REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 140 OF 2019

JOHN WAMBUA alias BENSON WAMBUA.....APPELLANT

=VERSUS=

MATHEW MAKAU MWOLOLO.....1ST RESPONDENT

AND

SILVESTER MUTHOKA MAKAU.....2ND RESPONDENT

(Being an appeal against the whole judgement delivered by Honourable E. H. Keago, SPM on 23rd October, 2019 in Machakos CMCC No. 582 of 2014)

BETWEEN

MATHEW MAKAU MWOLOLO.....PLAINTIFF

-VERSUS-

JOHN WAMBUA.....1ST DEFENDANT

BENSON WAMBUA.....2ND DEFENDANT

AND

SYLVESTER MUTHOKA MUTHOKA MAKAU.....THIRD PARTY

JUDGEMENT

1. By a plaint dated 27th June, 2012, the 1st respondent herein sued the Appellant claiming general and special damages, costs and interests arising from a road traffic accident that occurred on 26th January, 2014 along Machakos-Kangundo Road as Sweet Waters. According to the 1st Respondent, on that day he was travelling as an authorised passenger in motor vehicle registration no. KAP 017X when motor vehicle registration no. KAX 272V was so negligently, carelessly and/or recklessly driven, managed and/or controlled by the Appellant and/or his authorised driver, agent and/or servant that it lost control, veered off the road and collide with motor vehicle registration no. KAP 017X. As a result of the said accident, the 1st Respondent sustained severe and extensive injuries which were particularised as blunt injury to the right shoulder and right big toe.

2. It was pleaded that at all material times, the Appellant was he beneficial owner of motor vehicle registration no. KAX 272V.

3. In his defence, the Appellant denied the allegations of negligence made by the 1st Respondent and averred that the accident was caused by the negligence on the part of the driver of motor vehicle registration no. KAP 017X. Following an application by the Appellant, the 2nd Respondent herein was joined in the suit as a third party on the ground that the 2nd Respondent was the driver of the said vehicle.

4. In his defence, the 2nd Respondent denied that he was the owner of motor vehicle registration no. KAP 017X and hence was not liable to indemnify the Defendant. He further denied that the accident was caused by his negligence and asserted that the same was caused by the negligence of the driver of motor vehicle registration no. KAX 272V.

5. In his evidence, the 1st Respondent testified that on 26th January, 2014 he was travelling from Machakos to Mutituni in motor vehicle registration no. KAP 017Y a Toyota Saloon since there was a problem getting public vehicles. At around Sweet water, there was a Maruti (Suzuki) on part of the road in the opposite direction. Another saloon vehicle registration no. KAX 272V driven by **Benson Wambua** emerged behind the Maruti and though the driver of in motor vehicle registration no. KAP 017Y, in which he was, tried to avoid it, the said registration no. KAX 272V came and knocked theirs. It was his evidence that he was seated on the right side behind the driver.

6. As a result of the accident, he was injured on the right shoulder and right big toe and was taken by the said Maruti to Machakos Level 5 Hospital where he was treated. He was later seen by **Dr Loipasha** who prepared a report for him and he reported to the police station where he was issued with a police abstract. Upon conducting a search, it was found that the owner of motor vehicle registration no. KAX 272V was **John Wambua** and his advocate wrote to **Benson Wambua** and his insurance a demand letter. According to the 1st Respondent, as a result of the accident he incurred some expenses. He exhibited a copy of the records of the search, the demand letter and 5 receipts for Kshs. 1,730/=. Though he had healed, he sought damages and costs of the suit.

7. In cross-examination, the 1st Respondent stated that he was seated behind the driver. It was his evidence that the Maruti was parked on the opposite side of the road facing Machakos with its light on and part of the body on the road though he did not get the number plates. He however denied that there were potholes at the accident scene since he knew the road very well as he used it daily. Though he saw the vehicle ahead, he saw the registration number of the KAX at the police station. According to him, the point of impact was on their side and since it was a head on collision, the greater impact was on the front. It was his case that the driver of KAX was to blame since he ought to have slowed down which he did not but came at a speed.

8. PW2, **PC Jamal Bare Mohamed**, attached to Machakos Traffic Base testified that on 26th January, 2014, a Sunday, there was a report made of an accident which was received under OB No.19 of 26/1/14. The said accident occurred around 2030Hrs near Valentine`s High School – along Machakos – Kangundo Road. In the said accident, one **Sylvester Muthoka Makau** aged 34 years, the 2nd Respondent, was driving motor vehicle registration number KAP 017X, Toyota Saloon from Machakos towards Kangundo and he had a passenger on board. On reaching the accident scene, he collided head on with another motor vehicle registration number KAX 272V Toyota L-Touring Saloon coming from the opposite direction driven by **Benson Wambua**, the Appellant. According to the report, the driver of KAX 272 V left his side thus causing he accident and was therefore the one to be blamed. As a result of the accident, four people were injured including the Respondents herein with the 1st Respondent sustaining a cut on the forehead and were all rushed to Machakos Level 5 Hospital here they were treated in fair condition while both vehicles were towed to Machakos Police Station. He exhibited the police abstract report.

9. According to him, based on the OB Report which he relied on, the accident occurred at St. Valentines, near Mumbuni. **Corporal Wanjohi** went to the scene and drew a sketch map from which he concluded that the driver of motor vehicle KAX 272V was to blame since the said vehicle left its lane and knocked KAP 017X. However, the police file went missing and the said officers have been transferred. According to the police abstract report, the matter was pending under investigations.

10. PW1, **Dr John Mutunga**, produced the medical report prepared by his colleague, **Dr Loipasha**. According to him, in preparing the said report, the said doctor relied on the 1st Respondent's P3 form and treatment notes. It was his evidence that the 1st Respondent sustained blunt injury right shoulder and a blunt injury to the right big toe. He was treated as an outpatient and was put on painkillers. On examination he complained of painful right shoulder. It was his opinion that the 1st Respondent suffered soft tissue injuries and it was anticipated that he would completely recovery. He also produced the p3 form prepared by the same doctor which captured the injuries based on treatment notes and receipts which he exhibited.

11. At the close of the plaintiff's case, the Appellant, a police officer, testified that he owned motor vehicle KAX 272V Toyota L. Touring and was on leave at the time of the accident but I was based in Nakuru. On 26th February, 2014 at some minutes past 8pm, he was from home, Masinga to Machakos along Machakos-Kangundo Road. It was his evidence that he was on his lane driving at a speed of between 60-80Kph and when he reached Sweet Waters past Mumbuni around 50m from the Mavivye junction, there was no obstacle ahead of him. However, there was an on-coming vehicle whose lights he could see. The said oncoming vehicle realised that there was a pothole on his lane and swerved to the right hitting his vehicle head on but at the right side.

12. As a result of the accident, the right front lights were completely damaged and he also got injured on his forehead. According to the Appellant, he was not anticipating the driver would swerve towards him so he could not apply brakes and by the time he did so he had already been hit. He was helped to the Hospital by a vehicle which was behind him while he left his vehicle on the same left lane where he was hit. After he was treated and discharged, he went back to the police station around 10Pm to check on the status of my vehicle and found **Corporal Wanjohi** who told him to go and sleep. However, when he checked the OB he realised that the said officer had falsified the facts since the officer was accompanied by the owner of the motor vehicle registration number KAP 017X, which had crushed into him and who was known to the said officer.

13. The next day, the Appellant went to see the Base Commander and explained to him what had taken place and **Corporal Wanjohi** was called but he had no sketch plan. According to the Appellant, he was not served with a Notice of intended prosecution and no one was charged for the accident. It was his belief that no file was opened. In his evidence, the road had no street lights though there was also moonlight and the headlights were on. The road was a straight sketch with nothing abstracting view and there were passer-by's, on both sides of the road one of whom was **Robinson Muia**, who took him to hospital after identifying his vehicle. According to him at the police station, he found the driver of motor vehicle KAP 017X which had seven passengers, 2 on the front with him and 5 on the back seat. He insisted that the accident did not occur on the left land facing Mutituni.

14. DW2, **Robinson Muia Lucas**, a driver plying Mutituni –Machakos route was on 26th January, 2014 at around 9pm driving his motor

vehicle registration no. KAV 124K a Maruti from Mutituni towards Machakos at about 40KPH. After dropping some ladies at Sweet Waters, another vehicle registration No. KAX 272V a G-touring Toyota passed him and as he was following the same, all of a sudden, another vehicle from Machakos registration number KAP 017X Toyota Saloon which was avoiding a huge pot holes knocked the G-touring. It was his evidence that the KAP had 8 passengers and though it was a saloon it was a commercial vehicle. He then took the driver of KAX who was known by one of my passengers to Machakos General Hospital. According to him, the G-touring was at a distance of 50 metres ahead. By then the police had not arrived. It was his evidence that the collision occurred on his lane on the left side as one faces Machakos.

15. In cross examination he stated that the area was well lit as the accident occurred at a place with three shops that had their security lights on and he had also beamed his lights. Both himself and the G-touring were doing 40Kph but he could not tell the speed at which the KAP was being driven. According to the witness, the KAP was in competition with them for passengers and he saw 8 passengers alight from the said vehicle with the driver being the 9th. I carried the driver of KAX to hospital. My passengers alighted.

16. DW3, **John Ngotho**, was on 26th January, 2014 at around 9pm from his friend`s place, Mwangaza Sweet waters and as the friend, **James Makau**, was bidding him goodbye, a saloon car from Town, KAP 017X Toyota Saloon – dark bluish and another, KAX 272V, Toyota G-Touring Wagon white in colour going towards town collided head-on before them. It was his evidence that the KAP driver was avoiding a pothole and swerved to his right thus causing the accident. After the accident, a maruti KAV offered to help and they took the driver of KAX to hospital in the Maruti. It was his evidence that the KAP was overloaded with 8 passengers, 5 at the back and 3 and driver in the front. He testified that he personally helped them out together with the maruti driver. However, none of the passengers in KAP was seriously injured. Before they left for the Hospital, there were no police.

17. In cross-examination, he confirmed that he was on the left side towards town. He explained that Mwangaza is a market with construction both sides of the road and that there is a shop called Mwangaza which gave the area the name. He was with many other people and there was a pothole on the right side of the road towards town, about 10 of metres from where he was standing, on the side from Machakos direction. The road had a street light at sweet waters. According to him, both vehicles were damaged. In his view, the driver of KAP was to blame since the vehicle was overloaded and he was speeding when he swerved to the right and was unable to control the vehicle. According to him, KAV, the maruti was behind the KAX and that the accident happened almost instantaneously with the Maruti joining the road.

18. On behalf of the 2nd Respondent, no evidence was adduced.

19. In his judgement, the learned trial magistrate found that though the 1st Respondent blamed the Appellant for the accident, the Appellant blamed the third party who did not call any evidence to rebut the Appellant's evidence. The Court however found that the Appellant did not state what action he took to avoid the accident. Since the 1st Respondent was a passenger, the court found that he had no control over the manner in which the two vehicles were being driven and hence could not have contributed to the occurrence of the accident. The court proceeded to hold the Appellant and the 3rd party liable for the accident in the ratio of 50:50%.

20. As regards the quantum, the court assessed general damages for pain and suffering in the sum of Kshs 120,000.00 and special damages in the sum of Kshs 2,230/= and awarded the costs of the suit to the 1st Respondent with interests.

21. Aggrieved by the said decision the appellant lodged this appeal citing the following grounds:

1) THAT, the Honourable trial Magistrate erred in Law and in fact by failing to consider the Appellant's evidence on record.

2) THAT, the learned trial Magistrate erred in law and in fact by considering irrelevant Principles in reaching in decisions.

3) THAT, the learned trial Magistrate erred in law and in fact by failing to consider relevant principles.

4) THAT, the learned trial Magistrate erred in law and in fact by failing to appreciate that the 3rd party did not tender any evidence.

5) THAT, the learned trial Magistrate erred in law and in fact by apportioning liability in the ratio of 50:50 between the Appellant and the 3rd Party.

6) THAT, the learned trial Magistrate erred in law and in fact in holding the Appellant 50% liable for the accident.

7) THAT, the learned trial Magistrate erred in Law and in fact by failing to consider that the 1st and 2nd Defendants referred to one and the same person (that is the Appellant herein) and thus holding that the 1st Defendant closed his case when he failed to secure the attendance of his witness.

8) THAT, the learned trial Magistrate erred in law and in fact by awarding general damages which were extra ordinary high in the circumstance.

22. In this appeal, it was submitted on behalf of the Appellant that the trial court seems to have ignored the testimony of the Appellant's witnesses which clearly showed that it was motor vehicle registration no. KAP 017X that caused the collision. Since the evidence was that the Appellant was on his correct lane, it was submitted that it was erroneous for the trial court to question what the Appellant did to avoid the accident. The 2nd Respondent having failed to call evidence, it was submitted that the court had no option but to hold the 2nd Respondent 100% liable.

23. As regards the award, it was submitted that since the evidence was that the 1st Respondent sustained a blunt injury on the right shoulder and the big toe, the award of Kshs 120,000/= was extremely high and was based on the application of wrong principles.

24. On behalf of the 1st Respondent, it was submitted that based on the evidence adduced by the 1st Respondent, the Appellant herein was solely to blame for causing the accident since the defence witnesses were inconsistent in their testimony. In support of the submissions the 1st Respondent relied on Section 42 (3) of the ***Traffic Act*** which provides that:-

> ***No person shall drive or being the owner of person in charge of a vehicle at speed exceeding 50 Km per hour or any road within the boundaries of any Trading Centre, Township, Municipality or City.***

25. It was submitted that DW 1 was clearly in contravention of Section 42 (3) of the ***Traffic Act*** in this case as he was driving at a speed of 60 – 80 Kph. According to the 1st Respondent, it is interesting to note that DW 1, DW 2 & DW 3 quoted that a total of 7, 9 & 8 passengers respectively were on board **M/v Reg. No. KAP 017 X** whereas PW 2 a Police Officer attached to Machakos Police Station Traffic Department testified that the only injuries emanating from the accident were only suffered by 4 people, 3 who were aboard M/v Reg. No. KAP 017 X and the Appellant herein who was the driver of M/v Reg. No. KAX 272 V. To the 1st Respondent, DW 2's averment that M/v Reg. No. KAP 017 X was competing for customers with him could not be true as they were both headed in opposite directions and further it was not possible for DW 2 to ascertain that DW 1 was driving at a speed of 40 Kph as he could not see DW 1's speedometer and had no radar device to ascertain at which speed DW 1 was driving. In addition, it would have been impossible for DW1 to see the occurrence of the said accident as his line of vision was obscured by M/v Reg. No. KAX 272 V.

26. The 1st Respondent therefore submitted that his account on what transpired is a true account of what happened on that day and urged this court to find the Appellant 100% liable.

27. On the issue of quantum, it was submitted that the 1st Respondent herein suffered injuries blunt injury right shoulder and injury to the right big toe. To the 1st Respondent, an award of Kshs 120,000/= by the court was a bit on the lower side in consideration of the injuries suffered by the 1st Respondent and contended that an award of Kshs 300,000/= would suffice based on **HCCA No. 16 of 2008 - Kiwanjani Hardware Ltd & Anor –vs- Nicholas Mule Mutinda** and **G4S Security Service (K) Ltd -vs- Jackline Nagome Barare HCCC No. 112, 113 & 114 of 2015**.

28. It was therefore submitted that this Appeal is not merited and should be dismissed with costs.

Determination

29. I have considered the foregoing. 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 from a trial by the High Court is by way of a retrial and the principles upon which 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."**

30. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented 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.

31. Before dealing with the merits of the appeal, it is important to deal with the liability of third parties in proceedings where they are joined. Order 1 rule 15 of the ***Civil Procedure Rules*** provides as hereunder:

> ***(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—***
>
> ***(a) that he is entitled to contribution or indemnity; or***
>
> ***(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or***
>
> ***(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.***

32. It therefore follows that a third party's liability is only in respect of ***contribution towards the defendant's liability or to indemnify*** the defendant for the amount that the Court finds due from the defendant to the Plaintiff. The second scenario is that the defendant has a claim against the third party for a relief or remedy relating to or connected with the subject-matter of the suit between the Plaintiff and the

defendant which is substantially the same as some relief or remedy claimed by the plaintiff. In other words, the Defendant claims that it also has a substantially similar claim against the third party as the claim the plaintiff makes against the defendant. In this instance it would be as if the defendant is making its claim against a defendant. The third scenario is where there is similar question to be decided in the plaintiff's claim against the defendant as in the claim by the defendant against the third party. It is clear that in all the three scenarios there is no question of the plaintiff making a claim against the third party. To the contrary the claim in the third party proceedings relates to the third party's liability to the defendant. In other words, there is no claim by the Plaintiff as against the Third Party. It was in this regard that it was held in **Commissioner for Transport vs. F O Boero [1954] 27 LRK 9** that third party procedure is a means for trial of questions between the defendant and the third party of liability of the third party to make contribution or indemnity and not for the joining of a third party as a co-defendant.

33. **Platt, J** in **Zanfra vs. Duncan & Another (1969) THCD 135** similarly held that a third party is not a defendant unless the plaintiff decides to make him one and he is not concerned with the claim but with the contribution to the defendant. Therefore, as was held by **Birech, Commissioner of Assize** in **George O. Obondo vs. Matiko Agoy Akedi Kisumu HCCC No. 306 of 1995**, the action between a defendant and a third party being one based on contribution and indemnity the cause of action accrues when the judgement is given against the defendant or when he pays the amount admitted in discharge of his liability. What this means is that the liability of the third is conditional upon the finding of liability by the defendant to the plaintiff so that if the plaintiff's suit fails, no issue arises with respect to the third party's liability to the defendant. In other words, third party proceedings are not the same as a claim against a co-defendant or a counterclaim against another party.

34. In this case however, the court found both the Appellant (who was the defendant) and the 2nd Respondent (who was the third party) liable to the 1st Respondent (the Plaintiff) in the ratio of 50:50. With due respect that finding was erroneous. The Court ought to have made a specific finding as to whether the Appellant was liable to compensate the Plaintiff and then proceeded to make a finding as to whether the 2nd Respondent ought to indemnify the Appellant or contribute towards the Appellant's liability. As no challenge to the decision has been taken by the 2nd Respondent, I will say no more on the issue.

35. In this case, it is clear from the judgement that the basis upon which the Learned Trial Magistrate found the Appellant liable was because the Appellant did not state what action he took to avoid the accident. The question that arises is whether this Court ought to interfere with this finding of fact.

36. 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 a 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 courts 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, an 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 from 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 judgement 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 shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

37. Nevertheless, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

38. In this case this court is being called upon to interfere with the trial court's apportionment of liability. In **Khambi and Another vs. Mahithi and Another [1968] EA 70**, it was held that:

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

substitute its own apportionment for that made by the trial Judge."

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

40. According to **Zarina Akbarali Shariff and Another vs. Noshir Pirosesha Sethna and Others [1963] EA 239:**

> **"The findings of a trial Judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances."**

41. Similarly, in **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434** it was held that an apportionment of liability made by a trial Court will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous.

42. The question that arises is whether based on the evidence before the court, the trial court could properly arrive at the decision he did. From the evidence of the Appellant, he was driving at a speed of between 60-80Kph at the time he saw the on-coming vehicle which upon noticing a pothole on his lane swerved to the right hitting his vehicle head on. According to the Appellant, he was not anticipating the driver would swerve towards him so he could not apply brakes and by the time he did so he had already been hit. It is therefore clear that the Appellant did not take any action whatsoever to avoid colliding with the said vehicle. In **Zarina Akbarali Shariff and Another vs. Noshir Pirosesha Sethna and Others [1963] EA 239**, it was held that:

> **"A driver on the main road...is bound to exercise the right of being on the main road in a reasonable way. He has to watch and conform to the movement of other traffic which is in the offing, and he must take due care to avoid collision with it. The answer as to whether the court is entitled to think that the driver, despite his *prima facie* right of way, should surrender that right in anticipation of possible failure on the part of the driver on the side road to note the safe course, must turn on the conduct of the driver on the side road and on the opportunities which the driver on the main road has of observing it. There must be something in the conduct of the driver on the side road which the driver on the main road ought to have seen and which would have certiorated him, had he been taking proper care, that the driver on the side road was not going to pass behind but was going to try to pass in front of the driver on the main road. There is no doubt that anyone driving on the main road is entitled to keep his proper place on the road, and to do so in reliance on the side traffic heaving itself as the rules of the road desires, until it may be the very last moment observation of a gross infringement by others calls for a special attempt to deal with it…If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions…A driver is never entitled to assume that people will not do what experience and common sense teach him that they are, in fact, likely to do…It is not correct that drivers are entitled to drive on the assumption that other road users whether drivers or pedestrians, would behave with reasonable care. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all forms, but he is not entitled to put out of consideration the teachings of experience as to the form those follies commonly take…He cannot be expected to cope with every form of recklessness or outrageous conduct on the part of other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper look-out, would leave him able to take reasonable avoiding action if the need became apparent. What is reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper lookout, that could be negligence contributing to an accident…This does not mean that the driver on the major road can disregard the existence of the cross-roads: it is his duty to keep a proper look-out of all the vehicles or pedestrians who are using or may come upon the road from any direction and if he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be."**

43. Similarly, in **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434** it was held 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 than will permit his course at any time to avoid anything he sees after he has seen it…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 tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct…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."**

44. According to **Aganyanya, J** (as he then was) in **Merali & 2 Others vs. Pattani [1986] KLR 735:**

> **"That one is driving on major road does not mean that she is entitled to ignore traffic approaching the junction from the minor road and assume, which the plaintiff here did, that such traffic would always conform to the "yield" sign…The plaintiff was thus negligent in failing to slow down. The possibility of danger emerging at that junction on either side of the minor road was reasonably apparent in view of the fact that visibility was obstructed by high hedges and it was incumbent upon the plaintiff to take extra precautions. This was not a case where the plaintiff should have taken that it was a mere**

possibility that danger would emerge, which would never occur to the mind of a reasonable man…Anyone driving on a major road is entitled to go on that road in a proper position and is entitled to keep his proper place on that road and to do so in reliance on side road traffic behaving himself as the rules of the road desires until it may be at the very last moment some observations of a gross – infringement by other calls for special attempt to deal with it. The driver on a major road as the plaintiff was is not expected, say, to slow down to a pace of 15 miles an hour in broad daylight, when approaching a side road or otherwise share the blame for any collision, which may occur. But here the plaintiff omitted to take due care for the safety of the defendant and as a prudent driver, she ought to have guarded against possible negligence of drivers on the minor road, defendant included, as experience shows negligence to be common…Though therefore the defendant was mainly to blame for the accident and ought to compensate the plaintiff therefor; the plaintiff contributed in some measure to it and her contributory negligence put at 30%."

45. According to the decision in **Mwanza vs. Matheka [1982] KLR 258:**

"Speed Itself is not necessarily negligence. But it is probable that the driver of the bus took no action at all, according to the evidence, to avoid this violent meeting. He did not ease further to his near side or slow down. He was not, of course, required to steer his bus with its passengers over to his near side straight into the culvert. He must have seen the tanker approaching long enough to rule out any decision having to be made in the agony of the moment…On the evidence, the plaintiffs have proved the defendants were negligent, but it is not possible to apportion the blame and so the defendants are equally to blame."

46. What comes out from the said decisions is that there is no hard and fast rule when it comes to apportionment of liability where one driver is *prima facie* on the right. In other words, a driver on the road must always keep at the back of his mind that some road users are likely to be negligent give allowance for that and ought not to adopt an attitude that as long as he is driving properly on the road, he ought not to take action which a reasonable driver is expected to take when there appears to a possibility of danger posed by other roadusers. If he fails to do so, he could be liable in negligence if not wholly to a certain extent.

47. In this case, according to the Appellant the 2nd Respondent was attempting to avoid a pothole when he swerved onto the Appellant's lane. Other witnesses stated that it was in fact the Appellant who on coming upon the maruti vehicle which was partly on the road, came onto the 2nd Respondent's lane hence the collision. Either way, there was no evidence that the Appellant took any action to either avoid the accident or minimise the impact of the collision. He therefore cannot completely avoid liability. The learned trial magistrate found him 50% liable.

48. In light of the conflicting evidence on record as regards the manner in which the accident occurred, there is no basis upon which I can find that that apportionment of liability was clearly wrong, or based on no evidence or on the application of a wrong principle or that it was manifestly erroneous. As was held by **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. Everyday, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not 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, in its judgement, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising 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."

49. Similarly, in **Lakhamshi vs. Attorney-General [1971 EA 118** 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, of negligence. In many cases, as for example, where vehicles collide near the middle of a 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."

50. As regards the award of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of

damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

51. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

52. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held 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..."**

53. In his submissions the Appellant did lay any basis to justify a finding that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. 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."**

54. On my part I have considered the award and even if I was to find that sitting as the trial court, I would have awarded a different figure, that per se is not a justification for interfering with the award.

55. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

56. As was held in **Mariga vs. Musila (1984) KLR 251:**

> **"The assessment of damages is more like an exercise of discretion and the appellate court is slow to reverse a lower court's decision on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for this or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles."**

57. Having considered the authorities relied upon, it is my finding that there is no basis for interfering with the award.

58. In the premises, this appeal fails and is dismissed with costs.

59. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 24th November, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Mulandi for Mrs Thoronjo for the Respondent

Appellant present in person

CA Geoffrey