



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVL APPEAL NO. 21 OF 2012

PATRICK NGULUL.....APPELLANT

VERSUS

MUTIE MUTUNE.....RESPONDENT

AND

PRIMAROSA FLOWERS LIMITED.....THIRD PARTY

(Being an appeal from the judgment and decree of the Chief Magistrate's Court

at Machakos Hon. S. M. Mungai, CM delivered on the 17th February, 2012

in Machakos CMCC No. 692 of 2009)

BETWEEN

MUTIE MUTUNE..... PLAINTIFF

-VERSUS-

PATRICK NGULUL..... DEFENDANT

AND

PRIMAROSA FLOWERS LIMITED.....THIRD PARTY

JUDGEMENT

1. The respondent herein was the plaintiff before the magistrate's court in Machakos CMCC No. 692 of 2009 in which he sued the appellant herein seeking general damages for pain, suffering and loss of amenities., special damages in the sum of Kshs 7,700/-. Costs and interests.

2. According to the plaint, the appellant was the registered owner of motor vehicle registration no. KAY 830R at the material time. On or about 1st January, 2009 at about 8.45 am the respondent was lawfully travelling in motor vehicle registration no. KAZ 108G along Mombasa Road near Devki Steel Mills when the appellant, his servant and/or agent so negligently drove, managed and/or controlled motor vehicle reg. no. KAY 830R and caused it to lose control and hit motor vehicle registration no. KAZ 108G in which the respondent was travelling. As a result, the respondent sustained serious bodily injuries and suffered loss and damage. He proceeded to plead the particulars of negligence, injuries and special damages.

3. PW1, **Dr Titus Ndeti**, confirmed that he examined the respondent on 1st March, 2009 and in his opinion the respondent sustained bruises on the forehead, blunt injury to the chest with bruises and bruise on the left leg. . He was treated at Athi River Medical Services and

discharged. At the time of his examination the respondent complained of head ache and chest pain and had scars on the forehead and front part of his chest. The doctor's opinion was that the respondent suffered soft tissue injuries which caused him pain, the bruises had healed with scars and the pain was expected to subside with the use of pain killers.

4. PW2, **PC Peter Mwangi**, was one of the officers who rushed to the scene of the accident where they found officers from the Highway Patrol. At the scene they found a bus KAZ 108G, Tata which was transporting workers to Prima Rosa Flower Plantation heading from Nairobi towards Mombasa direction. A motor vehicle KAU 830R Toyota Vista, coming from the opposite direction rammed on the front side of the bus and the bus landed on the left side of the road facing Mombasa direction off the road while the Toyota which had overturned due to the impact, stopped in the middle of the road facing Mombasa direction. They then took photographs and measurements at the scene and recorded statements from members of the public after which he proceeded to Mutongoni Hospital where the victims had been taken and recorded their names. One of them, a passenger in the salon car, however succumbed while undergoing treatment. It was his evidence that the two vehicle were upon inspection found not to have had pre-accident defects though the blame was placed on the saloon car because it left its lane where overtaking was barred and went on to hit the bus. He confirmed that one of the victims was the respondent herein. According to PW2, by the time of his testimony, the driver of the saloon had not yet been charged since he was seriously injured though the recommendation was that he be charged. He was yet to be traced since he vacated his house after being served with the Notice of Intended Prosecution.

5. The respondent herein testified as PW3. According to him, on 1st January, 2009 he was heading to work in a bus, KAZ 108G, belonging to Prima Rosa Flowers at 7.30 am along Nairobi Mombasa Road when near Devki the said bus collided with a saloon car, KAU 830R. When he alighted from the vehicle he found the saloon on the lane belonging to the bus and that the saloon had hit the bus on the front side. In his view the saloon was to blame for the accident. He sustained injuries to the left leg, chest and back of the head and was treated and discharged at Mutunoni or Athi River Medical Services. After that he continued with treatment at Kajiado and though he had recovered he still had chest and head pains and was unable to do heavy work. He produced the treatment documents as well as the copy of the search certificate of the saloon vehicle.

6. PW4, **Felister Mala Mutiso**, was on the same day working for Prima Rosa Flowers Ltd. She was also in the said bus. Along Mombasa Road, she heard a bang and she was thrown on the right side. When the bus stopped she alighted and saw a saloon KAU 830R which had collided with the bus. According to her the saloon was from the opposite direction. She also blamed the saloon for leaving its lane and veering off to the bus's lane. She confirmed that the respondent who was her colleague was in the bus and that people got injured.

7. At the close of the respondent's case, the appellant testified as DW1. According to him, on 1st January, 2009, he was driving motor vehicle reg. no. KAU 830R Toyota Vista with his wife and other passengers when they were knocked by a bus belonging to Prima Rosa Flowers near Devki. According to him, there was a stage on the left side as one heads towards Nairobi and therein was a *matatu*. According to him, a lorry from Nairobi came and stopped suddenly and behind the lorry was a bus which swerved to his lane while ramming into the lorry knocking his vehicle on its lane. As a result, the vehicle turned round and he was injured fracturing both his hands and right leg. According to him, his brother passed on in the accident after which he was taken for treatment. After he was discharged police officers went and informed him that he was to blame but never returned. He denied that he was to blame for the accident and prayed that the case be dismissed. In cross-examination he admitted that he had neither recorded his statement nor sued the bus.

8. **Winfred Mbula Nzioka**, DW2, was travelling with her husband, the appellant on the said day in KAY 830R when they came across a stationary lorry. A Prima Rosa bus, KAZ 108G, then appeared from behind the bus hooting and collided with their car which was being driven on the left side as one heads towards Nairobi. After the accident, a police officer visited their house and informed the appellant, that it was the appellant who was to blame for the accident. According to PW2, the appellant was not to blame for the accident. In cross-examination, she stated that the two vehicles collided head-on.

9. DW3, **Samwel Kunto Mueti**, a *bodaboda* taxi operator, was on 1st January, 2009 at Devki Stage where he had dropped a passenger. As there were many vehicles, he stooped to cross the road when he heard a motor vehicle belonging to Prima Rosa hooting. According to him there was a lorry near the stage and its driver was buying cigarettes. The said bus collided with a salon car which was on the left side heading towards Nairobi and the car was extensively damaged. In his view, the bus driver was to blame for the accident as he ought to have allowed the lorry to move instead of overtaking the lorry and going onto the salon car's lane. In cross-examination he however stated that the vehicle which hooted was the salon. He however did not take the registration number of the lorry which drove off the accident.

10. In his judgement, the learned trial magistrate found that the sketch plans and legends which were produced by PW2 depicted the position of the vehicles after the accident and suggested a possible point of impact which was on the left hand as one heads towards Mombasa which tallied with the respondent's evidence. It was his finding that the sketch plans strongly indicated that both vehicles were at high speed considering the effect of the impact. He therefore found that the realistic and reasonable version as to how the accident occurred was the one presented by the plaintiff. He therefore proceeded to find the appellant 100% liable and based on various authorities he awarded the respondent Kshs 100,000.00 as compensation for general damages and Kshs 7,500.00 as special damages with costs and interests.

11. Aggrieved by the said judgement, the appellant appeals to this court citing the following grounds:

- 1) That the learned trial magistrate erred in law and in fact in awarding the plaintiff damages that were manifestly excessive.
- 2) That the learned trial magistrate erred in law and in fact in holding the appellant 100% liable.
- 3) That the learned trial magistrate erred in law and in fact in not holding the third party liable for the accident.
- 4) That the learned trial magistrate erred in law and in fact in disregarding the submissions of the appellant on both liability and quantum.

5) That the learned trial magistrate erred in law and in fact in arriving at a conclusion which was not based on evidence but speculation.

6) That the learned trial magistrate erred in law and in fact in awarding special damages which were not proved.

12. It was submitted on behalf of the appellant that from the evidence adduced by PW2, PW3 and PW4 it is clear that it was Motor Vehicle Registration Number KAU 830R which was involved in the alleged accident and NOT KAY 830R as pleaded in the plaint. Based on section 107 of the *Evidence Act* it was submitted that the respondent failed to prove the averments of paragraph 3 and 4 of the plaint that vehicle KAY 830R caused the accident and instead adduced contrary evidence that Motor Vehicle registration number KAU 830R Toyota Saloon is the one which allegedly caused the accident. In this regard the appellant relied on Eastern Produce (K) Ltd –vs- Joseph Lemiso Osuku (Eld.HCCA No 21 of 2004) in which the court held:-

“It cannot be gain said that it was for the respondent to prove his claim as contained in his pleadings for it is trite law that the burden of proof falls upon he who alleges. It is trite law that parties are bound by their pleadings.”

13. It was submitted that whereas PW2, **Peter Mwangi**, visited the scene of the accident, he did not witness the accident. PW3 and PW4 were passengers in Motor Vehicle Registration number KAZ 108G. The respondent did not call the driver of KAZ 108G to testify on how the accident occurred. On the other hand, the defence witnesses narrated how the accident occurred which was corroborated. In this respect the appellant relied on Peter Ndungu –vs- Apricot Apple Promotions Systems & Ano. (Nrb.HCCC No 1424 of 2001) where the court considered the evidence of the independent witness and apportioned liability equally and further held that the evidence contained in the police file was yet to be tested on oath and that both explanations by the parties may be true. It was submitted that the trial court failed to consider the evidence of the eye witness who had recorded his statement with the police otherwise had the trial court taken the evidence of DW3 then it ought to have dismissed the suit.

14. It was further submitted that the court erred in law and in fact in failing to frame issues and give reasons and or decisions contrary to Order 21 Rules 5 (previously order 20 Rule 4) of the *Civil Procedure Rules* which requires that judgments in defended suits do contain a concise statement of the case, the points for determination, the decision thereto and the reasons for such decision. In this regard the appellant relied on Shalimar Flowers Ltd vs. Noah Muniago Matianyi (Nkru HCCA No. 175 of 2008) where the court held that the magistrate failed to summarise the case for both the plaintiff and the defendant, it did not analyse the evidence before making his determination and the reasoning thereof and make judgment. It was contended that had the trial court framed issues for determination then the court should have found and held that motor vehicle registration number KAY 830 R was not involved in the accident and never caused the accident. It was reiterated that the evidence on record is that motor vehicle registration number KAU 830R is the one which was involved in the accident yet the said vehicle is not owned by the appellant.

15. It was further submitted that the trial court erred in not taking into account the submissions as filed by the appellant, the defence of sole and or contributory negligence and the evidence as a whole as adduced by the appellant and his witnesses. The court totally disregarded the evidence of the eye witness and failed to give reasons as to why it disregarded the same. Reliance was placed on Simon Kamau –vs- Michael Waweru (Nrb. HCCC NO 1864 of 1991) in which the court held that:-

“When the defence raises the plea of contributory negligence the plaintiff must file a reply to the defence to rebut the pleading otherwise it will be deemed admitted.”

16. It was submitted that the defence raises sole and or contributory negligence of the plaintiff and or of motor vehicle registration number KAZ 108G yet contrary to Order 7 rule 17 of the *Civil Procedure Rules* the 1st respondent failed to file a reply to the defence and should thus be held liable. The appellant relied on Benedict Mwazighe –vs- Bandari Transporters Ltd & Ano. (MBS.C.A.C.A No 284 of 2000) in which the court held as below:-

“The plaintiff did not, as required him by order VIII rule 17 of the civil Procedure Rules, file a reply to the defence which had alleged negligence on his part. There are some particulars of negligence in the defence which by their nature required to be traversed specifically by the plaintiff. The plaintiff had been alleged to have cut across the path of the defendant’s vehicle suddenly and unexpectedly and had also attempted to enter port Reitz through the wrong half of the road...Apart from the plaintiff no further evidence was called to throw more light on the issue of negligence. The plaintiff did not deny the particulars of negligence attributed to him by the defendant and no reply to the said defence was either filed. Further, the plaintiff chose not to say anything about the intention by the police to prefer charges against him. One the particulars of negligence attributed to the plaintiff is that he attempted to drive across the defendant’s path of travel suddenly and without notice having emerged from behind a bus with the intention for turning into Port Reitz Road. I find it difficult to accept the plaintiff’s version that the defendant was wholly to blame for the accident and especially so because he has not in my view proved any fact of negligence attributed to the defendant.”

17. It was submitted that the aforesaid passage from the judgment of the Honourable commissioner of Assize, in our view sums up what the plaintiff was expected to have done to prove the case. The plaintiff did not even attempt at the trial to dispute the defendant’s version of the cause of the accident which had attributed negligence to him. In our judgment, to require the plaintiff to displace the allegation of negligence made against him in the defence, is not the same thing as requiring him to prove his case beyond reasonable doubt as is required of the prosecution in a criminal trial. It is simply that the plaintiff has not proved his case to the required standard on a balance of probability.

18. According to the appellant, it was wrong for the trial court to have concluded and without evidence that had the bus collided head-on with the car on the car’s left lane as contended by the defendant and his witnesses then the bus would have run over the car or throw it off the road to the right side as one faces Mombasa direction yet the evidence of DW1 is not to the effect that the alleged accident was a head-on collision. PW1 and PW3 testified that the car hit the bus on the front side. It was submitted that the court having found that both vehicles were on a high speed should have found both of them liable. This court was therefore urged to find that the trial court erred in holding the

appellant liable when the evidence on record showed that it was vehicle Registration number KAU 830R which caused the accident.

19. As regards the quantum, it was submitted that the court erred in over-stating the injuries sustained by the respondent and proceeded to award damages which were not commensurate with the injuries. The court ought to have taken into account the medical reports which were before it than proceed to award damages which were high. To the appellant, an award of Ksh50,000.00 as submitted in the lower court would have been fair and reasonable. But since the plaintiff failed to prove liability, it was submitted the appeal be allowed and the award on quantum be set aside.

20. On the other hand, according to the respondent the evidence before the trial Court was that the driver of the saloon car KAY 830R lost control of his vehicle, veered off into their lane and rammmed into the bus in which the Respondent was a passenger. Not only did the respondent see the said saloon car veer off into their lane but also following the collision both vehicles stopped and when they came out of their bus they found that the saloon car was on their side of the road facing the general direction of Machakos when it was supposed to be facing the general direction of Nairobi. This, it was submitted was a clear indication that the saloon car had encroached to the side of the road which was legally meant for the bus. It was contended that the Respondent's evidence was extensively corroborated by the evidence of PW2, **P. C. Mwangi**, who by that time was attached to Athi River Police Station which investigated this accident and was further supported by the evidence of PW4, **Felista Nzula Mutiso**, who was also a passenger in motor vehicle Registration Number KAZ 108 G at the time of this accident. Both witnesses confirmed that the saloon car owned and driven by the Appellant grossly encroached on to the side of the bus and as a result caused this accident.

21. After carrying out a thorough investigation, taking measurements at the scene of the accident and assessing the accident and gathering information from members of the public, PW2 came to final conclusion that the driver of the saloon car Registration Number KAY 830 R was to blame for the accident and motor vehicle Registration Number KAZ 108G in no way contributed to the accident. He produced in evidence sketch plan and measurements they took at the scene of accident showing clearly that the saloon car Registration Number KAY 830 R had encroached to the side of the bus Registration Number KAZ 108 G and that is what caused the accident. The police having established that the Appellant was to blame for the accident went to the Appellant's home and issued him with a notice of intended prosecution.

22. It was submitted that contrary to the Appellant's submissions, both the Respondent's and his witnesses' evidence before the trial court were in reference to the accident being caused by motor vehicle Registration KAY 830R and NOT Registration Number KAU 830R. Though the said vehicle is referenced as KAU 830R in the typed court proceedings the same is referring to KAY 830R and at best must be the case of a writing error by the Magistrate or a typographical error by the court typist. This is clearly evidenced by the fact that the Police abstract and Search certificates produced in Court all indicate the motor vehicle as KAY 830R and its owner as the Appellant herein. Further, both counsel for the Appellant and Respondent in their written submissions before the trial court solely addressed themselves with regard to motor vehicle KAY 830R with no reference at all to a motor vehicle Registration Number KAU 830R. Moreover, nowhere in the Appellant's and his witnesses evidence before the trial court did they deny being involved in an accident with the motor vehicle Registration KAZ 108G nor make any reference regarding a motor vehicle Registration Number KAU 830R. Consequently, the court was urged to disregard the ludicrous averments by the Appellant concerning the same and hold the vehicle in reference to be motor vehicle Registration Number KAY 830R.

23. In the respondent's view, the Appellant's averments on the manner of occurrence of this accident being that vehicle KAZ 108G had swerved to the lane of the Appellant whilst avoiding to hit a lorry that had stopped suddenly were not supported by any evidence in Court save for their word of mouth.

24. As regards the evidence of DW3, it was submitted that firstly, DW3, **Mr. Samuel Kyalo Muteti**, never adduced any evidence to prove to court that he was a *boda boda* operator at the place where the accident occurred nor to establish how he came to connect with the Appellant herein. Secondly, though he alleged to have written a statement at the police station concerning the accident he did not produce a certified copy of the alleged statement as evidence in this Court. Consequently, in the absence of production of the abovementioned documentary evidence, it was submitted that DW3's evidence does not hold and cannot be relied on especially in his claim of being an eye witness to this accident.

25. In view of the foregoing, it was submitted that this Court should uphold the Lower Court's decision to enter judgement holding the Appellant herein 100% liable for this accident.

26. Regarding the quantum, it was submitted that it is agreed generally and as such a sound legal reasoning that no two victims of an accident will sustain identical injuries and as such the court will assess damages based on authorities with injuries that are almost similar. As for the principles when an appellate court interferes with an award of damages, the respondent relied on **Henry H. Ilanga vs. M. Manyoka (1961) EA at pg. 713**.

27. The respondent also cited **Jane Njoki Muraya and Another vs. Alice W. Kimani And Another HCCC No. 2886 of 1995** in which **Shaikh M. Amin, J** awarded Kshs. 150,000/= general damages for pain, suffering and loss of amenities to the 1st Plaintiff for soft tissue injuries to the left shoulder, left anterior chest wall and the left hip. In view of the above cited authorities which are quite old and taking into account that the issue of inflation, it was submitted that the Lower Court's assessment and award of quantum in this case was not inordinately high whereas the Appellant's proposal is inordinately low in the circumstances.

28. In the premises, this court was urged to dismiss with costs to the Respondent.

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. 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 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 circumstance 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 to 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."

32. 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."

33. In this case, it is clear that the issue to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved his case. 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 dependent on the existence of facts which he asserts must prove that those facts exist.

34. 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 that 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 that fact is upon him.

35. 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 cast 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."

36. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the

respondents in this case depending on the circumstances of the case.

37. In this case, the appellant was clearly a passenger in motor vehicle registration no. KAZ 108G. Although the appellant has raised the issue of contributory negligence and the failure on the part of the respondent to respond to the same, being a passenger, it is difficult to see how the respondent could have contributed to the accident notwithstanding the failure on his part to respond to the said allegations. It was therefore held by **Koome, J** (as she then was) in **Robert Joseph Bandu vs. Falcon Coaches Ltd & Another Nakuru HCCC No. 204 of 2005** that since the plaintiff was a mere passenger, there is no likelihood of his contribution to the occurrence of the accident.

38. In this case even if the driver of KAZ 108G was negligent, that negligence cannot be attributed to the passengers therein. This was the position adopted by **Trvelyan, J** in **Gian Singh Panesar and Others vs. Lochab and Another [1966] EA 401** where he held that:

“...this finding only affects the first plaintiff, who was the driver, for the passengers in the car were not identified with the driver’s negligence. In such circumstances it is no defence for the defendants to prove that someone else contributed to the accident.”

39. It was submitted that since the learned trial magistrate found that both vehicles were speeding, there ought to have been an apportionment of liability. However, as was held by **Mwera, J** as he then was in **Peter Kinyanjui Mburu vs. Geoffrey Kinyua Muchoya Nairobi HCCC No. 1400 of 1992**, the mere fact that the driver was speeding but speeding is not the cause of the accident no negligence can be said to have been proved. Similarly, **Aganyanya, J** (as he then was) in **James Wangugi Kigo vs. Waithaka Kahara Nairobi HCCC No. 598 of 1991**, held that driving at high speed *per se* does not constitute negligence, as it must be coupled with other factors. It follows that speeding alone by the two vehicles cannot be a basis for apportioning liability.

40. There was the issue of discrepancy in the registration number of the vehicle that was being driven by the appellant. It is however clear that both parties were clearly aware of the particulars of the vehicle involved. The law as I understand it is that parties are bound by their pleadings despite evidence. In this case the particulars of the said vehicle were clearly pleaded and there is no question of any party having been misled. Section 79A of the ***Civil Procedure Act*** provides that:

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

41. In this case, there was evidence from the police that based on the sketch plans and legends that the appellant was to blame for the accident. The said documents were duly produced as exhibits before the trial court. In my view the said court was entitled to rely on them, and therefore there is no basis upon which this court can fault that finding.

42. As regards the quantum, 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.”

43. 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...”

44. 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.”

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

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

47. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 23rd September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Wambua for Mr Kojwando for the Respondent

CA Geoffrey