road.
- i. Failing to stop, swerve, to brake and/or to slow down in any way so as to avoid hitting motor vehicle registration number KBU 186H.
- j. Causing the accident.

9 In the further alternative and without prejudice to the foregoing, the 5th Defendant aver that if the alleged accident occurred which is hereby denied then the same was solely caused by or substantially contributed to by the negligence of the plaintiff.

PARTICULARS OF NEGLIGENCE OF THE PLAINTIFF

- a. Failing to wear safety belt provide,
- b. Failing to buckle the safety belt,
- c. Failing to sit while the motor vehicle was in motion,
- d. Standing or attempting to stand while the motor vehicle was in motion,
- e. Walking or attempting to walk in a moving motor vehicle.
- f. Failing to adhere to traffic regulations on safety travel.

10 In the further alternative and without prejudice to the foregoing, the 5th Defendant avers that if the alleged accident occurred, which is hereby denied then the same was inevitable and occurred despite the exercise of reasonable care on the part of the driver thereof.”

Judgment of the trial Court

5. In finding for the plaintiff against the defendants, the trial court in its judgment delivered on 3rd November 2015 held as follows:

“JUDGMENT

Counsels herein did file their submissions on liability and attached authorities therein which I have considered. Plaintiffs’ Counsel submitted that since no defence witness attributed the accident to the plaintiff’s negligence the defendants should be held 100% liable. Counsel for 1st, 2nd and 3rd defendants submitted that the 4th and 5th defendants should held 100% liable while the 5th and 6th defendants submitted that 1st, 2nd and 3rd defendants be held 100% liable. From the evidence herein, it is clearly not in dispute that the accident did occur where the bus hit the lorry while trying to overtake it and that the bus occupants did sustain injuries. The particulars of negligence the 3rd and 4th defendants are set out in paragraph 10 of the said plaint.

The only eye witness were PW1 and PW2 who were sat at the front seat of the bus near the driver. In determining liability, PW1 said the both driver were to blame for the accident but the lorry driver was to blame highly for swerving into the lane of the bus while it was overtaking yet the driver had already indicated.

PW2 said he blamed both drivers as the bus driver was overtaking on a narrow road while the lorry driver blocked the bus from passing. That had the lorry paved way for the bus, the accident would not have occurred. That the lorry after being first hit by the bus came back and further blocked the lorry.

Both PW1 and PW2 said the bus was at moderate speed. PW2 saying in fact the driver was new on that road and since they were on education/geographical trip, they were site seeing. DW1 as well he drove at a speed of around 60-65 kph as students were studying along the way. DW1 produced the bus speed governor certificate proving that the bus was duly fitted with a speed at the time of accident.

Both PW1 and PW2 as well as DW1 said when the bus started to overtake the bus got onto its lane hence causing the accident. DW1 stated had he been following the lorry he would have hit it from the back but that since he was overtaking he hit it on the rear side.

I note that the 4th and 5th defendants did not call any witness and in particular the lorry driver who should have shed more light on the occurrence and in particular rebut the evidence of PW1, PW2 and DW1.

PW4 who was the Investigating Officer said the bus driver was to blame for the accident and that in fact a traffic case was pending

with charges preferred against him. He stated that he arrived at the scene one hour after the accident and did not find any students there and that both the drivers were present. On the contrary DW1 said they waited for police with PW2 but did not arrive hence proceeded to the hospital and that police later arrived at the scene when they had left. That he was not at all interrogated at the scene nor was ever summoned to the scene.

I found PW4 to be an incredible witness firstly for stating he was the Investigating Officer who had drawn the sketch plans he referred to though not produced. Interestingly when referred he confirmed the sketch plans indicated they had been drawn by one P.C Gitonga and his names nor signature was nowhere in the said sketch plans. Considering his contradicting evidence, I hence accord DW1 a doubt that he was indeed at the scene when police arrived and as such find that the police did not interrogate the drivers at the scene.

PW1 and PW2 indicated that the road was narrow and that the same was unmarked and as such I find that the bus driver ought to have been very careful and observant while overtaking and all factors considered I find that the 1st, 2nd and 3rd defendants did not submit on quantum. The advocate for the 4th and 5th defendants did submit on quantum in this particular test suit.

PW3 stated that on examining PW1 he had sustained the following injuries;

i) Severe soft tissue injury of the right leg.

ii) Blunt injury to the chest.

The doctor opined that PW1 sustained injuries which he classified as harm.

Counsel for 4th and 5th defendants submitted that an award of Ksh.50,000/= would be adequate compensation citing authorities therein.

Having considered the nature of injuries and inflation I do award general damages in test suit herein of Ksh.70,000/=.

In relation to special damages, the same have to be pleaded specifically and the plaintiff prays for Ksh.5,000/= for medical report and Ksh.200/= for police abstract. A receipt of Ksh.5,000/= towards medical report was produced and the said is duly awarded.

I hence enter judgment for the plaintiff and against the defendants jointly and severally as follows...”

[Emphasis added]

Memorandum of Appeal

6. The appellant filed the appeal on the principal grounds set out in the Memorandum of Appeal dated 2nd December 2015 as follows:

“MEMORANDUM OF APPEAL

4 THAT the learned Magistrate erred in law and in fact by failing to take into account the evidence and the submissions on Liability given on behalf of the Appellant while considering her judgment.

5 THAT the learned Magistrate erred in law and in fact by failing to appreciate the totality of the evidence before her and in not considering the submissions on behalf of the Appellant.

6 THAT the learned Magistrate erred in law and in fact by giving an award which is extremely high without regard to decided cases.

7 THAT the learned Magistrate erred in law and in fact by disregarding the evidence of the Appellants thus failing to judiciously exercise her discretion.

8 THAT the learned Magistrate erred in law and in fact by awarding special damages in the absence of strict proof thereof and proper receipts.

9 THAT the learned Magistrate erred in law and in fact by disregarding the evidence of the Appellant and considering extrinsic matters thereby basing the judgment on the same thus failing to judiciously exercise her discretion.

REASONS WHEREOF the Appellant prays that the appeal be allowed and;

a) Judgment entered pursuant thereto be set aside.

b) That the appeal be allowed as prayed.

c) Costs of this appeal and of the Judgment in the subordinate Court be awarded to the Appellant.

Dated at Nakuru this 2nd day of December 2015.

KINYANJUI NJUGUNA & CO.

ADVOCATES FOR THE APPELLANT”

Submissions

7. Counsel for the parties filed written submissions on their respective contentions. Principally, the appellant challenged the sufficiency of evidence to support the finding on liability and relying on the evidence of the plaintiff's witness, PW4 a police officer who testified on police findings on the scene of the accident and likely cause to suggest that the apportionment of liability was faulty. The appellant also faulted the quantum of damages as unsupported by comparable awards in like injuries and the award of special damages which it was alleged were unproved. The respondents supported the findings of the trial court and relying on the principle for interference with findings and awards of damages by a trial court urged the court to dismiss the appeal. The parties' submissions were dated respectively, for the appellant on 16th September 2019; 1st respondent on 10th November 2019; and the 2nd, 3rd and 4th Respondents' submissions on 16th September 2019.

Preliminary

8. The submissions for 2nd, 3rd and 4 respondents took up the issue which was not addressed by the appellant and the 1st respondent that “there is no appeal against the court judgment on liability” as follows:

*“Now to the matter at had. First we note the Memorandum of Appeal refers to the judgment in **Eldama Ravine SPMCC No. 75 of 2013**. From the record there is no appeal against the judgment in **Eldama Ravine SPMCC No.22 of 2013**. That in our humble submissions is a serious omission on the part of the appellant. The appeal has gone for directions and the appellant has not applied to cure the defects in the Memorandum of Appeal as required by the law and therefore the whole appeal has run afoul of the provisions of order 42 rule 4 of the Civil Procedure Rules. The point, indeed the fundamental point to note is that there is no challenge by way of an appeal against the decision of R. Yator (SRM) judgment on Liability rendered in the test suit on the 3rd November, 2015 in **Eldama Ravine CMCC No. 22 of 2013**. Order 42 rule 1 and 2 of the Civil Procedure Rules.”*

9. However, the court has perused the Record of Appeal in Kabarnet Civil Appeal No. 27 of 2017 (**formerly Kabarnet No. 03 of 2015**) whose Memorandum of Appeal is clearly shown as **“an appeal from judgment of Honourable R. Yator, Resident Magistrate delivered on 3rd November 2015 in Eldama ravine CMCC No. 22 of 2013”** whose recital is as follows:

*“The appellant being dissatisfied with the judgment of Honourable G. Yator Resident magistrate in **Eldama Ravine CMCC NO. 22 of 2013 delivered on 3rd November 2015 therein against the appellant now appeals against the whole Judgment on the following grounds:...**”*

10. There is in this appeal no reference to Judgment in Eldama Ravine SPMCC No. 75 of 2013, and the submission by counsel for the 1st respondent on that fact may have been mistaken. The reference to this appeal by two appeal numbers in Kabarnet High Court, that is, Appeal No. 03 of 2015 and 27 of 2017, Court arises from the fact that the appeals were first filed as no. 03 of 2015, when the High Court was first established before being transferred to Nakuru High Court when judge of the Court did not commence sittings at the station, only to be returned when this court was inaugurated in January 2017, and re-registered as No. 27 of 2017.

11. I do not find merit in such technical objection, and I proceed to consider the appeal on its merit.

Issues for determination

12. The issues flowing from the appeal, pleading, evidence and submissions by the parties are broadly two-fold, whether the 1st respondent proved on the applicable civil standard of a balance of probabilities that the appellant was liable for the traffic accident in the ratio apportioned by the trial court, or at all, and whether award of Ksh.70,000/- for soft tissue injuries was excessively high to warrant interference by an appellate court.

Determination

Legal framework

13. The legal framework under which this appeal is had is two-fold: the duty of an appellate court on appeal and the production of evidence to support facts alleged in pleadings, the principles of which are discussed at the outset.

Duty on an appellate court

14. The duty of an appellate court in civil proceedings is well known. In words of De Lestang V-P in the Court of Appeal for East Africa case of **SELLE V. ASSOCIATED. MOTOR BOAT CO.** (1968) EA 123, 126:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own

conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Shalom (1955), 22, E.A.C.A. 270).

15. See also *Peters v. Sunday Post Ltd.* (1958) EA 424, where it was held that-

“(i) whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong, the appellate court will not hesitate so to decide. Watt v. Thomas [1947] 1 AA E. R. 582; [1947] A.C. 484, applied.”

Principles for Appellate Interference with award of damages by trial court

16. The Court of Appeal in *Shabani v. City Council of Nairobi*, (1985) KLR 516 at 518-9 sets out the test for interference with awards of damages by the trial court as follows:

“The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in Butt v Khan, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:

“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 the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

This direction has since been followed frequently by this Court.”

See also *Kigaragari v. Aya* (1985) KLR 273; *Kemfro Africa Ltd t/a 'Meru Express Services' (1976) & Another v. Lubia & Another* (2) (1987) KLR 30.

The standard of proof in civil cases on a Balance of Probabilities

17. It is trite that the burden of proof lies with the appellant in accordance with sections 107, 108 and 109 of the Evidence Act, and no case law authority is necessary for that cardinal principle.

18. As regards the applicable standard of proof to the suit subject of the appeal herein, the learned authors of *PHIPSON ON EVIDENCE*, 16th ed. (2005) at pp. 154-5, paragraph 6 – 53 observe as regards the **standard of proof in civil cases** as follows:

“The standard of proof in civil cases is generally proof on the balance of probabilities. If, therefore, the evidence is such that the tribunal can say “we think it more probable than not”, the burden is discharged, but if the probabilities are equal it is not.”

Similarly, under section 3 (2) of the Evidence Act -

“A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.”

In cases, however, of serious allegations, the balance of probabilities requires cogent evidence as observed in *Phipson on Evidence*, *ibid.* at paragraph 6-54 as follows:

“(b) serious or criminal allegations

Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard. Otherwise, where there was a claim for fraudulent misrepresentation and a breach of warrant, the court might hold that the warranty claim was proven and the fraud claim not proven on the same facts. However, if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, and thus to prove the allegation.”

Pleadings not evidence

19. It is incontestable that pleadings are not evidence in a case. Indeed the rules of pleading prohibiting set out of evidences in pleadings as follows:

“Order 2 Rule 3(1) of the Civil Procedure Rules

3(1) Subject to the provisions of this rule and rules 6, 7 and 8 [relating to departure, particulars in defamation actions and

particulars of evidence in mitigation of damages in action for libel or slander] every pleading shall contain, and contain only, a statement in summary form of the material facts on which a party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.”

20. In addition the court has held in *CMC Aviation Ltd. v. Crusair Ltd* No. 1 (1978) KLR 103, (per Madan, JA) to the same effect that-

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. as stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in Casell’s English Dictionary, p. 394:

Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.

The pleading in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

21. Accordingly, the appellant having failed to call evidence to prove the facts that she relied on cannot rely on the alleged facts to disprove the case set up by the plaintiff on evidence adduced before the court. Moreover, it is objectionable to adduce evidence through written submissions filed in court as the appellant’s counsel so subtly attempted before this court. See decision of the Court of Appeal (*Nambye, Ouko and Kiage, JJA.*) in *Douglas Odhiambo Apel & Anor. v. Telkom Kenya Limited* [2014] eKLR and *Daniel Toroitich & Another v. Stephen Mwangi Muriithi & Another* (2014) eKLR..

Failure to transverse pleading in Defence

22. Counsel for the appellant in his written submissions urged that as the other defendants had not traversed the defence of the 5th Defendant, the same was to be deemed as admitted as follows:

“4.3 Whether the learned magistrate erred in law and in fact by failing to take into account the evidence before her and in not considering the submissions on behalf of the appellant

4.3.1 The Appellant gave a deduction of pertinent issues brought for determination which is in our considered view that the learned magistrate disregarded the totality of the evidence and submissions given by the Appellant.

4.3.2 **The Appellant submitted that the 5th defendants (Appellant herein) in their statement of defence laid blame on the 2nd, 3rd and 4th Respondents (1st, 2nd and 3rd defendants) for causing the accident. The 2nd, 3rd and 4th Respondents failed to traverse the blame laid upon it in evidence thereby admitting negligence as pleaded in the Appellant (5th Defendant) statement of defence. The Appellant concluded that the 2nd, 3rd and 4th Respondents should thus be held absolutely and/or wholly liable for causing the accident in question.**

4.3.3 Your lordship, even though the learned magistrate was keen to note that the Respondent did not call the driver of motor vehicle to give evidence, it is our humble submissions that she had misdirected herself in disregarding the evidence by the 1st, 2nd, 3rd and 4th respondents. It is upon the respondents to prove their case to the required standards. We therefore submit that the learned magistrate erred in finding the appellant 80% liable for the accident on the face of all available evidence.”

23. With respect, that reasoning is faulty. The 5th Defendant’s defence did not amount to a counter-claim against the co-defendants as to support a finding that as with a plaint if no traverse of facts pleaded therein is made, the same amount to an admission. In accordance with the rule of procedure, there is a *joinder of issues* which operates as a denial on the pleading last filed in this case the defence of the 5th Defendant. Order 2 rule 12 of the Civil Procedure rules provides significantly as follows:

“[Order 2, rule 12.] Denial by joinder of issue.

12. (1) **If there is no reply to a defence, there is a joinder of issue on that defence.**

(2) Subject to subrule (3)—

(a) there is at the close of pleadings a joinder of issue on the pleading last filed; and

(b) a party may in his pleading expressly join issue on the immediately preceding pleading.

(3) There can be no joinder of issue on a plaint or counterclaim.

(4) A joinder of issue operates as **a denial of every material allegation of fact made in the pleading on which there is a joinder of issue** unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.”

24. Even if the 1st, 2nd and 3rd sought to respond to the allegations of negligence on their part made by the co-defendant, they would have had to apply for leave to amend their defence as their defence was filed 2nd August 2013 while the 5th Defendant’s defence was subsequently filed on 30th September 2013. In addition, there was no valid notice of admission of case by the 1-3 defendants of the 5th defendant’s case in accordance with Order 13 rule 1 of the Civil Procedure Rules. Accordingly, I do not find that there was any admission of negligence by the 1-3 defendants by virtue of any lack of traverse on the co-defendant’s defence. It would have been different if there had been a counter-claim against which, as with a plaintiff, *joinder of issues* would not operate – see Order 2 rule 12 (3).

On the evidence before the Court

25. The appellant did not call any witnesses. The evidence adduced by the other parties in the trial court was as follows:

PW1 LAWRENCE LAWI KUBOKA.

*I am the Plaintiff herein and I live in Vihiga County Chemusure village and I am a teacher and I joined Emusire High School in September 2013. On 26.4.2013 I was a teacher at Nambale High School and we were on a geographical tour heading to Nakuru lake Baringo and lake Bogoria while using our school bus and lorry registration No. KBG 200 C which has a capacity of 52 and we did not arrive safely as there was an accident along the way involving our school bus and lorry registration KBU 186H. I was seated in the front seat of the bus i.e 1st row opposite driver’s seat and I could see the driver and the road clearly as it was around mid-morning and could see the proceeding on the road. **The road was straight but a bit narrow. There was a lorry in front of us we had been following for quite some time when driver of bus wanted to overtake the lorry and when we neared the lorry it swerved a bit into lane of our bus and left tip of the bus hit the right tip of the lorry from behind and shortly the bus was standing and I went into a blackout and when I came to saw the bus on a ditch right side of the road and the lorry had also fallen on the left side of the road. There were many people at the scene who tried to rescue us with the students and we were rescued with a motor bike to Eming Health Centre and we were given some first aid and referred to Nakuru Provincial Hospital and I was not admitted there. I have a treatment card from Nakuru Provincial General Hospital belonging to me and I was injured on my right knee and I had some chest pains and I wish to produce the treatment chit dated 26.4.2013 Pexhibit 1.** I recorded my statement at Mogotio police station the following day and I was issued with a P3 form which was duly filled and dated 26.4.2013 showing blunt injuries to chest and severe soft tissue injury on right leg which are places I was injured PMFI 2.*

I was also given a police abstract dated 5.5.2013 and wish to produce PMFI 3.

*My advocate sent me to a doctor who filled medical report Dr. Obed Onyona who prepared report on 13th May 2013 and **I paid a fee of Ksh.5,000/= (receipt). I wish to produce as MFI 4 (a) and 4 b respectively.***

I do blame the two drivers of the vehicles as they ought to have communicated so the overtaking to occur successfully. I blame the 3rd defendant as a driver he did not communicate with driver of the lorry. I could not tell the speed as the speedometer I could not see from where I was sitted. I blame the 4th defendant as she swerved on our way hence causing the accident.

I do seek compensation for injuries and costs for the suit.

Cross examination by Arusei

The accident involved the school bus and the lorry Registration No. KBU 186H. The road clear and straight. The weather was clear and calm and it was still early in the morning. We had followed the lorry for a while. Our driver had expressed intention to overtake the lorry. From look of things we were to overtake safely until the lorry swerved on the way of our driver. The lorry swerved a bit to the side of the bus.

If the lorry had not swerved the accident would not have occurred. The driver of the lorry would have carried the bigger percentage of the blame.

Cross examination by Wahome

The accident occurred at the mid-morning and the road was straight with no pot holes and there was no oncoming vehicle. We had followed the lorry for a while and at a distance and left tip of bus hit right tip of the lorry. It is the bus that hit right tip of the lorry. The impact was at the tips of the vehicle. I read the newspaper the following day saying the accident was due to human error. Our school driver was charged with the traffic offence which is still ongoing and I had not yet gone to testify and I have recorded the statements on what we saw. I was not able to read speed of the bus but it was on average speed.

Our driver indicated before overtaking and I did not hear any hooting. The bus was around 30 meters behind the lorry before overtaking and our driver was on the right lane when bus neared the lorry and suddenly lorry swerved a bit towards right lane and accident occurred. I do not think the point of impact should have been on the sides of the vehicles as the lorry did not swerve back. I do not know if the bus had a defective speed governor.

If the lorry had not swerved onto our way no accident would have occurred hence to blame a bigger percentage. When we were

going out of the bus it still on and part of the roof had been ripped off and it could have been ripped off by the tree aside due to a big impact.

I cannot tell if the impact would have been heavy if it was not speeding. As two professional drivers they should have communicated well and I do not know if the bus driver had hooted the canter would not have swerved. Probably if our driver had communicated there might not have been an accident. The bus driver showed intention of overtaking. There was communication and same was probably not effective. Bus driver should not have carried the bigger portion of blame.

Re-examination: Nil

PW2 ANTHONY OPOYA OHALA.

I come from Busia and I am a teacher at Nambale boys High School and on 26.4.2013 I was teaching at that school and on the material date I was travelling from Nakuru on geographical tour and going to Bogoria and Lake Bogoria along Nakuru – Baringo road. We did not arrive safely as we were involved in a road accident and we were using school bus registration KGB 200C which is a 56 seater and we were 29 students and 4 teachers in the bus. There was an accident on the way involving our school bus and a white canter lorry registration. No. KBU 186H. I was seated in front next to the driver and it was around mid-morning and the weather was fine, sunny and very clear. The road is a narrow road with cactus trees on the sides and the road is unmarked. After passing Mogotio we saw a white canter in front of us heading towards Baringo and we followed it for some time until our driver decided to overtake.

While the bus was overtaking when then it hit the tip of the right rear of the lorry when it had just started to overtake and the bus was on the right side of the road and when the first impact occurred the bus proceeded to overtake the lorry when the lorry again swerved into our lane and hit the bus further and it went off the road and our driver managed to control it when it was held by a bush and the bus had been ripped off and the normal door could not open so we used the driver's door. We were 31 injuries and we lost 5 boys where four died on the spot and one died later. At that particular moment I could not tell where I was injured but currently my left shoulder gets out when I play. We recorded our statement at Mogotio police station. I blame both the drivers for the accident and our driver was overtaking on a narrow way and the lorry after paving way went back to block our bus and the lorry disappeared after causing accident without helping us. The driver of lorry blocked our bus from overtaking. We were driving slowly as we were now on the road and we did not know where lake Bogoria was and we were also site seeing and animals on the road and we were at 60 – 80 kph.

Five boys were taken to ICU, and five passed away and 21 broken arm.

Cross examination by Arusei

The accident involved the school bus and a white canter lorry Registration KBU 186H. The weather was very clear and road straight but narrow. Our driver was at point of overtaking when first impact occurred and the lorry swerved to our driver's lane. There was a first impact and a second impact and the first one the lorry was displaced and went aside when our bus then proceeded ahead overtaking when the lorry came back on the road and hit our bus from the side and the bus was displaced and the canter not swerved back to our bus the bus could have proceeded direct ahead. The canter failed to pave way and blocked the bus and had it paved way the accident would have been avoided. The road had two lanes and other vehicles were overtaking one another safely and we proceeded. The bus was on moderate speed and not speeding and the bus driver was careful and had been a driver for quite a long time and he expressed methods of overtaking. The bus driver and the lorry driver were to blame at 50:50.

Cross examination by Wahome

The road was straight and there was no oncoming vehicle and the weather was very clear and the canter was ahead and the bus was behind when it first hit the lorry on the right rear.

I was seated right in-front after the driver and I was on left side and I was with Mr. Kuboka with other two lady teachers.

After accident the bus had not overturned but the branch of the tree removed the roof to 3¹/₄ of the bus had ripped off as impact was very heavy. Our driver put emergency break hence we swerve from point of impact to where it stopped it was 10 meters away. The side where the branch was is where the boys passed away. After first impact the vehicles moved from close to 3 meters before second impact hence it was immediately. Had the lorry pave way the accident should have been avoided and the canter should have considered these were school children and when you overtake the lorry should have paved way. We paved way for other vehicles that overtook us. I blame the canter for not paving way.

The driver of canter ran away and we struggled to rescue the boys and if they were stuck in the vehicle we could have met them at the hospital. There were other public members who came to the scene and there was a crowd. I did not see the lorry driver running away. Our driver was charged of causing the accident. We recorded our statement the following day at Mogotio. It was too late for our driver to go back to left side of the road and our driver hit canter as it did not pave way. I am not a driver and cannot tell who was to pave way and I am protecting the school children.

Re-examination: nill

PW3 Dr. Obed Omuyona male adult Christian sworn states in Kiswahili

Medical practitioner – Nakuru town. On 20.5.2013 I examined one Lawrence Lawi who was involved in road traffic accident on 26.4.2013 and sustained severe soft tissue injury on right leg and blunt injury on the chest and was taken to Emining Health Centre and treated as an outpatient. At time of examination was still complaining of chest pain. Had healed bruises on right leg and I classified degree and injury as harm and prepared medical report while relying on treatment chit from Emining and he did not indicate he went to another hospital nor PGH and history from himself and physical examination. **The nature of injuries was soft tissue.** I also filled P3 form on 5.5.2013 and had blunt injury to chest severe soft tissue to right leg and are consistent with medical report. I issued receipt of Ksh.5,000 to prepare report and I wish to produce.

PMFI 4a – Pexhibit 14a

PMFI 2 – Pexhibit 2

PMFI 4b – Pexhibit 4b

I have charged Ksh.10,000 fee to attend Court and issued receipt Pexhibit 5.

Cross examination by Arusei

I have sworn to tell the truth as per p3 form and medical report I captured Lawrence Lawi as of 17 years and was a student and I do not know if he was a teacher at Nambale secondary school. The P3 form indicates and I did examine him. There are no teachers teaching at High school at 17 years old who I examined was a student and am telling the truth. They were soft tissue injuries and not serious and had fully recovered at time of examination.

Cross examination by Musili: Nil

Re-examination: I relied on treatment card and P3 form (refers to document form Emining) and it indicates age as 24 years and there could be a mistake from P3 form which originates from the police and it was not my mistake as it was from the P3 form and the medical report was made in good faith and not malicious.

PW4 NO. 43932 SGT. MUTUMA MBERIA

I am a Police Officer – Mogotio police station on traffic duties. I am in Court in relation to an accident that occurred on 26.4.2013 and I was the Investigating Officer therein. On that date I was at the station when I was informed of an accident along Mogotio – Marigat road at Kimose and together with other officers went to scene and on arrival found the school bus and canter involved in an accident at the scene. The bus registration KBG 200C which had 33 passengers and the canter registration KBU 186H Isuzu canter I assessed scene and took sketch plan of the scene and I conducted my investigations and documented my investigations in the sketch plan measurements and legend. **The sketch plan shows position of both vehicles after the accident. Motor vehicle registration KBG 200C the bus hit by canter from rear and lost control and both vehicles were heading same direction with the bus ahead of canter. As per sketch bus was behind the canter. Both were travelling from Mogotio towards Marigat with canter ahead of the bus and on reaching at location of accident, bus driver wanted to overtake the canter and as a result it hit the said canter on right rear side and lost control and bus crossed to right side of the road as you face Marigat direction and hit a tree and four students in the bus died on the spot. I then charged the driver of the bus with causing death by dangerous driving as he was to blame for the accident as he hit the canter from rear while overtaking.** Many students were injured and five died in total 4 on the spot and fifth in hospital. I did fill the police abstract which I wish to produce PMFI 3 – Pexhibit 3. I wish to produce the sketch measurement and legend as Pexhibit 6.

The owners of the KBG 200C Motor Vehicle and the bus belongs to Nambale Boys Secondary School and the canter KBU 186H belongs to Lydia Gaturuhu as per the copy of records (referred to) which I did search. However, as per police abstract the driver of canter had said it belonged to Nyota tissue transporters and it was written on right side of the vehicle. Nyota tissue is a company and registered under names of Lydia Gaturuhu and its one and the same person and I wish to produce the copies of search as Pexhibit 7a, b.

Cross examination by Arusei

I am the Investigating Officer herein and I prepared the sketch. As per the Pexhibit 6 the fifth document it read “fair sketch plan drawn on the 29/4/2013 at 4:00 pm by P.C Gitonga and it does not have my names and it shows drawn by P.C Gitonga from page 1 to 5. My names do not appear anywhere. I came to scene same day at around 12:00 pm and Pascal Dindi Omusa was at the scene and he blamed him for the accident plus driver of canter and his two turn boys and there were so many people there. I am very honest I found the driver of the canter who was not injured as well as the bus driver was present and not injured. There were no teachers at the scene and I tried to contact the teacher and drivers and I have the investigation diary for the accident and it in my file and I have not produced in Court and it’s a vital document but is with me.

As per Pexhibit 6 page 4 it shows “possible point of impact” (reads) and it means a possibility meaning not accurate. The actual point of impact was not there. As per possible point of impact I charged your client. I did not charge Dindi basing of propositions. Your client Lawrence had a driving licence and bus he was driving had a speed governor. I came after 1 hour of accident and my evidence is after one hour and accident took place when school bus was overtaking and I cannot be able to tell if the bus had indicated to overtake. The driver could not have been correct to say he indicated before overtaking as he hit the canter. The accident was not on lane of overtaking and the canter was hit on rear right side. If two vehicles are moving on one direction and one ahead swerves it depends on whether accident occurs. I found the vehicles at different direction and not spot of accident and I maintain the bus is to blame. The statement of bus driver is in my file and I did not carry it to Court and I

interviewed the driver and I recorded at police station and not at the scene. There were teachers who were eye witnesses who I interviewed and took their statements and are in my police file. I have given my opinion. I did investigations and I have all documents in the police file and not produced in Court and not shoddy and I prepared everything but in police file and if required I can use another day and I can produce now.

Cross examination by Musili

I am the Investigating Officer and I was called to the scene after the accident. On arrival the driver of canter was at the scene. As per sketch maps I indicate "possible point" as I was not there when accident occurred so to indicate actual point. There were skid marks. **The bus was behind the canter and trying to overtake the canter. That the bus kept enough distance he could not have hit the canter. There was skid marks on the road. The bus had its roof completely removed. The roof was ripped off when it hit a tree and there was a big impact. Both bus and canter were inspected and both documents. The road is straight with no obstructions and driver of the bus was charged in Eldama Ravine Traffic case no. 18/2013 and the case has not been concluded in Court.**

Re-examination: as per Exhibit 3 police abstract indicates I am the Investigating Officer as per Pexhibit 6 is conclusive of my investigations.

DW1 PASCAL DINDI OMUSA

I come from Mandende Busia County Nambale Sub-County and I am a driver Nambale Boys Secondary School.

On 26.4.2013 we were in Nakuru where I had brought students of Nambale High School on geographical study at lake Baringo and lake Bogoria and from Nakuru we proceeded on Nakurur – Marigat road and left Nakuru 8:00 – 9:00 am heading to Bogoria and on the way there was an equator line where teachers asked me to stop and students alighted and were to be taught after which we headed to lake Bogoria and on arriving where there are refugees I slowed down and on arriving at Kimose around 11:00 am **there was a vehicle ahead of us a canter and I started to indicate that I wanted to overtake and the canter did not show me any sign whether to pass or not. Indicated the right light as we were following each other towards Lake Baringo. I then flashed so as to alert I was behind him and did not respond and I then overtook on nearing and he then got to my side of the road on the right to prevent me from passing. There was only one lane to Baringo. When I neared the canter he swerved to my side like he was in shock and obstructed me not to pass and an accident occurred and the side mirror of left side of bus got the canter and it lost control. The road was straight and smooth no pot hole and weather very clear. When he got to my way and there was a tree on my right I tried to swerve and the bus headed towards the tree that had a lot of branches so as not to hit direct and the branches then got the top of the bus and removed the entire roof.**

The bus was in good condition and inspection had been done and speed governor fitted and I have a certificate issued on 16.4.2013 and to expire on 16.4.2013 and wish to produce speed governor Dexhibit 1. I do not know if vehicle was inspected as I was rushed to hospital. I have my driving licence (as filed in cc 21/2013).

When accident occurred those in canter ran away and due to impact the doors could not open and we escaped due to opening of accident and I saw two students lying down and others still buckled but later died. A government lorry then helped us take injured to hospital other vehicles picked us and ambulance helped the injured to hospital and I remained behind with Anthony (PW2) who is a teacher Nambale boys as we waited for police to come and they came after we had been taken to the hospital. Sgt. Mutua Mberia (PW4) did not find me at the scene. No police officer to date asked me to go to scene. Mberia only wrote my statement on 27th at Mogotio police station and I never visited scene with him and he is lying I went to scene with him. No investigation were done in my presence and I cannot recall the scene to date. I was charged with the offence of traffic and is pending in Court and I blame the driver of the canter for coming to my side of the road and prevented me from passing. I was never shown the sketch map and its my first time seeing it in Court. The bus was driving at moderate speed around 60 – 65 kph as students were on a study tour and needed to study along the way and I was not on high speed as bus had a speed governor.

When I was charged with the traffic offence I pleaded not guilty and its pending.

My vehicle was hit by the right rear side of the canter.

I did not hit behind the canter directly but it's because he came to my side after leaving his lane and getting to right side. Point of impact was on right side of the road and hadn't the canter come to right side the accident would not have been caused.

Cross examination by Keboga

Accident occurred and my students were injured and four died on the spot and another on way to the hospital and five were seriously injured and I do not know exactly number of slight injuries but around 20 – 21.

Cross examination by Kasina

We were from Nakuru heading to Lake Baringo and canter heading same direction and it entered into my side on to the right side. **My bus hit the canter on left side and the windscreen got folded. I hit it mid left side mirror and left and when he swerved to my side that's when I hit him. Had I been following I would have hit head on but my bus was on the edge was swerving and I was on my fifth year driving the bus and I know of keep distance which I had kept so to overtake and indicated so to overtake and lorry did not flash and I did not hoot but I flashed lights and good driver should look at his side mirror so the canter should have seen it. I was on moderate speed of 60 – 65kph and impact occurred that tore roof top and could be due to being in unstable mind after accident occurring. I did apply brakes.** I was charged in traffic case 182/2013 charge with causing death by dangerous driving and

I did not know if canter driver was charged and the canter driver is a prosecution witness whenever accident occurs one had to be charged and I am not to blame for the accident.

Re-examination by Arusei

The canter swerved to my side and it caused me to hit it after it obstructed me and both vehicles hit each other because it swerved and I tried to brake and to escape it as it fully swerved to my side and my bus failed the tree after it hit me on the body.

Balance of Probabilities

26. On a balance of probabilities upon analyzing the evidence - the only evidence presented before the court by the Plaintiff's witnesses PW1, PW2, PW3 and PW4, and the 1-3 defendant's witness DW1 - the court comes to the inevitable view that the accident subject of this proceedings was contributed to by the defendants in equal measure by the 1st - 3rd defendants' driver and the driver for the 4th and 5th Defendants for the following reasons:

1. According to PW1 who was "was seated in the front seat of the bus i.e 1st row opposite driver's seat and I could see the driver and the road clearly as it was around mid-morning" the accident happened as follows:

"The road was straight but a bit narrow. There was a lorry in front of us we had been following for quite some time. [W]hen driver of bus wanted to overtake the lorry and when we neared the lorry it swerved a bit into lane of our bus and left tip of the bus hit the right tip of the lorry from behind and shortly the bus was standing and I went into a blackout and when I came to see the bus on a ditch right side of the road and the lorry had also fallen on the left side of the road."

On cross-examination by counsel for the 1-3 defendants PW1 said:

"Our driver had expressed intention to overtake the lorry. From look of things we were to overtake safely until the lorry swerved on the way of our driver. The lorry swerved a bit to the side of the bus. If the lorry had not swerved the accident would not have occurred. The driver of the lorry would have carried the bigger percentage of the blame."

On cross examination by counsel for 5th defendant PW1 said:

"If the lorry had not swerved onto our way no accident would have occurred hence to blame a bigger percentage. When we were going out of the bus it still on and part of the roof had been ripped off and it could have been ripped off by the tree aside due to a big impact."

I cannot tell if the impact would have been heavy if it was not speeding. As two professional drivers they should have communicated well and I do not know if the bus driver had hooted the canter would not have swerved. Probably if our driver had communicated there might not have been an accident. The bus driver showed intention of overtaking. There was communication and same was probably not effective. Bus driver should not have carried the bigger portion of blame."

2. According to PW2 who said he was "seated in front next to the driver and it was around mid-morning and the weather was fine, sunny and very clear" described the accident as follows:

"The road is a narrow road with cactus trees on the sides and the road is unmarked. After passing Mogotio we saw a white canter in front of us heading towards Baringo and we followed it for some time until our driver decided to overtake."

While the bus was overtaking when then it hit the tip of the right rear of the lorry when it had just started to overtake and the bus was on the right side of the road and when the first impact occurred the bus proceeded to overtake the lorry when the lorry again swerved into our lane and hit the bus further and it went off the road and our driver managed to control it when it was held by a bush and the bus had been ripped off and the normal door could not open so we used the driver's door. We were 31 injuries and we lost 5 boys where four died on the spot and one died later."

On cross-examination for 1-3 defendants PW2 said:

"The accident involved the school bus and a white canter lorry Registration KBU 186H. The weather was very clear and road straight but narrow. Our driver was at point of overtaking when first impact occurred and the lorry swerved to our driver's lane. There was a first impact and a second impact and the first one the lorry was displaced and went aside when our bus then proceeded ahead overtaking when the lorry came back on the road and hit our bus from the side and the bus was displaced. [Had] the canter not swerved back to our side the bus could have proceeded direct ahead. The canter failed to pave way and blocked the bus and had it paved way the accident would have been avoided. The road had two lanes and other vehicles were overtaking one another safely and we proceeded. The bus was on moderate speed and not speeding and the bus driver was careful and had been a driver for quite a long time and he expressed methods of overtaking. The bus driver and the lorry driver were to blame at 50:50."

On cross-examination for 4 and 5th defendants PW2 said:

"After accident the bus had not overturned but the branch of the tree removed the roof to 3¹/₄ of the bus had ripped off as impact"

was very heavy. Our driver put emergency break hence we swerve from point of impact to where it stopped it was 10 meters away. The side where the branch was is where the boys passed away. After first impact the vehicles moved from close to 3 meters before second impact hence it was immediately. Had the lorry paved way the accident should have been avoided and the canter should have considered these were school children and when you overtake the lorry should have paved way. We paved way for other vehicles that overtook us. I blame the canter for not paving way.”

3. According to PW4, the police officer who produced a sketch plan on the accident scene the accident happened as follows:

“The sketch plan shows position of both vehicles after the accident. Motor vehicle registration KBG 200C the bus hit by canter from rear and lost control and both vehicles were heading same direction with the bus ahead of canter. As per sketch bus was behind the canter. Both were travelling from Mogotio towards Marigat with canter ahead of the bus and on reaching at location of accident, bus driver wanted to overtake the canter and as a result it hit the said canter on right rear side and lost control and bus crossed to right side of the road as you face Marigat direction and hit a tree and four students in the bus died on the spot. I then charged the driver of the bus with causing death by dangerous driving as he was to blame for the accident as he hit the canter from rear while overtaking.”

On cross-examination for the 1-3 defendants he said:

“As per Exhibit 6 page 4 it shows “possible point of impact” (reads) and it means a possibility meaning not accurate. The actual point of impact was not there. As per possible point of impact I charged your client. I did not charge Dindi basing of propositions. Your client Lawrence had a driving licence and bus he was driving had a speed governor. I came after 1 hour of accident and my evidence is after one hour and accident took place when school bus was overtaking and I cannot be able to tell if the bus had indicated to overtake. The driver could not have been correct to say he indicated before overtaking as he hit the canter. The accident was not on lane of overtaking and the canter was hit on rear right side. If two vehicles are moving on one direction and one ahead swerves it depends on whether accident occurs. I found the vehicles at different direction and not spot of accident and I maintain the bus is to blame.”

On cross-examination for the 5th defendant he said:

“The bus was behind the canter and trying to overtake the canter. That the bus kept enough distance he could not have hit the canter. There was skid marks on the road. The bus had its roof completely removed. The roof was ripped off when it hit a tree and there was a big impact. Both bus and canter were inspected and both documents. The road is straight with no obstructions and driver of the bus was charged in Eldama Ravine Traffic case no. 18/2013 and the case has not been concluded in Court.”

4. The defence for 1-3 defendants was given by the driver of the bus DW1 as follows:

“there was a vehicle ahead of us a canter and I started to indicate that I wanted to overtake and the canter did not show me any sign whether to pass or not. Indicated the right light as we were following each other towards Lake Baringo. I then flashed so as to alert I was behind him and did not respond and I then overtook on nearing and he then got to my side of the road on the right to prevent me from passing. There was only one lane to Baringo. When I neared the canter he swerved to my side like he was in shock and obstructed me not to pass and an accident occurred and the side mirror of left side of bus got the canter and it lost control. The road was straight and smooth no pot hole and weather very clear. When he got to my way and there was a tree on my right I tried to swerve and the bus headed towards the tree that had a lot of branches so as not to hit direct and the branches then got the top of the bus and removed the entire roof.”

On cross-examination for the 5th defendant, he said:

“My bus hit the canter on left side and the windscreen got folded. I hit it mid left side mirror and left and when he swerved to my side that’s when I hit him. Had I been following I would have hit head on but my bus was on the edge was swerving and I was on my fifth year driving the bus and I know of keep distance which I had kept so to overtake and indicated so to overtake and lorry did not flash and I did not hoot but I flashed lights and good driver should look at his side mirror so the canter should have seen it. I was on moderate speed of 60 – 65kph and impact occurred that tore roof top and could be due to being in unstable mind after accident occurring. I did apply brakes.”

On re-examination he concluded that:-

“The canter swerved to my side and it caused me to hit it after it obstructed me and both vehicles hit each other because it swerved and I tried to brake and to escape it as it fully swerved to my side and my bus failed the tree after it hit me on the body.”

Finding

Nature of the road calling for careful driving

27. The accident happened on clear day on a clear road between two vehicles, one bus KBG 200C which was overtaking the other, a canter Lorry KBU 186H. The size of the road was by all accounts narrow and vehicle being overtaken was required to keep to its lane while the other overtook. There was evidence that the driver of the overtaking vehicle had signaled to signify his intention to overtake but it was not clear whether he had hooted to ask the vehicle he was overtaking to give way. PW1 testified to the collision of the bus and the lorry as the former started to overtake the latter, and the witness had gone into a blackout.

28. PW2 testified that there were two collisions the latter of which he said was occasioned when the driver the lorry which was being overtaken drove back on the right side of the road, and concluded that **“had it paved way the accident would have been avoided”**. This almost deliberate act on the part of the driver of the lorry, by which DW1 claimed he was obstructing him from overtaking, would require on principle of balance of probability very cogent evidence to prove, that the driver after the initial collision refusing to give way drove back on to the right lane therefore causing the second collision. See *Phipson on Evidence*, supra. The driver of the bus DW1 conceded that he did not hoot and only flashed lights and thought the other driver should have seen the lights through the rear mirror. Failure to continually check his rear view mirror, and the bus driver’s failure to hoot, may have been cause for failure of communication between the two drivers, of which PW1 said **“Probably if our driver had communicated there might not have been an accident.”**

29. Although the bus driver said that he applied brakes and was driving at 60-65kph, he could not avoid the collision because the driver of the lorry swerved to his side **“and it caused me to hit it after it obstructed me and both vehicles hit each other because it swerved and I tried to brake and to escape it as it fully swerved to my side”**. The improbability of this conduct by a driver in the usual course of things required cogent evidence, which did not come from the police officer’s evidence which was based on hearsay, as the fair sketch produced was shown to have been drawn by on P.C Gitonga at 4.00pm and the witness PW4 saying he had gone to the scene at 12.00 noon, and which placed the point of impact at left lane of the two vehicles removing the whole notion of the obstruction while overtaking which would have placed the point of impact on the right overtaking lane. The Investigating Officer said:

“The accident was not on lane of overtaking....

*As per sketch bus was behind the canter. Both were travelling from Mogotio towards Marigat with canter ahead of the bus and **on reaching at location of accident, bus driver wanted to overtake the canter and as a result it hit the said canter on right rear side.”***

Loss of control of vehicle

30. There was no evidence that the driver of the overtaking vehicle had upon the first impact slowed down or swerved to avoid further collision, which happened shortly thereafter according to PW2. The bus driver however claimed to have applied brakes and lost control, PW4 confirming that there were skid marks on the road. The bus driver was not able to control his vehicle when the driver of the lorry allegedly obstructed him from overtaking. The skid marks evidence given by the police officer, PW4 would indicate that the driver of the bus had attempted to stop but was unable to avoid the collision as he must have been driving at an excessive speed in the circumstances.

31. The fact of inability of the overtaking bus driver to control the vehicle after the first and second collision, if they were two, points to the bus having been driven at a speed in which effective control of the vehicle was impossible given that, as testified by PW4, **“[had] the bus kept enough distance he could not have hit the canter.”** That is negligence on his part. The failure of the driver of the lorry which was being overtaken to give way upon being signaled by the overtaking bus or to keep to its side of the road sufficiently to allow other road-users to use the road without accident also points to negligence on his part.

32. The sketch-plan produced by the police officer PW4 was a hearsay document having been prepared by another officer who did not testify. Like the trial court I am unable to take much benefit from the evidence thereon by the police officer PW4 who was not the person who had drawn the sketch of the accident scene, although alleged to have visited the scene.

Conclusion

33. I find it, on the evidence before the court, more probable than not that the two driver were negligent as alleged by the plaintiff; the 4th and 5th defendant’s lorry driver failing to keep off the overtaking land on the narrow road to give way to the 1-3 defendant’s bus driver who communicated his intention to overtake but who was unable to control his vehicle when the lorry driver failed to give way on account of driving the bus too close to the vehicle ahead and at a speed which did not permit him to effectively control the vehicle, as evidenced by the skid marks on the road and the extensive damage on the vehicle and loss of life, although some of it partly attributable to the impact on hitting a roadside tree, upon loss of control. It would appear to the court on evidence before the court that the two drivers were competing over the road, the driver of the bus trying to overtake and the driver of the lorry trying to avoid being overtaken and, therefore, refusing to give way as testified by the witnesses PW1 and PW2.

34. For these reasons, I would apportion liability against the defendants, as did the plaintiff’s witness PW2, in the ratio **50:50** between the 1st, 2nd and 3rd defendants on the one hand, and the 4th and 5th Defendants on the other hand.

Quantum of damages

35. In challenging the trial court’s finding on the quantum of general damages, counsel for the appellant submitted that -

5.2.2 *In the said submissions, the Appellant submitted that Kshs.50,000/- would be adequate compensation for the injuries sustained by the plaintiff. The appellant relied on the case of **Socfinaf Co. Ltd vs. Ngugi Mwaura Nairobi HCCA no.742 of 2003** in which the plaintiff sustained soft tissue injuries and was awarded general damages of Kshs.20,000/-*

5.2.3 *The Appellant further relied on the case of **Menengai Oil Refineries Ltd vs. Jeremiah Mwaura Wandeto (2012) eKLR** where the plaintiff suffered injuries to his left forearm, left ankle joint, left shoulder and right hand. The court was of the view that an award of Kshs.60,000/- is reasonable and fair compensation.*

5.2.4 *While giving its award, the learned magistrate did not consider the proposals of by the Appellant as per their submissions. Further, the magistrate failed to indicate which authorities she relied on when delivering her judgment. We submit that the judgment*

falls short of the required procedure as the said judgment fails to set out the points of determination, the decision and the reasons for such decision.

36. The trial court is bound by the principle of compensation which requires comparable awards for comparable injuries and she cited the decisions relied on by the 5th defendants, who had proposed 50,000/- for the soft tissue injuries on the 1st respondent as shown in the judgment set out above. Both the defending parties proposed comparable awards in the range of 50,000/- to 60,000/-. Whatever the proposals for award of damages made by parties it is the discretion of the court to award damages in a particular case, the principle only being that like injuries should be compensated by comparable awards. See *H West & Son Ltd. v. Shephard* [1964] AC 326; *Southern Engineering Ltd v. Mutia* (1985) KLR 730; and *Gicheru v. Morton & Another* [2005] 2 KLR 332. Although it be desirable that courts take submissions on the question of quantum for the parties, it is the compliance with the principles for the award of damages that matters: an award that is otherwise consistent with the principles for the grant of damages will not be set aside for failure to invite or consider or apply quantum supported by a parties submissions. Indeed, *Gicheru v. Morton*, the Court of Appeal held that in that case “*several High Court cases cited to the Court concerning the quantum of damages in matters libel did not appear to have solid juridical grounding and they were not to be taken as persuasive or as guidelines to be followed by trial courts.*” Indeed, section 79A of the Civil Procedure Act insulates a decision of the trial court from challenge based on any breach of procedure or practice that does not affect justice of the case as follows:

“No decree to be altered for error not affecting merits or jurisdiction

79A. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.

[Act No. 10 of 1969, Sch.]”

37. The doctor PW3 testified as regards the injury of the appellant that “**the nature of injuries was soft tissue.**” I do not find that the award of 70,000/- for the soft tissue injuries in this case were so inordinately high as to amount to an unreasonable estimate to justify the appellate court on the principle of *Bhutt v. Khan*, supra, to interfere with the trial court’s award.

Special damages

38. It is trite law that special damages must be specifically pleaded and proved. From the evidence of the Plaintiff PW1, it was clear that a medical report and receipt therefor were produced as Plaintiff exhibits 4A & B, and they had specifically been pleaded in the Plaint. The award of special damages in the sum of Ksh.5000/- was properly awarded. A receipt for payment of the police abstract which was pleaded in the sum of Ksh.200/- was not produced and the same will be discounted.

Orders

39. Accordingly, for the reasons set out above, the court sets aside the finding of the trial court on liability and substitutes therefor judgment for the plaintiff 1st respondent against the defendants in the ratio of 50:50 against the 1st - 3rd defendants on the one hand and the 4th and 5th defendants on the other hand, which finding shall apply to all the cases related to this test suit.

40. The court affirms the trial court’s award of Ksh.70,000/- in general damages and special damages in the sum of Ksh.5000/- in favor of the 1st respondent against the defendants. The appellant has partly succeeded on the question of liability but failed on the question of quantum. The court shall, therefore, make an order that each party bears its own costs.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF MARCH 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kinyanjui & Co. Advocates for the Appellant.

M/S Keboga & Co. Advocates for the 1st Respondent.

M/S Arusei & Co. Advocates for the 2nd, 3rd and 4th Respondents.