REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 35 OF 2019

JAMES ITHALE AKOTHE.....APPELLANT

VERSUS

ABDIWELE ALI ABDI.....1ST RESPONDENT

EDWIN SUYA BUSOLO..... 2ND RESPONDENT

(Being an appeal from the Judgment dated January 20th or 28th February 2019 and allegedly delivered by the Hon. R. Ondieki (SPM) on the 20th or 28th day of February 2019 in Kilifi PMCC No. 2 of 2017)

Coram: Hon. Justice R. Nyakundi

Isaac Onyango Advocate for the appellant

Oduor Siminyu Advocate for the 1st respondent

2nd respondent in person

JUDGMENT

Pursuant to leave granted by this Court on 20.06.2019 in Malindi High Court Misc. Civil Application No. 17 of 2019, **James Ithale Akothe v Abdiwele Ali Abdi & Edwin Suya Busolo**, the appellant herein **James Ithale Akothe** being dissatisfied with the Judgment of the **Hon. R. K. Ondieki (Mr.) Senior Principal Magistrate** dated 28.02.2019 at Kilifi appealed against the whole Judgment, decision and directions and or orders on the following grounds:

(1). That the Learned trial Magistrate reached a decision that was against the Constitution, the Civil Procedure Act and the Civil Procedure Rules 2010, the Common Law and all applicable Laws.

(2). That the Learned trial Magistrate improperly exercised his discretion and or duty by taking into account matters which he ought not to have taken into account and failing to take into account matters he should have taken into account.

(3). That the Learned trial Magistrate erred in Law and fact in finding the appellant 100% liable for the accident, the subject matter of the suit before him.

(4). That the Learned trial Magistrate erred in failing to consider and apply all evidence tendered before him by and on behalf of the appellant.

(5). That the Learned trial Magistrate erred in Law and in fact in failing to appreciate and apply the record of proceedings available in the Court file relating to the joinder of the 2nd respondent as a third party to the suit before him.

(6). That the Learned trial Magistrate erred in failing to consider the totality of the evidence given by the appellant and respondent.

(7). That the Learned trial Magistrate erred in not apportioning any blame on the 1st respondent.

(8). That the Learned trial Magistrate erred in failing to take into account into the court case file records and or Judgment all the evidence tendered in Court by and on behalf of the parties.

(9). That the Learned trial Magistrate erred in failing to consider, apply and or distinguish the written submissions and legal authorities cited and relied upon by the parties.

(10). That the Learned trial Magistrate erred in making an excessive and very outrageously high award on damages.

(11). That the Learned trial Magistrate in not following the legal principles applicable in assessment of damages for personal injuries.

(12). That the Learned trial Magistrate erred in delivering a Judgment which was irregularly, improperly and wrongly dated and

(13). That the Learned trial Magistrate in abdicating his role as an independent and impartial arbiter and taking up the role of parties to the case before him.

Reasons wherefore the appellant prayed for orders:

(a). That findings of the Hon. R. K. Ondieki (Mr) SPM in the Judgment allegedly dated 20th or 28th January 2019 and allegedly delivered on 20th or 28th February 2019 holding the appellant 100% liable for the accident the subject matter of the case before him be set aside and be substituted with a finding apportioning liability at 40% against the 2nd respondent and the reminder 60% of the liability be shared apportioned between the appellant and the 1st respondent at such other percentages as this Honourable Court may deem fit, just and appropriate.

(b). That the award of general damages and special damages made in favor of the 1st respondent be reviewed, vacated, set aside and replaced with such other lower award as this Honourable Court may deem fit, just and appropriate.

(c). That the award on loss of future earning capacity be set aside and the claim thereof be dismissed with costs.

(d). That the 1st and 2nd respondents do bear the costs of this appeal.

The appellant then withdrew in entirety all the grounds challenging the award on quantum of damages as well as special damages and now seeks to proceed with the appeal only to the extent of the findings on liability. Consequently, the appellant withdrew grounds 10 and 11 as well as prayer b and c in the memorandum of appeal.

Before the commencement of the appeal there was a question for resolution on whether the failure by the appellant to deposit the decretal sum of Kshs.6,431,833.00/= into a joint interest account within the time limit set out renders the current appeal nugatory. The purpose of depositing the decretal sum was to provide security in an application for leave to appeal out of time and stay of execution pending appeal. This Court made a determination on the application dated 10.06.2019 allowing the appeal to be filed out of time with the condition that the appellant deposit the entire decretal sum in Court. It was this Court's ruling that to deny the appellant his right to a fair hearing under Article 50 of the Constitution of Kenya 2010 on the basis that he had failed to deposit the decretal sum would only serve to deny the appellant the right of access to justice protected under Article 48.

Having said that I shall now turn to the appeal. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. **(See Selle & Another v Associated Motor Boat Company Ltd & others {1968} EA 123).**

The duty of an appellate Court is well set out in the case of **Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another CA. No. 345 of 2000** where the Court held:

"As a first appellate Court we are not bound by the findings of fact made by the superior Court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O'Connor P. stated in Peters v Sunday Post Ltd {1958} EA 424, at Pg. 429

"It is a strong thing for an appellate Court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness."

This Court will however interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did. **(See Ephantus Mwangi & Another v Wambugu {1983} 2 KCA 100):** or in accordance with the principles and guidelines in **Robert Nsioki Kitavi v Coastal Bottlers Ltd {1982} – 198 IKAR 891 – 895:**

"The appellate Court will only interfere with a trial Judge's assessment for damages when the trial Judge has taken into account a factor he ought not to have been into account or failed to take into account or the award is so low that it amounts to erroneous estimate."

Consequently, guided by the above principles of Law stated in the aforementioned case I shall proceed to review the facts and evidence presented in the Trial Court. At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. The parties filed written submissions but did not find it necessary to orally highlight.

Brief facts of the case

In **Civil Case No. 32 of 2016, Edwin Busolo v James Akothe & Sony Motors Limited,** the 2nd respondent herein being the plaintiff therein vide plaint dated the 15.02.2016 and filed on the same date sought special and general damages from the appellant stated that he was lawfully riding motor cycle KMCU 152H along the Malindi-Mombasa highway at Mtwapa on 30.07.2015 when motor vehicle KBW 920E, where the 1st defendant was the beneficial owner while the 2nd defendant was the registered owner of said motor vehicle, driven negligently and or carelessly violently collided with the aforementioned motor cycle causing him serious injuries, loss and damage. He claimed damages stating that he suffered comminuted and displaced fracture of the right femur, compound/open, comminuted and displaced fracture of the right lower tibia extending into the ankle joint, compound/open, comminuted and displaced fracture of the lower fibula extending into the ankle joint, degloving injury to the right upper arm with several lacerations on the forearm and right shoulder, blunt injury to the right knee joint and lacerations around the eye. He blamed the accident on the carelessness, recklessness and or negligence on the part of the appellant and or appellant's driver, agent, servant and or employee.

In **Civil Case No. 2 of 2017, Abdiwele Ali Abdi v James Ithale Akothe,** vide plaint dated the 30.12.2016 and filed on 13.01.2017 the 1st respondent herein sought general and special damages for injuries following a road traffic accident which occurred on 30.07.2015 along Mombasa-Malindi road at Mtwapa involving the 1st respondent who was a pillion passenger in motor cycle KMCU 152H driven by the 2nd respondent, which collided with motor vehicle KBW 920E belonging to the appellant. The 1st respondent blamed the accident on the carelessness, recklessness and or negligence on the part of the appellant and or appellant's driver, agent, servant and or employee. He claimed general and special damages stating that he suffered a head injury with loss of consciousness, severe bleeding in the skull (intracranial), post trauma epilepsy, brain damage, post trauma brain masses-bifrontal hygroma, dislocation of the right hip, dislocation of both jaw TM joints (mandible and maxilla), nose and left cheek bone (zygomatic arch), bleeding within the skull airspaces (bilateral maxillary hemorrhages) as well as multiple cuts and lacerations.

In support of his case the 1st respondent relied on his witness statement filed alongside the plaint and his oral evidence, medical report and oral evidence of **Dr. Ajoni Adede** as well as the oral evidence of **PC Charles Mumo**.

The appellant consequently filed a written statement of defence dated 24.01.2017 where he denied liability and blamed the accident on the 2nd respondent who was the rider of said motor cycle as well as the 1st respondent who was the pillion passenger.

Later on 04.07.2017 the appellant filed an application seeking to enjoin the rider of motor cycle KMCU 152H, the plaintiff **in Civil Case No. 32 of 2016, Edwin Busolo v James Akothe & Sony Motors Limited,** as a third party to the suit against whom the defendant is entitled to claim indemnity. A third party notice was issued and served and the third party attended the hearing on the 22.11.2017 when **(PW1)** and **(PW2)** was giving evidence. The appellant relied on evidence of **Dr. Udayan R. Seth** gave his oral evidence and produced a medical report dated 11.05.2017, **(DW2) Onesmus Kinyua Muchubu and (DW3) Patrick Mionki Kibia** who both gave a written statement as well as testified in Court.

The 2nd respondent did not file any response neither did he testify or call any evidence after the service of the 3rd party notice in **Civil Case No. 2 of 2017, Abdiwele Ali Abdi v James Ithale Akothe,** further no directions were taken either.

On conclusion of the hearing parties were allowed to file written submissions which were filed by the 1st respondent on 04.09.2018 and appellant on 24.10.2018.

Parties' submissions at trial

The plaintiff filed written submissions dated 08.08.2018 while the defence filed submissions dated 03.09.2018.

The Trial Court's Judgment

The Appellant's Submissions

Counsel for the appellant, Mr. Isaac Onyango, in his submissions dated 12.11.2019 submitted on all the grounds of appeal cumulatively. They also sought to rely on their written submissions submitted at trial. They submitted that the Learned trial Magistrate acted on no evidence, misapprehended the evidence, acted on the wrong principles with the results that his Learned Judgment and or findings on liability is wholly untenable in Law and fact.

Counsel submitted that, the primary suit was consolidated with **Kilifi PMCC No. 32 of 2016** on 05.07.2017 in which the 2nd respondent, the third party in the primary suit, had already filed against the appellant relating to this very same subject accident. The consolidation was to enable the Court determine the issue of liability between all the parties in the two suits. However, the trial Court did not determine the issue of liability between the appellant and the third party. The Judgment also did not mention the consolidation yet the cases were never severed during the proceedings.

They further submitted that following the consolidation of the cases and joinder of the 2nd respondent as third party, the 2nd respondent had already consented to shouldering 40% of the liability for the same accident but the trial Court had ignored this glaring evidence and held the appellant 100% liable for the accident.

They also submitted that the appellant's driver had testified together with an eye witness (DW2) who blamed the 2nd respondent for driving on the wrong side of the road, with excess passengers, without a helmet and no reflective jackets, and the 1st respondent for agreeing to board the motor cycle with excess passengers, without a helmet and with no reflective jackets and for not ascertaining that the rider was qualified

and licensed, which evidence the trial Court ignored together with the 2nd respondent's concession on his role in causing the accident as there was no mention of any of this evidence including the consent tendered by the appellant during the trial. Further, they submitted that the trial Court did not consider nor make a determination on the competing evidence tendered by the appellant's witnesses on how the accident happened and who caused it. They submitted that the Judgment was incomprehensible and as such should be set aside.

Mr. Onyango, counsel for the appellant submitted that the trial Magistrate had acted out of the scope of the issues pleaded and relied on no evidence to reach his findings on liability as in part of his determination he purported that the appellant's driver was found to be driving under the influence of alcohol yet there was no evidence or findings to support that assertion as it requires a scientific and medical test to ascertain.

Further, it is their submission that the appellant's driver was also never charged with any offence therefore the assertion that he was driving with impaired vision was baseless.

It was also counsel's submission that from the evidence tendered in Court the 2nd respondent ought to have shouldered a higher percentage of liability as there was no evidence that he was a licensed rider, that the motor cycle was licensed to carry passengers and neither of the respondents were wearing reflective jackets nor helmets yet it was at night and the accident had occurred on the correct side of the appellant's motor vehicle, as such the trial Court ought to have held the 2nd respondent 100% liable.

It is also their submission that the injuries suffered by the 1st respondent would have been prevented or minimized had he worn a helmet, yet no findings on this were made on this in the Judgment.

For these submissions, counsel relied on the case of **Galaxy Paints Company Limited v Falcon Guards Ltd {2000} 2 EA 385, Tembo Investments v Josephat Kazungu & another {2005} eKLR and MNM & another v Solomon Karanja Githinji {2015} eKLR.**

The 1st Respondent's Submissions

The 1st respondent through his advocate on record **Oduor Siminyu & Company advocates** in their submissions dated 13.12.2019, submitted on all the issues cumulatively. They submitted that the appellant had opted to move this Court on the mistaken mis-interpretation of Section 5 of the Insurance (Motor Vehicle Third Party Risk) Act Cap 405 Laws of Kenya that their said insurers were only bound to settle the decretal sum of upto Kshs.3,000,000.00 and thus leave them exposed to settle any other amount in excess thereof. They submitted that as the appellant was not charged in the primary suit this then meant that the 1st respondent was properly covered under the policy, as a third party under the provisions of Section 4 (1) of the Act and therefore entitled to benefit under the policy. They submitted that the Courts have pronounced themselves in various case Law that the insurer is to settle all the decretal sum and follow up the balance from their insured.

They submitted that the impugned trial Court's findings were based on proper appreciation of the evidence before the Court and other principles of Law as such the same cannot be faulted and this Court ought to resist the appellant's invitation to interfere with the same as there is no basis for it to do so. They submitted that consent does not affect the 1st respondent as he was an innocent pillion passenger and as such the appellant cannot raise the issue of apportionment of liability to the 1st respondent.

On the award of damages counsel for the 1st respondent argues that he was a minor at only 17 years old at the time of the accident and has suffered life changing injuries that left him paraplegic.

For these submissions counsel relied on the cases of Samuel **Mukunya Kamunge v John Mwangi Kamuru {2005} eKLR, Wangechi & 2 others v United Insurance Co. Ltd {2004} eKLR, United Insurance Co. Ltd v Lawrence Ruthi Mwangi, Hellen Ainata Kokani v United Insurance Ltd (unreported), Thomas Maara Gichuhi v Law Society of Kenya & Another CA No. 141 of 2016 – Nairobi, Monarch Insurance Ltd v Moses Caleb Ochnago & another CA No. 12 of 2018, Christine Otieno Caleb v Attorney General {2014} eKLR and Lucy Wangechi & 2 others v United Insurance Company Limited {2004} eKLR**.

Issues for determination

It is now settled Law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of Law and facts and come up with its findings and conclusions. **(Court of Appeal for East Africa in Peters v Sunday Post Limited {1958} EA 424).** The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> ***(i). First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
>
> ***(ii). In reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and***
>
> ***(iii). It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.***

I stand by the **Court of Appeal for East Africa in Peters v Sunday Post Limited {1958} EA 424 where Sir Kenneth O'Connor** stated as follows:

> ***"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and***

who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords v Thomas (1), {1947} A.C. 484. "My lords, before entering upon an examination of the testimony of the trial, I desire to make some observations as to the circumstances in which an appellate Court may be justified in taking a different view on facts from that of a trial Judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of Law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really 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 the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

With this in mind, I have analyzed the evidence as this Court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following issue for determination by this Court which in my view is whether the trial Magistrate reached the correct decision in finding the appellant 100% liable for the accident.

Determination

This being the first appeal, it is my duty to re-examine a fresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility **(See Selle v Associated Motor Boat Company Limited {1968} EA 123).**

The thrust of the appellant's case is on the issue of liability as set out in the memorandum of appeal and submissions in essence that the trial Magistrate misdirected himself in disregarding the weight of evidence and submissions on liability and consequently came to the wrong conclusion. The appellant had pleaded that if the accident did occur it was caused or substantially contributed to by the 2nd respondent who was the driver of the aforementioned motorcycle registration and the 1st respondent. Pursuant to leave sought by the appellant, a 3rd party notice was issued to the 2nd respondent as the third party. The third party who had already filed suit over the same subject matter did not file any appearance nor did he respond to the allegations raised in the instant suit. He only appeared in person when the 1st respondent's witnesses were testifying.

From the proceedings at the trial Court it is evident to me that the Learned trial Magistrate did not consider all the evidence adduced. Further, there was no inspection reports of the two (2) motor-vehicles adduced in evidence. He apportioned liability at 100% against the defendant despite the fact that there was a consent signed on liability between the appellant and the admitted having been behind the motorcycle which had carried four (4) passengers therefore he should have been more careful.

The appellant has appealed on the grounds that the Learned trial Magistrate erred in holding the appellant liable for causing the accident to the extent of 100% contrary to the evidence adduced; he failed to determine the exact amount of money that was to be paid to the respondents by the appellant. He urged that the third party (2nd respondent) was totally to blame for the accident and that the third party's failure to tender evidence should be interpreted as an admission of all allegations made against him in the third party notice and the appellant's evidence that was not significantly challenged. It was his contention that he should have only been ordered to pay 60% of the sum awarded to the plaintiff as that was the extent of liability the Court should have found against him based on the consent on liability. That being ordered to pay the 40% share of the third party would be a miscarriage of justice since he would not be able to recover the sum from the insurer. That would mean being required to carry a burden that was not his. That should the liability be apportioned each party should pay its respective share as the directions on how the issue of liability between the parties in both suits should have been determined during trial but this was not done.

On this question of liability the 1st respondent contended that he was a pillion passenger on the motorcycle. This was the position of the 2nd respondent (third party) who was the rider.

The elementary principle of Law is that he who alleges must prove. Section 107 of the Evidence Act provides thus:

"(1) whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

Section 112 of the Evidence Act stipulates:

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

The second predominant issue is in connection with the motor vehicle collision that occurred on 30.7.2014. From that collision the respondent suffered multiple injuries. The contested allegation by the appellant is on the respondents liability.

There are issues which stand out from the record and the evidence as adduced before the trial Court. In **Lochgeely Iron Coal Co. Ltd v Mcmillan {1934} AC 1:**

> ***"In strict legal analysis, negligence means more than needless or careless conduct whether in omission or commission,. It properly connotes the complex concept of duty, breach of damage thereby suffered by the person to whom the duty was owing."***

It is this duty of care which was at stake before the trial Court as between the appellant and the respondent. generally, the extent liability would take the following two dimensional approach as expressed in the comparative case of **Neil Lewis v Astley Baker {2014} JMSC 1** where the Court succinctly stated:

> ***"Where the defendants negligence has created a dilemma for the claimant, the defendant cannot escape full liability, if the claimant in the agony of the moment tries to save himself by choosing a course of conduct which proves to be wrong one, provided the plaintiff acted in a reasonable apprehension of danger and the method by which he tried to avoid it, was a reasonable one, provided that most two conditions are satisfied, these being that the claimant acted in reasonable apprehension of danger and the method by which he tried to avoid the danger with which he was confronted at the material time was a reasonable one, then the claimant would not be contributory negligence as regards his loss and/or injury suffered."***

In the instant case, save for the Learned trial Magistrate reaching a finding that the claimant cannot be blamed for the accident. The principles that apply to liability as between the two parties to the collision are not well founded. The Court was asked to determine as to whom between the claimant and the defendant caused the accident which resulted to loss and damage subject matter of the suit.

In the circumstances of the case, I am of the view and do appreciate the principle in **Nance v British Columbia Electronic Railway Co. Ltd {1951} 2 ALL ER 448:**

> ***"Generally speaking, when two parties are so moving in relation to one another so as to involve risk of collision each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles, or both proceeding on foot or whether one is on foot and the other controlling a moving vehicle."***

And to cap it all the question of the distance between the motorcycle KMCU 125H and motor vehicle registration number KBW 920E becomes of paramount importance to determine liability and any contributory negligence.

In my assessment of the evidence and substance thereof, that issue was clearly not dealt with by the Learned trial Magistrate. A panoramic view of the record paints a picture of three distinct transactions. First, the claimant alleges that their motorcycle was hit from the rear, whereas the defendant insistence was to the effect that the motorcycle was being driven on the wrong side hence the collision. From the record also a chamber summons application to adjudicate third party proceedings was allowed by the trial Court but never featured at all in the final Judgment.

Clearly, this issue appears nowhere in the Judgment of the trial Magistrate. Therefore, when all is said and done the analysis of the evidence conducted by the Learned trial Magistrate failed to demonstrate the consequence of these transactions and their influence to the findings on liability.

It must always be recollected by the Court in what manner did the accident occur, thus was it by the negligence of the claimant or the vehicle in which she or he was on board. Further what was the conduct of the defendant? Did it connote negligence. This dominant principles are clearly explained by **Lord Mcmillan Hayor Bour Hill v Yong {1942} 2 ALL ER 396** in the following words:

> ***"Proper care connotes avoidance of excessive speed, keeping a good look out, observing traffic rules and signals and so on. Then to whom is the duty owed? Again I quote "To persons so placed that they may reasonably be expected to be injured by the omission to take such care."***

The Courts view of the matter is that upon assessment of the evidence failure by the Learned Magistrate to give reasons on that issue of the collision and blame worthiness of the two motor vehicles is entirely a misdirection. It is clear that liability was anchored on the fact that the claimant a pillion passenger cannot be blamed for the accident that may be so but on this case the precise question is in respect to the driver of the motor cycle KMCU 152H.

The gist of the appellant jurisdiction lies on the record and subsequent impugned Judgment. Accordingly, the settled guidelines in **Selle case (supra)** is to undertake an in depth assessment of the evidence and the adequacy of the reasons in the findings made by the Learned trial Magistrate to prefer one trajectory to the other.

Here the pleadings as a whole clearly failed to plead intoxication on the part of the defendant whereas in the final Judgment in unforeseen circumstances the Learned trial Magistrate seemed to have factored it to address the issue on liability. There is therefore a missing link in the chain between the pleading, evidence and the clarification made by the Learned trial Magistrate in the decision. It is sufficiently clear the basis of the finding had something to do with intoxication of the defendant.

In my view, the Learned trial Magistrate was entitled on the evidence before him to prefer the version of the collision given by the claimant and his witnesses. The likelihood of the motorcycle rider carrying excess passengers in relation to the accident is a matter not to be dealt

with in isolation. Admittedly, in the same cause of action in **SPMCC NO. 32 OF 2016** liability was apportioned by consent at **60%:40%** to be shouldered by the parties. However, this consent order does not seem to apply in **SPMCC NO. 2 OF 2017** where the respondent had filed an action against the same appellants. The question whether the legal effect of the consent on liability had lapsed to relieve the appellants of any liability was never disposed of by the Learned trial Magistrate. It is apparent that whatever method the Learned trial Magistrate used to ascertain liability and loss to the claimant. There was a legitimate expectation by the parties to have liability apportioned on the basis of **60%:40%.**

The rule is grounded on the principles that the pleadings and more so the evidence which bind the parties thereof arose from the same set of circumstances. I gravely doubt whether the two suits **SPMCC NO. 32 OF 2016** and **SPMCC NO. 2 OF 2017** as matters lay and given the conditions the findings on negligence could have been at variance with each other. Of significance too is the fact that the Learned trial Magistrate makes no mention as to liability determination in **SPMCC NO. 32 OF 2016.**

It was therefore the appellant's case that he was seeking indemnity and/or contribution from the 1st and 2nd respondent in the case against any orders that could be made against him. In the case of contribution he was urging that he was supposed to pay but the third party who was also responsible should be obligated to pay the portion of liability.

In the case of **Solomon Mwarimbo v Kenya Bus Service Ltd {1993} eKLR RSC Omollo J** (as he then was) stated that:

> ***"I have stated that there is no provision in the Rules requiring a third party who has appeared to also file a defence. A defendant who has issued a third-party notice is not, for example, entitled to apply to the Court for an exparte Judgment on the basis that a third party who has entered appearance has failed to file a defence. It appears to me that once a third party has entered an appearance and a defendant wishes to pursue the claim against the third party, then the burden shifts to such a defendant to apply to the Court, by way of a summons in chambers to give directions and when giving such directions, the Court, if satisfied that there is a proper question to be tried as to the liability of the third party, order such question of liability to be tried at or after the trial of the suit. If there is no proper question to be tried regarding the liability of the third party to the defendant, then the Court is entitled to enter such Judgment as it thinks proper against the third party. All these matters are to be determined at the stage where the Court is giving directions and directions can only be given on the application of the defendant."***

It is now trite Law that where a third party makes an appearance under Order 1 Rule 22 of the Civil Procedure Rules, the defendant is supposed to apply for directions by way of summons at which point the directions in the manner the matter may be determined is given. Prior to giving directions the Court must be satisfied that there is a proper question to be tried as to the liability of the third party before giving the method to be adopted by the defendant and the third party whether it should be determined in the course of trial of the suit or otherwise.

In the instant case no directions were taken. It was therefore a misdirection on the part of the Court to enter the Judgment as it did. Failure by the trial Magistrate to follow the laid down procedure made the third party appear as if it expressed its intention to admit the validity of the decree obtained against the defendant and its own liability to indemnity or contribute to the extent denied by the defendant.

In the case of **Jessie Mwangi Gachago v A. G. {1987} eKLR** it was state that:

> ***"third party issues are usually tried at or after the trial of the suit between the plaintiff and defendant and this must be made clear. This was not the case herein."***

From evidence adduced in the matter it is proved that the rider of the motorcycle who had overloaded it by carrying two (2) pillion passengers instead of one and was riding on the road oblivious of other road users an act that materially contributed to the accident. The driver should have been charged with a Traffic Case as a result. The question of indemnity and/or contribution should have been inquired into.

Just as a try the wary on quantum I observe as in the case of **Butt v Khan {1977} KAR 1 Law JA** stated that:

> ***"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 it misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

As this claim is not part of the appeal, I say no more.

In a nutshell the Learned trial Magistrate misdirected himself as there were no directions given as to how third party issues were to be tried. The decision the Magistrate came up with lacked clarity.

Therefore, each of the pleaded issues provided a sufficient basis for the Judgment and there were compelling reasons why the third party should be permitted to defend the proceedings as against the appellant. The circumstances truly are exceptional besides allowing third party application, further directions were never taken on the matter. In all these, Learned trial Magistrate had erred in principle in holding the appellant 100% liable on negligence. Further in this appeal the Court failed to take judicial notice of the apportionment on liability in **SPMCC NO. 32 OF 2016**, which may have a direct correlation in the proceedings at hand.

In my view, while the Law is very clear on the matter, its equally clear with regard to the instant appeal the procedure and the Law was not followed to the letter. When the circumstances are such that a party has not had a satisfactory fair trial the Court is called upon to exercise discretion to order for a retrial.

In the case of **Oraro Rachier Advocates v Co-operative Bank of Kenya Ltd {2001} eKLR** the Court held:

> ***"Circumstances under which a retrial may be ordered is a matter of the Courts wide discretion to consider when an order for retrial can be made. So the decision one way or the other would largely depend on the facts and circumstances of each case."***

On consideration of the matter at hand, the trial Court acted with jurisdiction but made an error in the application of the Law. That exercise of discretion affected the rights of the parties to the claim and as of necessity can be remedied through a retrial. In the premises, I allow the appeal by setting aside the Judgment entered against the appellant in the Lower Court and substitute it with orders as follows:

- ***The matter is remitted to the Lower Court for re-hearing on priority basis.***

- ***Mention before the Chief Magistrate's Court for directions within 21 days from todays date of the order.***

- ***Each party to bear their own cost.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF NOVEMBER, 2020

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R. NYAKUNDI

JUDGE