REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 169 OF 2018

MOHMED DAGANE FALIR aka ALI DAGANE.....….APPELLANT

VERSUS

ALFONCE MUTUKU MULI…….1ST RESPONDENT

REAL TILAK ENTERPRISES……2ND RESPONDENT

(Being an Appeal from the Judgment delivered on 3oth November, 2017 of the Hon. C.A. Ocharo (PM) delivered in Machakos Civil Suit No. 462 of 2015, Mohamed Dagane Falir aka Ali Dagane versus Alfonce Muli and Real Tilak Enterprises)

BETWEEN

MOHMED DAGANE FALIR aka ALI DAGANE.....……APPELLANT

VERSUS

ALFONCE MUTUKU MULI…….1ST RESPONDENT

REAL TILAK ENTERPRISES…….2ND RESPONDENT

JUDGEMENT

1. The Appellant herein, **Mohamed Dagane Falir aka Ali Dagane**, by way of a plaint filed in the lower court claimed general and special damages as well as the costs of the suit against the Respondents herein. According to the plaint, on or about 2nd September, 2012, he was lawfully walking on the pedestrian verge along Mombasa Nairobi Road at Kyumvi Area near Sorena Filling Station when he was knocked down by the 2nd Defendant's motor vehicle registration No. KBM 633P Isuzu Lorry which was being negligently driven, controlled and/or managed by the 1st Defendant as the 2nd Defendant's authorised driver, employee, servant and/or agent. As a result, the Appellant sustained serious injuries and suffered loss and damage. The particulars of the said negligence, injuries and special damages were itemised in the plaint. The Appellant also sought to rely on the doctrine of *res ipsa loquitor* the Highway Code and the Traffic Act, the rules and regulations made thereunder. Apart from the medical expenses of Kshs. 1,632,700/=, medical report expenses of Kshs. 3,000/=, police abstract fee of Kshs. 200.00 and motor vehicle search fee of Kshs. 500/=, the Appellant also sought future medical expenses of Kshs. 700,000/=.

2. It was pleaded that the 1st Defendant was as a result charged in Machakos Traffic Case No. 1339 of 2012 wherein he pleaded guilty and was fined Kshs. 4,000/= and in default to serve three months imprisonment. It was claimed that prior to the accident, the Appellant was an energetic and hardworking man who due to the injuries sustained, has been precluded from engaging in gainful occupation as a result of which he has lost earnings and has suffered loss of earning capacity.

3. In the defence filed by the Respondent, the ownership of the said vehicle was denied and the Respondents further denied the occurrence of the said accident as alleged in the plaint, the fact that the Appellant sustained the pleaded injuries as well as the allegation that the 1st Defendant was negligent. It was in fact pleaded that if there was such an accident, it was wholly caused and/or materially contributed to by the Appellant, and the particulars of the said negligence were itemised. The Respondent also sought to rely on the provisions of the Traffic Act, the Rules and Regulations made thereunder as well as the Highway Code. It was further pleaded in the alternative that if the said accident occurred, it was caused by a latent defect in the motor vehicle which occurred suddenly without any warning hence the respondents were unable notwithstanding the exercise of all reasonable care and skill to avoid the same. As such Respondents denied being negligence

and the applicability of the doctrine of *res ipsa loquitor*, the fact of injuries and damages claimed to have been suffered by the Appellant. In their view, the fact of conviction was irrelevant to the circumstances of the case and they challenged the claim for loss of earning capacity. It was disclosed that the Appellant had previously filed a suit being **Mavoko CMCC No. 324 of 2015** between the same parties relating to the same cause of action and it was sought that the suit be struck out. Consequently, the Respondents sought that the suit be dismissed with costs.

4. In support of his case, the Appellant sought to rely on his statement filed in those proceedings in which he stated that on 2 nd September, 2012 he was carefully walking on the verge of Mombasa Nairobi Road at Kyumvi Area near Sorena filling Station near a broken down lorry. Suddenly, he heard screeching tyres and before he could look back, he was knocked from behind and run over by the said Lorry Reg. No. KBM 633P. He was assisted by passer-by since his legs were completely crushed and together with the driver of the said lorry the said Samaritans took him to Machakos Level 5 Hospital. According to him, the driver was drunk and was staggering. Later he reported the accident to Machakos Police Station where he was issued with a police abstract. He was taken to Kenyatta National Hospital but due to lack of proper treatment, was transferred to Nairobi West Hospital but because of the high expenses, he was transferred to A-Amin Nursing Home after three weeks, where he stayed for about one month but was discharged due to his inability to afford treatment expenses. After that he was taken to his rural home in Garissa where he was bedridden. According to the statement, the 1st Defendant as the driver who was drunk, drove at a very high speed, carelessly and lost control of the lorry which veered off the road and crushed him and other pedestrians.

5 In his oral testimony, the Appellant testified that the accident occurred at about 6.00 pm and at that time he was a turn boy for Garun Construction Company while the said lorry was beside the road and was about to have its tyre changed following a puncture. In his evidence, he was under the lorry when he heard a loud bang and lost consciousness for 30 minutes. According to him, he sustained a fracture on one leg, fracture on the ribs and head injuries. According to his information, it was Muli who caused the accident though he could not tell if any action was taken against him. In his evidence the accident happened besides the road and the driver was to blame for getting off the road. He produced the bill from Nairobi Hospital for Kshs. 1,62,000/=, letter from the Hospital, summary of the invoices, original receipts, Hospital Documents from Ali Amin Nursing Home and a bill therefrom, treatment documents from Garissa District Hospital and receipts, medical report by **Dr. Kinuthia** and receipt, doctor's court attendance receipt, demand letter and receipt for motor vehicle search as exhibits.

6. The Appellant testified that he had not recovered and his leg had a metal implant. He was no longer able to work as he could not stand for long though before the accident he was being paid Kshs. 15,000/= per month and Kshs. 1,000/= daily for food and upkeep. At the time of his testimony he stated that he was working as a watchman earning Kshs. 10,000/= per month. According to the Appellant though the metal was supposed to be removed after two years he did not have the money.

7. In cross examination by **Mr. Njuguna** learned counsel for the Respondents, the Appellant stated that their vehicle was being used to transport sand and stones but at the time of the accident, it was loaded with sand from Sultan Hamud to Eastleigh, Nairobi. According to him, they had parked the vehicle off the side of the road and he was under the vehicle so he did not see what caused the accident. It was his evidence that half of his body was under the vehicle but his legs were outside as he was changing the front tyre. He was unable to tell what hit his head. In his evidence the documents from Machakos Hospital got lost. The owner of the vehicle, according to him, was **Ahmed Garun** who was however not present. He however did not know the defendant.

8. In support of his case, the Appellant called **PC Robert Tomno** who testified that on 2nd September, 2010 an accident occurred along Mombasa-Nairobi Road at Kyuvi Area involving motor vehicle reg. No. KBK 411D and KBM 633P both lorries. According to him it was reported that KBM was carrying sand from Mombasa direction to Nairobi when it came across KBK which was stationary being repaired and his KBK from behind as a result of which several persons repairing it were injured and were rushed to Machakos Level 5 Hospital for treatment. After investigations, the driver of KBM was charged with the offence of careless driving in Machakos Traffic Case No. 1491 of 2012 and fined Kshs. 4,000/= in default 3 months imprisonment. Though he was not able to get the police file the same having likely been disposed of, he produced the police abstract as an exhibit. According to him, the driver failed to keep distance. The witness however stated that he was not the investigations officer and did not visit the scene of crime which was at Sorena Filling Station.

9. The Respondents did not adduce any evidence.

10. In her judgement, the learned trial magistrate noted that while the pleadings and the statement indicated that the Appellant was a lawful pedestrian walking on the verge when he was hit, in his evidence he stated that he was repairing the vehicle when he was hit while under the vehicle; that there were discrepancies in the Appellant's name in the ID Card, the medical documents and the police abstract; that there were discrepancies between injures as pleaded and in the medical report. She noted that parties are bound by their pleadings and where there is a discrepancy as to how the accident occurred, the only remedy is to amend the plaint. She further noted that those indicated as having been injured were a pedestrian and a passenger yet the Appellant was not any of these. The court found that in the absence of an explanation, the discrepancies could not be ignored. It was also noted that the Appellant's evidence was not corroborated by the other people who were allegedly injured. The court concluded that in the absence of medical documents from Machakos Level 5 Hospital, the Appellant may not have been injured in the said accident and failed to prove his case on a balance of probabilities. According to the learned trial magistrate, the doctrine of *res ipsa loquitor* was inapplicable in these circumstance.

11. She however found that the Appellant proved her case, she would have awarded Kshs. 300,000/= as general damages but as the receipts were doubtable, she would not have awarded any special damages. The suit was accordingly dismissed with costs.

12. It is that decision that provoked this appeal.

13. In this appeal it is submitted on behalf of the appellant that from the evidence of **PW1** (Traffic Police Officer **Richard Tomno**) and **PW2** (the Appellant), it is clear that 1st and 2nd Respondents were liable in negligence. It was submitted that from PW1/s evidence, he blamed the 1st Respondent for causing the accident as the 1st Respondent veered off the road and hit the rea of the motor vehicle registration number **KBK 411D** which was being repaired off the road; the 1st Respondent failed to keep a reasonable distance as he was over speeding and failed to control his motor vehicle registration number KBK 411D and pleaded guilty when charged in court. In support of his case he referred to the Occurrence Book in court with all the accident details in the Police Abstract which was a public record and on one has ever contested the same.

14. It was also submitted that the Appellant also testified on how the accident occurred. It was submitted that by perusing the evidence on record My Lord, you will notice that the Appellant suffered severe injuries. This is clear from the Medical Report on Record.

15. According to the appellant since the Defence did not offer any evidence to counter or challenge the Plaintiff's evidence, it remains that on a balance of probability, the Appellant was able to prove his case that it is the Respondents who are wholly to blame for causing the accident and reliance was places on **Autar Singh & Another –VS- Raju Govindjii, HCCC 548 of 1990 as cited in Mary Njeri Murigi –VS- Peter Macharia & Another [2016] eKLR**.

16. It was submitted that there is nothing that the Appellant did that contributed to the causation of the accident and since it is not enough to plead contributory negligence and offer no evidence to prove the same, the Respondents are wholly to blame and find them 100% liable and the 2nd Respondent is vicariously liable for causing the accident being the 1st Respondent's employer.

17. Regarding the discrepancies in the pleadings and evidence under oath, it was submitted that the Appellant should not be punished for the mistakes of counsel in drafting the pleadings and that this court should find that the correct evidence is as given under oath by the Appellant in court. In this regard the Appellant relied on the decision of Lord Nicholls of Birkenhead in **Re H and Others (minors) [1996] AC 563, 568.**

18. It was the Appellant's case that from the foregoing, it is clear that the Appellant was indeed knocked down by the 2nd Respondent's motor vehicle registration number KBM 633P Isuzu Lorry which was being negligently driven, controlled and/or managed by the 1st Respondent as the authorised driver, employee, servant and/or agent of the 2nd Respondent. As a result of the said accident, the Appellant sustained serious injuries and has suffered great loss and damage and the Appellant has therefor fully discharged the burden of proof as required for ordinary civil cases. The Appellant proved his case on a balance of probabilities as required by the law and we pray that my Lord holds as such.

19. As regards the discrepancy in the name of the Appellant, it was submitted that the trial court erred for failing to consider the fact that the Appellant ably in his evidence, explained the reasons why his names differed in the various documents. Therefore, the trial court cast doubt on the Appellant's case without any justifiable reason when the Defence in their case never at one point raised the issue of the Appellant's name and the issue was never in doubt before the Honourable Court. According to the Respondent, since the Respondents merely denied the Appellant's evidence without attempting to produce any evidence to the contrary and did not call witnesses to support their cased, he did not understand why the court went ahead and found that the Appellant was lying when there were not two scenarios to compare and contrast.

20. It was therefore the Appellant's contention that the finding by the learned magistrate was/is not supported by the evidence on record and that the said finding was based on no evidence at all, or on a misappropriation of it or the court is shown demonstrably to have acted on wrong principles in reaching the said findings. This court was therefore urged not to uphold the said finding.

21. It was further claimed that the Learned Magistrate erred in law and in and in fact in failing to consider the Plaintiff's/Appellant's written submissions and authorities on record.

22. In the Appellant's view, it has demonstrated and given enough reasons why the same should be disturbed.

23. Regarding damages, it was submitted that as per the Plaint and evidence on record and from the treatment notes from Machakos Level 5 Hospital, Kenyatta National Hospital, Nairobi West Hospital and Al Amin Nursing Home, the Appellant sustained fracture of the Upper Third Femur of both legs, fracture of eight ribs of the right side with haemothorax, fracture of left femur, fracture of both hips and severe head injury leading to concussion. As per the medical report by **Dr. Moses Kinuthia**, the Appellant's complaints were painful leg with inability to walk properly. At the time of the said examination, he with a left sided limping gait with help of crutches, there was a surgical scar on the lateral aspect left hip and thigh, there was a bony angulation mid left thigh and left lower limb was shorter than he left about 5cm. based on the foregoing it was submitted that the injuries that the Appellant sustained were grievous and have left him permanently incapacitated yet the trial court found that a mere sum of Kshs. 500,000/= would have been sufficient compensation without referring to any case law. In the appellant's view the awarded sum was very low and that a sum of Kshs. 5,000,000/= is adequate for the pain suffering and loss of amenities. In support of his submissions the appellant relied on **Alex Wachira Njagua –VS- Gathuthi Tea Factory & Another [2010] E.A eKLR.**

24. Submitting on the award for loss of earning, it was contended that the Appellant was employed as a loader/turn boy by M/S Garun Construction Company Limited earning Kshs. 20,000/= per month and since then, he has been unable to work and will never work due to the nature of the injuries he sustained. He is now forced to work in available jobs and at the time of trial he testified that he was employed as a watchman earning a paltry Kshs. 10,000/= a month. He was 26 years old at time of the accident and thus work out as follows: Kshs. 20,000/= x 12 x 34 = Kshs. 8,160,000/=.

25. The applicant also submitted that he prayed and proved special damages of Kshs. 1,636,400/= and produced receipts to proof the same. The trial court however did not award the same allegedly because the court doubted whether the receipts belonged to the Appellant. According to him, the trial court did not have authority to authenticate any receipts as the same were not objected by the Defence. It was further contended that the trial court also reduced the damages for future medical expenses without any reasons whatsoever. From the evidence on record, it is clear that the Appellant who still has metal implants in situ which are hurting him and they need to be removed. He feels pain when it is cold and cannot move with them. He thus requires further surgery and the same would, considering the nature of injuries and economy would definitely cost more that Kshs. 300,000/= as awarded by the trial court. The court was urged to award the said sum of Kshs. 700,000/= being damages for future medical expenses expected.

26. It was further the Appellant's case that he had adeptly demonstrated the Appeal herein on each ground as pleaded by the Appellant and prayed that this appeal be allowed on the terms submitted above.

27. In opposing the appeal, the Respondents submitted that in dismissing the Appellant's suit in the Subordinate Court, the Learned Magistrate pointed out the glaring discrepancies in the evidence on the Appellant's pleadings an in his oral evidence in court which ought not to be overlooked contrary to the assertion made by the Appellant and it is the Respondents' submission that the Trial Magistrate was correct in finding the liability could not attach when the Appellant had not proven his case on a balance of probabilities. This inconsistency in evidence raises the question as to where the Appellant was when the alleged accident occurred and whether he actually did witness the occurrence of the accident so as to place blame on the Respondents' for causing the same. From the said evidence the Subordinate Court was only left to speculate as to how the accident occurred and could not on a balance of probabilities tell who was to blame for the same. Despite the aforesaid discrepancy, the plaintiff did not call and independent eye witness to shed light as to how the accident occurred and who was to blame for the same. The Appellant instead opted to call PW1 who neither witnessed the occurrence of the accident nor was he the investigating officer. Additionally, his evidence was merely to the effect that the Respondents' motor vehicle hit the vehicle that the Appellant was repairing from the rear. No evidence to attribute liability on the Respondents' part was led. It was thus submitted that the decision of the Learned Magistrate was appropriate in the circumstances and this court was urged not to find in the contrary. In so submitting, reliance was placed on the case of **Lilian Wanjiku Wanjohi –VS- Tornado Carriers Ltd [2016] eKLR and Commercial Transporters Limited –VS- Registered Trustees of the Catholic Archdiocese of Mombasa [2015] eKLR.**

28. Further, it will be noted that the Appellant purported to attribute blame to the Respondents for reasons that the First Respondent had been charged with careless driving and fined Kshs. 4000/=. It is however the Respondents' submission that the same is not conclusive proof of negligence on the part of the Respondents. In so submitting reliance was placed on the case of **Joseph Kahinda –VS- Evans Kamau Mwaura & 2 Others [2014] eKLR.**

29. According to the Respondents contrary to Appellant's submissions, the burden of proof in civil cases solely rests on the Plaintiff and in this case the Appellant which burden the Appellant did not discharge and they relied on ***Halsbury's Law of England*** 4th Edition, Volume 17, paragraphs 13 and 14.

30. To the Respondents, it is not clear how the accident occurred it was equally not proven that it was the Respondents were to blame for the accident as a result of their negligence. Thus left the particulars of negligence as indicated in the plaint as unsubstantiated. The inconsistent evidence laid out by the Appellant fell short of the required standard of proof and therefore the Learned Magistrate was right to have dismissed the Appellant's suit.

31. It was contended that although the Appellant in his submissions indicates that the reasons why his names differed in various documents was explained in court, nowhere in copies of court proceedings is any such explanations given and that in cross-examination he gave his name as "**MOHAMED DAGANE FALIR**". If the Appellant was indeed the same person one wonders why he would give different names to the medical officers preparing his medical records and the police officers for purposes of preparation of the medical report. This alone casts doubt as to whether the Appellant was indeed injured on the 2nd September, 2012 or even involved in the accident that occurred on the said date. The mere existence of an injury was not sufficient proof that the Appellant was injured on the said date and as a result of the Respondents' negligence. Noting that no independent eye witness was called to shed light on this glaring inconsistency of names, what follows is that the Appellant failed to prove his case on a balance of probabilities and the trial magistrate was right in dismissing the Appellant's suit.

32. It was the Respondents' case that the Trial Magistrate gave due consideration to the sum proposed by the Appellant and the supporting authorities thereto.

33. As regards the assessment of damages the Respondents urged the court to refrain from interfering with the decision of the Learned Magistrate for reasons stated herein above. Should this court however opt to take a different route and overturn the Subordinate Court's finding on liability, it should find the sum of Kshs. 500,000/= as general damages for pain and suffering as sufficient compensation base on **Akamba Public Road Services –vs- Abdikadir Adan Galgalo [2016] eKLR and the case of Benuel Bosire –VS- Lydia Kemunto Mokora [2019] eKLR.**

34. It will be noted that the case of **Alex Wachira Njagua** relied upon by the Appellant is incomparable as the Plaintiff therein were more severe in the circumstances as the Plaintiff therein was 100% incapacitated and became mentally ill owing to the injuries that she suffered.

35. Regarding damages for loss of earning, it was submitted that no proof for the same was led as there was no evidence of the Appellant's employment or earnings. In this regard reliance was placed on **Ndoro Kaka Kokondo –VS- Salt Manufacturers [K] Limited [2016] eKLR.**

36. Regarding the special damages, it was submitted that although the Appellant did not raise an objection as to the authenticity of the receipts, the subordinate court was still vested with the mandate of interrogating the contents thereto. As was **"Mohamed Dagane Falir"** whilst the receipts from Nairobi West Hospital **"Dakane Ali".** The same already casted doubt as to whether the said receipts were indeed issued consequent to payments that he made at the said hospital. This cuts across all the rest of his documents in support of claim for special damages that is the medical report, police abstract and motor vehicle search. It was thus submitted that the Learned Magistrate was right in finding as she did in her judgement to the effect that special damages could not have been awardable had she made a different finding of liability.

37. According to the Respondents, the basis for this award was the medical report by **Dr. Moses Kinuthia** which estimated the cost of removal of metallic implants at Kshs. 700,000/=. Similarly, just like the award on special damages an award for future medical expenses is not awardable in the circumstances since the said estimations was not backed up by facts and was merely an unsubstantiated guesswork attempt. It will be noted that the doctor who made the said estimation did not attend court to testify as the reasons for his aforesaid estimation. Going by the aforesaid it was submitted that the sum of Kshs. 300,000/= proposed by the Learned Magistrate cannot said to be awardable based on the cases of **Zachariah Waweru Thumbi –VS- Samuel Njoroge Thuku [2006] eKLR** and **Ndoro Kaka Kokondo – VS- Salt Manufacturers [K] Limited [2016] eKLR.**

38. Based on the foregoing, the Respondents urged the court to dismiss the appeal with costs.

Determination

39. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle –vs- Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal 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."**

40. 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.

41. However, in **Peters –vs- Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support 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."**

42. 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."**

43. In this appeal, it is clear that the determination of the appeal revolves around the question whether the appellant proved his case on the balance of probabilities and if so 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.***

44. 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.***

45. 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."**

46. It follows 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.

47. 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."**

48. 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."**

49. 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."**

50. 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….."**

51. 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.*
> >
> > *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 loose because the requisite standard will not have been attained."*

52. What then is the position where a party testifies on oath and the other party does not adduce any evidence? As stated in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriith & Another [2014] eKLR** (supra) where the evidence adduced by the plaintiff fall far short of what is expected in a civil suit, in that the plaintiff's evidence does not meet the 51% threshold, the plaintiff's case will fail notwithstanding the failure by the Defendant to adduce evidence. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the Appellant chose to remain silent. In other words, the failure by the Defendant to adduce evidence cannot be a basis for propping up an otherwise hopeless case by the plaintiff.

53. However, where there is credible evidence from the Plaintiff, the failure to adduce any evidence by the defence may well mean that the plaintiff has attained the standard prescribed in civil proceedings. It was therefore held in **Janet Kaphiphe Ouma & Another –vs- Maries**

Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga through Stanely Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997 that:

> **"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."**

54. In this case it was pleaded by the Appellant that on or about 2nd September, 2012, he was lawfully walking on the pedestrian verge along Mombasa Nairobi Road at Kyumvi areas near Soren Filling Station when he was knocked down by 2nd Defendant's motor vehicle registration No. KBM 633 P Isuzu Lorry which was being negligently driven, controlled and/or managed by the 1st Defendant as the 2nd Defendant's authorised driver, employee, servant and/or agent. As a result, the Appellant sustained serious injuries and suffered loss and damage. The particulars of the said negligence, injuries and special damage were itemised in the plaint. The Appellant also sought to rely on the doctrine of ***res ipsa loquitor*** the Highway Code and the ***Traffic Act***, the rules and regulations made thereunder. In support of his case the Appellant sought to rely on his statement filed in those proceedings in which he stated that on 2nd September, 20102 he was carefully walking on the verge of Mombasa Nairobi Road at Kyumvi areas near Soren Filling Station near broken down lorry. Suddenly he heard a screeching tyres and before he could look back, he was knocked from behind and run over by the said Lorry Reg. No. KBM 633P. according to the statement, the 1st defendant as the driver who was drunk, drove at a very high speed, carelessly and lost control of the lorry which veered of the road and crushed him and other pedestrians.

55. The Appellant's statement having been adopted as part of his examination in chief, it therefore formed part of his evidence in the case. Up to that extent, the evidence was consistent with the pleading and had the Appellant not said anything further probably the learned trial magistrate would have had no difficulty finding for him. I say probably because the learned trial magistrate also took issue with the fact that the Appellant did not call any of the people he alleged to have been to testify in support of his case. However, no rebuttal evidence was adduced by the Respondent. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:-

> **"In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."**

56. What are the consequences of a party failing to adduce evidence? In the case of **Motex Knitwear limited vs. Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002, Lessit, J** citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998** appreciated that:

> **"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."**

57. Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that itis trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

58. In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & another Nyeri HCCC No. 95 of 1988, Makhandia, J** (as he then was) held that:

> **"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."**

59. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni J**. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

> **"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."**

60. Similarly, in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165 B of 2000, Mbaluto, J** held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted.

61. If one is still in doubt as to the legal position reference could be made to the case **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996 where Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff.

62. There was also the aspect of conviction in a traffic case. As regards the relevancy of a conviction of a traffic offence to a civil claim in respect of negligence, Section 47A of the ***Evidence Act*** states that:

> **"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such, judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

63. In relation to that section, it was held by the Court of Appeal in **Chemwolo and another vs Kubende [1986] 492: 1986 – 1989] EA 74** in which **Platt, JA** opined that:

> **"It was not for the Judge to read the proceedings in the Traffic Case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even prima facie case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case.....It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgment of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages."**

64. According to **Apaloo, JA (**as he then was) in the same case:

> **"It was not competent for the judge to merely peruse the record of the criminal trial and conclude that a prima facie case on contributory negligence cannot be established. If the averments contributory negligence are proved at trial, the Court may well feel that the plaintiff was in part to part to blame for the accident and the court would then come under a duty to assess his own degree of blameworthiness and depending on the court's assessment of the responsibility for the accident, such apportionment may affect perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it is a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."**

65. Similarly, in **Robinson vs. Oluoch (1971) EA 376**, it was held that:

> **"The respondent in this case was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying that a conviction for an offence involving negligence driving is conclusive evidence that the convicted person was the only person whose negligent caused the accident, and that he is precluded form alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47 A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."**

66. What I understand the Court of appeal to have been stating is that a defendant cannot be barred from putting forward a defence simply because of the fact of a conviction in a traffic case since in appropriate circumstances a defence of contributory negligence is always available to the defence. It is however my view that where the defence has been given an opportunity to offer evidence but fails to do so, as was held by **Githinji, J** (as he then was) in **Ernest Mwara Situma vs. Aziz bin Ali Ciragdin Mombasa HCCC No. 510 of 1989:**

> **"Conviction in a traffic case is conclusive proof that the defendant is guilty of negligence under section 47A of the Evidence Act."**

67. In this case there is simply no evidence on record on the basis of which can find that any other person was negligence or contributed to the accident apart from the 1st Respondent. The evidence was that the 1st Respondent rammed into a stationary lorry and it was his act that occasioned injury to the Appellant. He did not dispute this. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

> **"Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."**

68. In that case the court further found that:

"When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his court at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object ..... Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.... There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."

69. That was the position in **Tart vs. Chitty and Co. (1931) ALL ER Pages 828 – 829** where **Rowlat, J** had this to say:

"It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be in things and people and animals in the way at any moment and he is bound to go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it."

70. In **Karisa and Another vs. Solanki and Another [1969] EA 318** it was held that:

"The car driver, driving at a speed of about 65mph which was not in itself negligent, when he saw the oncoming bus, whose presence on the road reduced the area available to take evasive action should any emergency occur and whose lights to some extent impaired the area of vision provided by its own lights, only reduced his speed to about 60 mph. This action was one which a reasonably careful driver, and the duty which the car driver owed to the plaintiff was that of being a reasonably careful driver, would not have taken, as the speed in those circumstances enormously increased the potential danger of an accident. While, therefore, a speed of 60 mph is not negligence, it is that aped in the particular circumstances which constitutes negligence; and the Judge was wrong in considering the question of speed separate from the other circumstances of the case... We are not satisfied that the car driver could not and should not as a reasonable careful driver, keeping a particular keen look-out, have seen the lorry in time to have swung to the left on the verge, no matter how uncertain his knowledge of the precise terrain there, rather that run straight into the stationary lorry.... Looking at the facts of the case as a whole, the Judge tended to consider the two main circumstances of speed and a proper look-out separately and not part of a comprehensive whole, and it was this failure to look at the facts as a whole which led him into the manifest error of coming to the conclusion that there was no negligence on the part of the car driver. He was clearly wrong in failing to find negligence on the part of the car driver. Consequently, the car driver found to have contributed to the accident to the extent of 20 per cent."

71. In **Vyas Industries vs. Diocese of Meru [1976 – 1985] EA 596; [1982] KLR 114,** it was held that an appellate court will not interfere with apportionment of liability unless the Judge has come to a manifestly wrong decision or based his apportionment on wrong principles and this was the case since the greater blame attaches to a driver who runs into an unlighted stationary lorry on a straight road.

72. In the Appellant's oral evidence, he however seemed to have changed the version in the pleadings and his statement. He averred that he was under a vehicle when the accident occurred. The issue that the court ought to deal with is which version the trial court ought to have relied on in arriving at its determination. From the judgement, the learned trial magistrate seemed to have based her first limb of the decision on the discrepancy between the pleadings and the oral evidence without considering the contents of the Appellant's statement which had been adopted as forming part of his evidence in the case.

73. The issue of how the court is to proceed where there are discrepancies in the evidence of a party was dealt with by the Court of Appeal in **Kenya Meat Commission vs. Raden [1990] KLR 292; [1988 – 92] 2 KAR 134:**

"The court would hesitate to apply the rigours of the universal rule of pleading regarding fraud to a case of industrial injury which is an action of a wholly different character, involving, as it does, the recollection of witnesses of a rapid series of events in which there is understandably a risk of confusion, especially by the person injured. Again the court would be reluctant to apply rules applicable to a commercial contract to a case of personal injury but when parties agree on an issue, the court should decide the case upon that issue if it is properly framed, and arises out of the pleadings.... The object of pleading is to give to the opponent fair notice of the case he has to meet so that he may direct his evidence to that issue... But in this case since the defendants did not object that the evidence was at variance with the pleaded particulars of a negligence, they should not wait until the end of the case, or on appeal, and then, as it were, huff the other side for not having led evidence in accordance with the plaint. It would be most unfortunate, in a case of personal injury, if a plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading."

74. **Madan, J** (as he then was) in **Welch vs. Standard Bank limited [1970] EA 115** expressed himself as hereunder:

"When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Every day, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the court to draw a distinction between them, they must both be held to blame, and equally to blame...Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, it its judgement, the court is able to discern that which is

right owing to it being fair and just in the circumstances, without jeopardizing the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion...There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does hold so in this case."

75. Similarly, in **Lakhamshi vs. Attorney General [1971] EA** it was held that:

> **"A Judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, on negligence. In many cases, as for example, where vehicles collide near the middle of wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them."**

76. I agree that a party ought to lead evidence based on his pleadings sand ought not to wander away from his pleadings. The Court of Appeal in **Dakianga Distributors (K) ltd v. Kenya Seed company Limited [2015] eKLR** rendered itself as follows:-

> **"A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The common law Library No. 5) where the learned authors declare:-**
>
> > **"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."**

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

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

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

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

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."**

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

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

> **"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties**

have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in *Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182,* **the Court held that:**

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

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

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

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

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

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

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

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

84. However, where a party's evidence discloses two versions which are not too diametrically inconsistent, to dismiss a suit on the basis that the evidence is inconsistent with the pleadings would be too drastic. In this case there was evidence that was consistent with the pleading which was never controverted. It is therefore my view that the learned trial magistrate erred in dismissing the suit on the ground of inconsistency between the pleadings and the evidence.

85. Regarding the Appellant's names, the pleadings were clear that the appellant was described as **Mohamed Dagane Falir (also known as Ali Dakane).** To my mind as long as the names in the document fitted the Appellant as described in the pleadings, it would not be fatal that the said documents did not consistently refer to the Appellant.

86. As regards the award of general damages, the medical report of **Dr. Moses Kinuthia** only revealed a fracture of the shaft left femur. Therefore, whatever else the Appellant pleaded did not amount to evidence. That averments in pleadings are not evidence was appreciated in **Francis Otile –vs- Uganda Motors Kampala HCCS No. 210 of 1989** where it was held that the court cannot be guided by pleading since pleadings are not evidence and not can they be a substitute therefor. Before that the then East African Court of Appeal held in **Mohammed & Another vs. Haidara [1972] E.A 166** where that the contents of a plaint are only allegations, not evidence. According to **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997,** where a defendant does not adduce evidence the Plaintiff's evidence is to be believed as allegations by the defence is not evidence. In **CMC Aviation ltd vs. Cruisair ltd. (No.1) [1978] KLR 103; [1976 – 80] 1 KLR 835 Madan, J** (as he then was) expressed himself as hereunder:

> **"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them of any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact the truth of which is submitted for investigations. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear of obvious; ground for knowledge, indication or testimony; that which makes truth evidence, or renders evidence to the mind that it is truth."**

87. Based on **Benuel Bosire vs. Lydia Kemunto Mokora [2019] eKLR** I have no reasons to fault the learned trial magistrate's opinion that Kshs. 500,000.00 being an award for general damages was reasonable. 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."

88. Regarding loss of earning and loss of earning capacity, the distinction between the two was explained succinctly in **Mumias sugar Company Limited vs. Francis Wanalo [2007] eKLR** where it was held that:

"There is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages...the award for damages...The award of damages under loss of earning capacity only arises where a plaintiff at the time of the trial is in employment, but there is a risk that he may lose this employment at some time in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well-paid job. It is different from an actual loss of future earnings, which can already be proved at the time of the trial. The claim for loss of future earnings is assessed on the ordinary multiplier/multiplicand bases. In contrast where there is a substantial risk that a plaintiff at some future date before the end of his working life will lose his job and be thrown into the labour market, the assessment of risk and damages is much more difficult. No mathematical calculation is possible and the multiplier/multiplicand approach is impossible or inappropriate and it is impossible to suggest any formula for determining the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market. It is not correct that whenever a plaintiff established a claim under the head of loss of earning capacity, the damages are to be considerable and that it can never be right to award only a few hundred pounds damages. Each case must depend on its own facts, but it the court decides that the risk of the plaintiff losing his present job, or of his being unable to get another job or an equally good job or both, are only slight, a low award is right. If as will be rare both are negligible or fanciful no award should be made. If one or both are real or substantial, but neither is serious, the award should not be a token or derisory award but should generally be in hundreds of pounds. If both risks are serious, the compensation should generally be in thousands of pounds...A court can, in appropriate cases, give an award for loss of future earnings and for loss of earning capacity to the same plaintiff so long as the overlap of the two awards of damages is avoided...Loss of earning capacity can be a claim on its own apart from a claim for general damages for pain and suffering (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then on at the date of the trial). Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as loss of earning capacity. At any rate, what is in a name if damages are payable. This type of claim (loss of future earnings) could be a claim on its own and the figure need not be plucked from the air because the plaintiff would be expected to furnish the material on which a reasonable figure would be based... The award of loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of the trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss or earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

89. In **Zacharia Waeru Thumbi –vs- Samuel Njoroge Thuku [2006] eKLR** it was held that:

"It is on the foregoing basis that in my humble view, awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the law of Torts. Such an award is an affront to the general principles governing the award of special damages. For even if such claim is pleaded it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings which can only be claimed and awarded under the head of general damages. [See WINFIELD & JOLOWICZ on Torts, 17th Edition 2002, at Page 760]

On the basis of the foregoing authorities and reasons, I hold that the Learned Magistrate was right in not warding the claim for future medical costs. The claim was made – pleaded – as per the Amended Plaint filed in Court on 12/11/02. But the claim was not proved. What was mentioned – the figure of K.Shs.100,000/-; - was purely guesswork by the Medical Doctor which may or may not be the exact figure at the time, and point of expenditure, when that future time comes.

Accordingly, I reject this ground of appeal as lacking in substance and conducive to sheer speculation."

90. Similarly, in **Ndoro Kakak Kakondo –vs- Salt Manufacturers [K] Limited [2016] eKLR**, it was held that:

"Loss of earnings is claimed as special damages. It must be specifically pleaded and strictly proved. The court understands

this to comprise lost wages, it is a specific figure, based on the Claimant's rate of monthly salary and the years expected to continue working."

91. However, the same court in **Kanini –vs- A.M. Lubia & Olive Lubia [1982 -1988] 1 KAR 727** seemed to have taken a different view on the issue whether loss of earning capacity is only awardable to a person who is in employment at the time of the injury, in that case it expressed itself as hereunder:

"We do not know if the learned Judge rejected this claim (loss of earning capacity) on the ground that the appellant, being a refugee in Kenya, was by law, not allowed to engage in employment or on the ground that there was no sufficient evidence to prove that he had previously worked in Somalia. On the latter issue we have set out the appellant's evidence. He had worked as a forklift operator and he gave the names of his previous employers. He had sought to produce documents to support that claim but unfortunately for him, he was not allowed to produce them because "he was not the maker of the documents." But the learned Judge did not specifically say she disbelieved his oral evident with regard to his previous employment. The Judge actually accepted the submissions of the respondent's counsel that the appellant being a refugee had no earning capacity. We think the appellant had lost some earning capacity as a result of the accident…True he could not be employed in Kenya, but there was no evidence that he will always remain a refugee in Kenya; he could at some future date return to his native country or go to some other country where he could be employed. The loss of earning capacity will always remain with him and it is unreasonable to hold that he can only be compensated for that loss if he employable in Kenya. We think the approach adopted by the learned Judge was not fair to the appellant. But it is clear that one cannot tell when the appellant would be able to return to his country where he would be employable. While we agree that he has suffered some loss which he himself put at Kshs. 4000/= per month, we think it would not be right to give him many years of a working life, seeing that it is uncertain when and if he will be able to be employable again. Accordingly, we would give him five working years and at the rate of Kshs. 4000/= per month we award him a sum of Kshs. 4000 x 5 x 12= Kshs. 240,000/= on the head of loss of earning capacity."

92. In this case however, I agree with the learned trial magistrate that there was no basis upon which an award under either of those heads could be made.

93. As regards special damages, based on my finding as regards the Appellant's name, I find the Appellant was entitled to the pleaded and proved special damages in the sum of Kshs. 1,632,700/=/. I also find that there was no basis for disbelieving the opinion by **Dr. Kinuthia** that the Appellant would require Kshs. 700,000/= being due cost of future medical expenses.

94. Having considered the material placed before me in this appeal I find merit in this appeal. I set aside the decision of the learned trial magistrate and substitute therefore a finding of liability against the Respondents in favour of the Appellant at 100%.

95. In respect of damages, I awarded the Appellant the following:

a) General damages for pain and suffering - Kshs. 500,000/=

b) Future medical treatment- Kshs. 700,000/=

c) Special damages- Kshs. 1,632,700/=

Total- Kshs. 2,832,700/=

96. While (a) will attract interest at court rates from the date of judgement in the lower court, (b) and (c) will attract interest at the same rate from the date of filing suit till payment in full.

97. Judgement accordingly.

Read, signed and delivered in open court at Machakos this 16th day of June, 2020.

G.V. ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey