REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 8 OF 2017

EDWARD WASAMBA ONYANGO

(Suing as the next friend of a minor COW....................APPELLANT

VERSUS

THE CHAIRMAN BOARD OF GOVERNORS-AGORO

YOMBE SECONDARY SCHOOL.............................RESPONDENT

(Appeal arising from the judgment and decree in Bondo PM's Court Civil Suit No 109 of 2015

delivered on 20th April 2017 by Hon E.N.Wasike SRM)

JUDGMENT

1. This appeal herein is premised on the judgment of the learned trial magistrate Mr. E. N. Wasike in the Principal Magistrate's Court at Bondo in Civil Suit No. 109 of 2015 delivered on 20th April, 2017.

2. The genesis of the case is that vide a plaint dated the 26/8/2015 and a subsequent Amended Plaint dated 15/6/2016 filed by **EDWARD WASAMBA ONYANGO (Suing as the next friend of a minor COW)** (*hereinafter referred to as* ***the Appellant***) as against **THE CHAIRMAN OF GOVERNORS- AGORO YOMBE SECONDARY School- and THE SECRETARY BOARD OF GOVERNORS - AGORO YOMBE SECONDARY SCHOOL** (*hereinafter referred to as* ***the Respondents***).

3. The Appellant, the then Plaintiff, had prayed for the following orders:-

a) General damages for pain, suffering and loss of amenities.

b) Costs of the suit.

c) Interest on a) and b) above.

4. The relevant antecedent facts in this Appeal are discernible from the record and as summarized herein below.

5. The Appellant being aggrieved and dissatisfied with the judgment and decree of the Principal Magistrate's Court at Bondo in Civil Suit No. 109 of 2015 delivered on 20th April, 2017 through its advocates filed Civil Appeal Nos. 8 of 2017 on the following grounds; -

1. The learned magistrate misdirected himself in failing to make a finding against the Defendants.

2. The learned magistrate erred in law and in fact by failing to appreciate the evidence tendered with regard to the liability of the Respondents.

3. The learned trial magistrate misdirected himself in totally disregarding the evidence by the appellant and the evidence on record on the issue of negligence against the respondents.

4. The learned trial magistrate erred by failing to appreciate that the plaintiff had proved his case on a balance of probabilities

which was uncontroverted by the Defendant.

6. In the said judgment, the learned magistrate entered judgment in respect of liability by stating that from the evidence on record, the plaintiff never witnessed the accident and it is trite law that the burden of proof of any fact or allegation is on the plaintiff and therefore the Plaintiff must establish a causal link between someone's negligence and the injury. That the plaintiff must adduce in evidence from which on a balance of probability, a connection between the two may be drawn and that unfortunately, the Plaintiff failed to establish the Defendant's negligence. The court added that the case was one where the Plaintiff failed to avail any eye witness and so it could not make decisions based on presumptions and in the end, held that the evidence on record fell short of holding the Defendant liable and therefore found the Defendant not liable.

7. On quantum in regard to General Damages, the court observed that the minor suffered injuries as a result of the alleged accident and was even admitted in Hospital. It further found that the available evidence showed that the plaintiff minor suffered fracture on the right mid- shaft femur with tibio fibular fracture hence it was quite evident that the injuries were serious and basing on their nature and also being guided by the relevant authorities, he would award the Plaintiff a sum of Kshs. 800,000 as general damages for pain, suffering and loss of amenities, had the plaintiff appellant proved liability against the Respondent Defendant.

8. Special damages were not awarded for reasons that the Plaintiff did not plead them as required by law, and in conclusion the court observed that since the court did not find the Defendants liable, it thus dismissed the suit with each party to bear their own costs.

SUMMARY OF THE CASE

9. The core of the matter is that the Plaintiff suing as the next friend of a minor COW through his advocate in the lower court cases filed ***suit no. 109 of 2015*** on 15/6/2016 against the Defendant therein seeking compensation in the form of general damages for pain and suffering, costs of the suit and interest.

10. It was alleged in the pleadings that on the 14/ 12/ 2014 COW was knocked by motor vehicle Reg. No. KBQ 462 D ISUZU BUS which was so negligently driven by the defendant or persons authorized by the defendant thereby causing the child to sustain severe bodily injuries.

11. The listed particulars of negligence on the part of the Defendant now Respondent were as follows:

i. Driving the said motor vehicle at an excessive speed in the circumstances.

ii. Driving carelessly and recklessly.

iii. Driving without due regard and care to the nature of the road.

iv. Failing to swerve, stop, brake, hoot, slow down and/or in any other way manage motor Vehicle Registration No. KBQ 462 D so as to avoid knocking the Plaintiff.

v. Allowing a defective motor vehicle on the road.

vi. Driving the said motor vehicle negligently and without due regard to the safety of other road users of the said road.

It was alleged that as a result of the above stated acts of negligence on the aprt of the defendant, its driver and agent, the minor was seriously injured in the following areas:

a. Fracture of the right mid shaft femur with tibia fibular fracture

b. Facial injuries with bruises

c. the defendant filed a defence denying all particulars of the claim against it and pleading contributory negligence on the part of the plaintiff minor.

12. The defendant filed a defence on 14th October 2015 denying the plaintiff's claim in toto and contending that the accident if any was occasioned by the sole negligence or contributory negligence of the minor plaintiff.

13. Particulars of contributory negligence were particularized as follows:

i. Walking aimlessly in the middle of the road

ii. Failing to take due care and attention of own safety

iii. attempting to cross the road at undesignated points

iv. Walking on the road while obviously intoxicated

v. Causing the said accident

vi. Failing to heed the incurrent(sic) hooting by the driver of motor vehicle registration number KBQ 462D Isuzu Bus.

14. This being the first Appellate Court there is need to give a fresh look at the evidence adduced before the lower court bearing in mind that I had no benefit of having seen or hearing the witnesses as they testified. This is the principle espoused in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court of Appeal stated** the following with regard to the duty of a first appellate court:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held,*** *inter alia****, that:-***
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> ***"On a first appeal from the High Court, the Court of***
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> ***Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

15. In **Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] Eklr** the Court of Appeal stated as follows of the role of the first appellate court:

> ***"……The above is also true for the High Court sitting on a first appeal. The learned Judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered."***

16. Examining the trial record, PW1 Edward Wasamba Onyango in his Witness Statement filed in court on the 27/8/2015 alongside the Plaint and which statement was adopted as his evidence in chief stated that on 14/12/2014, he received a call from his worker Mr. Okumu at around 11.00 am telling him that his grandson CO aged about 3-4 years had been involved in an accident along Bondo-Misori road at corner Kawak. Further, that he went straight to Madiany Hospital where the child had been taken and found the driver of the vehicle that had taken the grandson to hospital. He added further that the child was given first aid and transferred to Jaramogi Oginga Odinga Hospital where the child was admitted with a report of a fractured mid shaft femur with tibia fibular/ fracture and he stayed in hospital for 12 weeks and that he later learnt that the bus that knocked him belonged to Agoro Oyombe Secondary School. The Bus registration Number was given as KBQ 462 D. He stated that the plaintiff minor could not walk properly.

17. In cross examination he stated that he did not witness the accident.

18. The plaintiff produced as exhibits the hospital discharge summary, exemption application form, Xray treatment form, P3 Form Police Abstract, Medical report, Statutory Notice. He blamed the driver of the suit motor vehicle for the accident.

19. The Defendants filed their Defence dated 7/10/2015 and a subsequent Amended Statement of Defence dated 20/6/2016 denying the contents of the Plaint and stated at paragraph 10 of the same that if an accident occurred, then the same was due to the sole and/or contributory negligence of the Plaintiff, and they listed the particulars of contributory negligence as follows:

a. Walking aimlessly in the middle of the road.

b. Failing to take due care and attention for own safety.

c. Attempting to cross the road at undesignated points.

d. Walking on the road while obviously intoxicated.

e. Causing the said accident.

f. Failing to heed to the incurrent hooting by the driver of motor vehicle registration number KBQ 462 D Isuzu Bus.

20. The Plaintiff thereafter also filed a Reply to Defence dated 10/12/2015 reiterating the contents in the Plaint and adding that there was no contributory negligence on the part of the Plaintiff as alleged at paragraph 10 of the defence and in answer to paragraph 11 of the Defence, contended that a Demand Letter was duly served upon the Defendants and concluded by stating that the Defence was a sham, ill-conceived, vexatious, scandalous and an abuse of due process hence should be struck off.

21. The defence was backed up by the **Defence Witness** Walter Obonyo Akumu who testified that he is a driver by profession and employed by Agoro Oyombe Secondary School as the driver of the school bus. That on 14/12/2014 at around 11.00 am as he was driving at a speed of about 50km/hr from Bondo heading to Misori and upon approaching corner Kawak, he saw motor cycle riders on the left lane and that he saw 3 children running on the left side of the road with 2 children chasing the other. That upon sensing that the children would run onto the road, he drove on the right lane so as to avoid any accident in case the children decided to run into the road without ensuring whether it was safe to do so. He then stated that as he was about to pass the children who were running, the child who was being chased ran onto his path, and to avoid the accident, adding that he managed to pass the child without knocking him.

22. That however, after he passed the child, he saw one child lying on the road from his side mirror and it is then that he stopped the bus and went to look at the child, found the child injured and he then stated that it seemed the child had rammed onto the rear side of the bus.That he then asked the boy where he lived and went to the home and found a lady who accompanied them to Madiany District Hospital for treatment.

EVIDENCE

PLAINTIFF'S CASE

23. **PW1**, **Edward Wasamba** testified that **COW was** his grandson and was aged about 3-4 years. That he lived with him as the caretaker of all his needs. He recalled that on 14/12/2014 he left his home for work and at around 10.00 am, he received a call from home that **C** had been knocked by a vehicle and upon rushing to the scene, he found that **C** had already been taken to Madiany Hospital by the owner of the vehicle. That the victim was then referred to Jaramogi Oginga Odinga Teaching and Referral Hospital where he was admitted from 4/12/2014 upto 30/12/ 2014 and that they were issued with medical documents.

24. He testified that the minor sustained a fracture on the thigh and does not walk properly like before as he limbs and blamed the driver of the aforestated vehicle. During **cross-examination,** he stated that he did not witness the accident.

DEFENCE CASE

25. **DW1- WALTER OBONYO OKUMU** testified that he was a driver for the Agoro Oyombe Secondary School. That he had been a driver for 35 years. He recalled that on 14/12/2014 while he was going to pick a group from Misori using a School Bus and as he reached a place called Corner Kawaka, he saw three motorcyclists ahead and as he was trying to overtake the motorcyclist, he saw children chasing after one another. That the children were running near the road and suddenly they entered the road, that he swerved and changed lanes and started driving on his right. That he then overtook the motorcyclist and the children and that as he was returning to his lane, he saw a child seated on the road vide a side mirror. That he then applied his brakes and stopped, that he then saw that the child was trying to stand but he could not manage. That the motor cyclists also stopped, and that after he alighted from the bus and proceeded to where the child was and that is when he realized that the child's leg was broken.

26. DW1further testified that it is after he had overtaken the motor-cyclists that he realized the child sitting on the road. He also stated that after the accident, two of the motorcyclists had taken off, and that when he asked, the motor-cyclist said that the child had hit himself on the bus and he insisted that he did not knock the child and that they took the child to Madiany Hospital and after which they made a report to the police station.

27. In **cross-examination,** DW1 reiterated that he had been a driver for more than 35 years and that he had a valid driving licence. He stated that he usually drove on the left side of the road. He added that he swerved to avoid the motor-cyclists and the children. That he did not get out of the road.

28. DW1 further stated that had he swerved on the left, he would have caused an accident. He also added that he was not going at a high speed and that he was moving at 50km/hr. He also stated that the children were running towards the road from the thickets. He also added that there was a possibility that the motor-cycle knocked the child and reiterated that he saw the child through a side mirror. He maintained that the bus did not knock the child and that he only stopped like a Good Samaritan. That the child did not cross the road and he also stated that he was not confused.

SUBMISSIONS IN THE LOWER COURT

THE PLAINTIFF'S SUBMISSIONS.

29. The Plaintiff, in submission through his advocate, reiterated what was already stated in the claim/ Plaint and evidence adduced while maintaining that the injuries sustained were as a result of the sole negligence on the part of the Defendants and that during the course of trial, the Plaintiff produced medical receipts and reports stating the nature of the injuries sustained as a result of the accident and also produced copies of demand letters they issued out to the Defendants and that the police abstract contains the registration number of the vehicle which was involved in the accident.

30. The plaintiff's counsel framed their issues for determination as follows;

1. ***Whether the defendants owed a duty of care to the Plaintiff?***

2. ***Whether the duty of care was breached by the Defendants?***

3. ***Whether the Plaintiff was entitled to any damages?***

31. On issues 1 and 2, it was submitted that the defendants or their agent owed a duty of care to other road users including motorists and pedestrians. That they owed a duty of care which duty was breached by the defendants.That the agents of the defendant having failed to owe the duty of care to other road users drove the motor vehicle registration no. KBQ 462 D ISUZU Bus in a careless way that it occasioned an accident hence causing the plaintiff to suffer serious injuries which were termed by the doctor as grievous harm.

32. On issue 3, it was submitted that it is trite law that once there is a duty of care and the same is breached, the victim is entitled to damages from the person or entity that breaches the duty. It was submitted that in the defence, the defence witness testified that while he was overtaking motor cycles ahead of him, he saw children coming from the bus trying to cross the road and later on saw children in the middle

of the road after he had gone ahead of them, urging the court that the driver of the motor vehicle was driving at a high speed and hence submitted that the standard of proof required in civil matters which is proof on a balance of probabilities was met by the Plaintiff based on the evidence adduced.

33. It was further submitted that on liability, the Defendants were to blame for the accident which resulted in the Plaintiff sustaining serious injuries which were classified by the doctor as grievous harm. The plaintiff thus urged the court to hold the Defendants liable for the injuries sustained.

34. On quantum, it was submitted that the plaintiff sustained severe injuries which caused him to be admitted in Hospital and that at the time he went for medical checkup, he (the child) had recovered but was still complaining of pains on the right leg which pains were as a result of the soft and bone tissue injuries.That the injuries were classified as grievous harm and in computing the general damages relied on the case of **Caroline Wanjiku Karimi V Simon k. tum & another [2012] eKLR** where the court awarded Kshs. 1,800,000/= for comparative injuries and a submission made that an award of Kshs. 2,000,000/= would be appropriate bearing in mind the harsh economic conditions and the inflation rates. The plaintiff's counsel also prayed for costs of the suit and interest thereof.

DEFENDANTS' SUBMISSIONS

35. The defendant's submissions reiterated the Plaintiff's claim and the facts thereof. The defendant addressed the following issues for determination;

> ***1. Liability.***
>
> ***2. Quantum.***

36. On liability, it was submitted that liability must always follow fault and that the Plaintiff testified that on the material day, he was not at home and was only informed that the minor had been hit by a vehicle and that it was imperative that PW1 never witnessed the occurrence of the accident and that he only came to testify on the injuries of the minor and dependency and that PW1 failed to produce any documents to show that at the material time, the defendants, its agents, servants or employees were negligent in their acts.

37. The Respondent's counsel thus submitted that PW1 failed to prove how negligent the defendants were and that it was an established principle of law that for the plaintiff's claim to succeed, he must establish causal link between the defendants' negligence and his injury as was held in **NAIROBI HCCA NO.152 OF 2003, STATPACK INDUSTRIES LIMITED VS JAMES MBITHI** quoted in **NAKURU HCCA NO. 320 OF 2004 TIMSALES LTD VS WILLY NGANGA WANJOHI that:**

> ***"It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce in evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessary as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."***

38. Further it was submitted that in the testimony of DW1, he stated that he overtook the 3 motorcyclists and the children successfully and went back to his lane that is the left lane and that this fact had not been rebutted. In addition, it was submitted that upon DW1's inquiry into the circumstances of the accident, the motor cyclist stated that the child hit himself on the bus hence the Plaintiff minor did not exercise due diligence, care and attention while crossing the road hence thereby occasioning or accelerating his own injuries.

39. On quantum it was submitted that in the event the plaintiff if found to have proved his case, an award of Kshs. 500,000/= would be sufficient to compensate and on this the defence relied on the case of ***FRANCIS MAINA KAHURA VS NAHASHON WANJAU MURITHI [2015] EKLR*** and on specific damages it was submitted that the plaintiff never pleaded for anything in his Plaint hence he was not entitled to any special damages.

THE LOWER COURT JUDGMENT

40. In his judgment the trial magistrate reiterated the testimony of PW1 stated that the plaintiff averred that on the 14.12.14 or thereabouts, he was walking along Bondo – Misori road when at Corner Kawak area the defendant and/ or his authorized driver and/or agent negligently drove or controlled motor- vehicle Reg. No. KBQ 462 ISUZU Bus that he permitted it to veer off the road thereby knocking the minor plaintiff as a result of which he sustained severe bodily injuries. The Plaintiff stated that as a result of the said accident he suffered fractures in the right mid- shaft femur with tibia fibula fracture.

41. The trial court reiterated the plaintiff's and defendants' testimonies as adduced on oath.

42. On liability, the lower court reiterated the defence submissions by stating that it is trite law that liability must always follow fault and that it is incumbent upon the plaintiff to show that the defendant was indeed liable and this is after he has adduced evidence spelling out the negligent act of the defendant.

43. The trial court then stated that from the evidence of PW1, it was quite clear that the Plaintiff never witnessed the accident and stated that it is trite law that the burden of proof of any fact or allegation is on the Plaintiff and therefore he must establish a causal link between someone's negligence and the injury. That the Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn, but that unfortunately, the Plaintiff failed to establish the Defendant's negligence.

44. The court then noted that this was a case where the plaintiff had failed to avail any eye witness and so the court could not make decisions

based on presumptions hence held that the evidence on record fell short of holding the defendant liable therefore found the defendant not liable.

45. On quantum of general damages, the court stated that the minor suffered injuries as a result of the alleged accident and was even admitted and on the available evidence, the Plaintiff minor suffered fracture on the right mid- shaft femur with tibiofibular fracture. Thus the court stated that it was quite evident that the injuries were serious and basing on their nature and being guided by the relevant authorities, he would award the Plaintiff a sum of Kshs. 800,000 as general damages for pain, suffering and loss of amenities.

46. On special damages the trial court observed that it is trite law that special damages have to be specifically pleaded and strictly proven but since the Plaintiff had not pleaded special damages, the court would not award and in conclusion stated that given that the court did not find the defendant liable for the accident the suit was dismissed and ordered that each party to bear their own costs.

APPELLATE SUBMISSIONS

APPELLANT'S WRITTEN SUBMISSIONS

47. The appellant in his written submissions filed in court on 28th March 2018 the argued all the grounds of appeal as one under the blanket heading that; *did the trial magistrate make an error in finding that the Respondent was not liable for the injuries suffered by the Plaintiff?.*

48. It was submitted that the Appellant proved his case on a balance of probabilities. That the Appellant entirely laid the blame on the Respondent for the injuries sustained by the Appellant and that in as much as there was no eye witness, the Appellant blamed the Respondent for the injuries sustained. That the accident, age of the Appellant and the ownership of the accident vehicle are not in dispute.

49. It was further submitted that the exhibits produced in evidence confirmed that the Appellant indeed sustained injuries as a result of an accident involving a motor vehicle belonging to the Respondent. That a copy of a discharge summary form and medical report proved that the Appellant had sustained injuries as a result of the accident. Furthermore, that a police abstract was produced which showed that indeed an accident took place involving the Respondent's motor vehicle.

50. That all the evidence that was adduced by the Appellant was to the effect that an accident took place, the Appellant was injured, the vehicle that knocked the Appellant belonged to the Respondent and that the driver of the motor vehicle confirmed that there was an accident and he stopped, he saw that the client was injured and he took the injured child to hospital.

51. In the opinion of the appellant, he had proved his case against the Respondent on a balance of probabilities. Reliance was placed on the case of ***ABDI KADIR MOHAMMED & ANOTHER V JOHN WAKABA MWANGI [2009] EKLR*** where the court stated that:

> ***"It was similarly held in BUTT vs. KHAN [1981] KLR that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission. The test, as stated in GOUGH vs. THORNE [1966] 1 WLR 1387 (referred to in the BUTT vs. KHAN decision) was whether the child was of such an age as to be expected to take precautions for his or her own safety and finding of contributory negligence can only be made if blame could be attached to the child. In the absence of an eye witness account in the present case and having found the investigating officer's evidence quite unreliable, it cannot be said with certainty whether or not the deceased in this case did actually run into the road as claimed. Despite that being the evidence tendered by the witness called by the respondent the same cannot be the basis for finding the minor 50% to blame. For the father to have allowed him to attend the show on his own despite his tender years, there is no doubt that the deceased, whom the respondent described as clever boy did possess."***
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> ***The Court in the above case*** further made the following finding:
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> ***"Yet the same report stated that the motor vehicle was moving at a slow speed of between 30 to 40 kms due to a crowd in the town. It appears to me that the learned trial magistrate, taking the said piece of evidence as the best evidence available was right in finding negligence on the part of the driver. That the learned trial magistrate read carelessness on the part of the driver is not, in my considered view, an importation of personal opinion into the case. On a balance of probabilities the evidence tendered proved the above and the learned trial magistrate was therefore justified in finding as she did."***

52. The appellant further relied on the case of ***FELISTER NDUTA MUTHONI & ANOTHER V ATTORNEY GENERAL [2004] EKLR*** where the court made the following finding:

> ***"From the foregoing circumstances the time was early in the morning. The traffic was scarce. The deceased in this case seemed not to have been aware of the vehicle. It is without a doubt that DW2, the driver was over speeding. He failed to take precaution and to slow down to 50KPH as is required by the traffic rules for all the vehicles that are driven within the city boundary. At the same time the deceased should have taken precaution and stopped at the road without taking due care for the presence of oncoming traffic. I would in the circumstances find that the defendants, driver and or agent is liable for this accident. I say so due to the impact of the vehicle on the deceased. This was so great that it caused him to sustain fatal injuries soon after. I would compute liability against the defendant at 80%. I hold that the deceased bears 20% liability on the grounds that he ought to have taken precaution whilst at the vicinity of the road."***

53. It was thus submitted that from the cited cases above, and that even in the absence of an eye witness, the lower court and the High Court were still able to determine and settle the issue of liability particularly that which includes minors.

RESPONDENT'S WRITTEN SUBMISSIONS

54. In their submissions filed in court on 12th April 2018, the **Respondent's counsel submitted that it was an** undisputed rule that *'whoever alleges must prove'*. That at paragraph 5 of the Appellant's Plaint, Amended Plaint it is stated that *"on the 14th December 2014, or thereabout the plaintiff was lawfully walking off the road along Bondo – Misori road when at Corner Kawak area the defendant / or his authorized driver and/ or agent negligently drove and/ controlled motor vehicle KBQ 462D Isuzu Bus that he permitted it to veer off the road thereby knocking the minor plaintiff of which he sustained serious bodily injuries."*

55. That from thispleading, it was prudent and a must that having placed such an allegation against the Respondent, the Appellant was under all strict obligation to prove that actually the Respondent was indeed negligent for the alleged accident and invited the court to look at the decided case of **STRATPACK INDUSTRIES –VS- JAMES MBITHI MUNYAO; NAIROBI HCCA No. 152 OF 2013** where the court held that;

> ***'it is trite law that the burden of proof of any fact or allegation is on the Plaintiff and he must prove causal link between someone's negligence and his injuries; he must adduce evidence from which, on a balance of probabilities a connection between the two be drawn as not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.'***

56. It was further submitted that at the trial and the record placed before court that the Appellant was the only witness who gave evidence in court yet from his evidence, it is clear that the witness PW1 never witnessed the accident and that therefore there is no way he could have explained to court how the accident occurred. That due to his absence at the scene of the accident, there is no way he could explain the events leading to the alleged accident.

57. The Respondent further submitted that the Plaintiff went ahead and closed his case without calling a witness who was at the scene so that the court could have a feel of what really happened on the alleged date and that the respondents called their witness who was the Driver driving the suit vehicle who explained the details of how the issue was on the ground and that DW1 categorically denied in examination in chief and cross examination that he ever hit the Plaintiff minor.

58. That there being conflicting issues and stories as to the happenings of 14.12.14 that the Appellant alleged, then it was only prudent that the appellant could have called an eye witness so as to give the clear picture of how the accident occurred and give the true accounts as between the Respondents and the three motor cyclists who might have caused the accident.

59. Further submission was that the Appellant at the trial clearly failed to give a clear connection between his allegation of negligence on the Respondent and that of the injured minor.

60. It was further submitted that the trial court's judgment agreed with the respondents' sentiments as submitted by them in their submissions where they raised the issue that the Appellant had failed to give a clear connection between the alleged negligence on the defendant's agent/ driver and that of the minor's injury. And as such submitted further that they were in support of the findings of the learned magistrate and their submissions that the Appellant failed to prove his case to the required standards in law.

DETERMINATION

81. This court has considered the appeal herein, the evidence before the trial court, the grounds of appeal and the rival submissions by both the appellant and respondents' counsel both in the lower court and before this court. In my humble view, the only issue for consideration is whether the defendants/ respondents were liable for the accident.

62. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase ***Onus Probandi*** and when we talk of burden we sometimes talk of onus.

63. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to **Phipson on the Law of Evidence**, the term 'burden of proof' has two distinct meanings:

> *1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.*
>
> *2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.*

64. Section 107 of Evidence Act defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

65. Section 109 of the Evidence Act exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is

concerned.

66. The question therefore is whether the appellant herein discharged the burden of proof that the Respondent was liable in negligence for the occurrence of the accident wherein the plaintiff minor was allegedly injured.

67. First and foremost is that there is no doubt that an accident occurred in which the Plaintiff minor was injured. Hence, the only question is who caused the said accident.

68. The **Police Abstract** states that it is the driver of the defendant School Bus namely, **Agoro Yombe Secondary School** that caused the accident wherein the plaintiff child, **CW** was and no evidence was adduced to dispute the documentary evidence thereof and neither was there an objection to the production of the Said Police Abstract Form duly filled by the Police as evidence before the trial court. The Court of Appeal **in Joel Muga Opija v East African Sea Food Limited [2013] eKLR** allowed an abstract as evidence and stated:

> ***"It is clear to us that there has been a move from the rigid position that was pronounced, albeit as obiter, in the Thuranira case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."[emphasis added].***

69. The same Court of Appeal in **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR** stated:

> ***"... Since the plaintiff did not object to that evidence being adduced and allowed the said cheques to be introduced in evidence and are therefore on record, this court cannot simply ignore or overlook them. They must be taken into account more so considering the contrasting evidence tendered on the same by both the plaintiff and defendant..."***

70. During cross-examination of the defence witness Walter Obonyo, he stated in evidence that ***there was a possibility that the motor cycle knocked the child***. Accordingly, it is my humble view that the police abstract having held the driver of the School Bus as having caused the accident, if the said driver truly believed that the motor cyclist caused the accident, then he should have taken out a **Third Party Notice** to controvert the evidence by stating that the accident was caused by the motorcyclist and not him. There was no Third Party Notice on record.

71. In addition, considering that DW1 was the defendant driver and he testified in court, the defendant was bound by his pleadings which includes the **Defendant Witness Statement** filed in court on 13/7/2016 whereby he *stated that he managed to pass the child without knocking him but after he had passed the child, he saw one child lying on the road from his side mirror and stated that:* **"it seems the child rammed into the rear side of the bus.**" Further, in his statement he stated that he was driving on the left lane and the children too were running on the left side of the road and that he swerved to the right lane then on returning to his correct lane which is on the left, he saw through the side mirror a child seated on the road.

72. In my view, and from the foregoing evidence, the defendant in his narration of events of the material day, places himself on both lanes of the road and as it is the business of this court to evaluate and analyze the evidence afresh, I opine that having alluded in his statement that the child seemingly rammed into the rear side of the bus then the question is at what point did the child ram into the bus, was it at the point of swerving to the right lane or at the point of the defendant getting back to his correct lane which was on the left. The defendant does not state which position the child was lying at.

73. The court the Court of Appeal in **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR stated that:**

> ***"In determining those issues the learned judge found that the appellants' witness was not a truthful person at all. He further found that the three cheques listed in the statement of defence were not replacement cheques but were cheques issued by the appellant in respect of other transactions. The judge held that: "... Finally, parties are bound by their pleadings. As already stated, the defendant claimed in its defence that it issued the 3 cheques in replacement of the dishonoured cheques. However during the trial, it tendered into evidence six additional cheques namely 011077, 100953, 100955, 100 with a grant (sic) total of Kshs. 10,892,245/= as opposed to the total amount of Kshs. 5,128,500/= in replacement cheques pleaded in defence. Clearly this was a complete departure from its pleadings. Nor are they supported by the pleadings. I may even go further and state that the evidence led by the defendant on this aspect of the matter was completely at variance with its pleadings which is not permissible..."***

74. On the need for this court to have a wholesome examination at the evidence and pleadings which includes the witness statement by the defendant witness, the Supreme Court of Malawi in **Malawi Railways Limited v Nyasulu [1998] MWSC 3** stated as follows on the importance of pleadings:

> ***"... The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice..."[emphasis added].***

75. In addition, the evidence of the defendant's driver which emerged during examination in- chief of the defence witness that when he asked the motorcyclist about the incident, the cyclist answered that "the child hit himself on the bus" and in the defendant's own witness statement he stated: **"it seems the child rammed into the rear side of the bus.**" Further, in their submissions, the defendants' counsel stated: "***upon DW1's inquiry into the circumstances of the accident, the motor cyclist stated that the child hit himself on the bus hence the Plaintiff minor did not exercise due diligence, care and attention while crossing the road hence thereby occasioning or accelerating his own injuries.*** These phrases displace the evidence adduced by the defendant witness that he overtook the motorcyclists and the children successfully. For that reason, I hold the view that in as much as the trial Magistrate had the opportunity to see the demeanor of the defence witness, the defendant's witness statement and evidence adduced in court contradict his part of the evidence. He obviously did not did not give the true picture of what happened hence this court is unable to appreciate the truthfulness or correctness of his version of what could probably have taken place as he himself does not know how the child got injured.

76. Albeit the plaintiff's witness who recorded a filed witness statement did not testify, what this court observes from the said witness statement which is not evidence before the court as the statement was never adopted as evidence, is that the said witness' evidence could not have aided the defendant's case, and neither can it be said that the said witness could have given evidence that was adverse to the plaintiff's case.

77. In the circumstances, albeit the plaintiff did not have an eye witness testify as to how the accident leading to his injuries was caused, this court finds and holds that the doctrine of ***Res ipsa*** would apply as PW1 was not an eye witness to the material accident and neither was he at the scene of accident.

78. The Court of Appeal in **Margaret Waithera Maina v Michael K. Kimaru [2017] eKLR in**voked the doctrine of R*es ipsa loquitur* as follows:

> ***"This is a case where the doctrine of Res Ipsa Loquitor applies. In Mukusa vs. Singa & Others (1969) E. A 442, it was held that for the doctrine to apply there must be reasonable evidence of negligence but where the thing is shown to be under the management of defendant or his servants and the accident in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care".***
>
> ***"It is worth noting that the driver of motor vehicle registration number KBA 917Q was not a party in this suit and therefore the enumeration of the particulars of negligence by the defendant was in vain. If the defendant's driver was not negligent as suggested then the defendant ought to have instituted 3rd party proceedings against the driver of motor vehicle registration No. KBA 917Q (See Esther Michele vs. Merahia Nduta) H.C.C.C No. 303 of 1991 in Nairobi.***
>
> ***A perusal of the court file shows that the defendant filed some documents to initiate 3rd party proceedings but apparently abandoned the same. In the absence of such proceedings, I find the defendant 100% liable."***

79. Aggrieved by that judgment the respondent appealed to the High Court **(Limo J.)** which allowed the appeal on the grounds, firstly, that the doctrine of *res ipsa loquitur* was not applicable because it was not pleaded and further because:

> ***"In situations where explanation exists on how the accident occurred even if there are two different versions, the doctrine of 'res ipsa loquitor' does not apply. The doctrine applies only in situations where an accident occurs and no other explanation can be attributed to it other than inference of negligence on the part of the defendant. This was not the situation in the above accident and the same was not pleaded. The doctrine is normally used to establish a tort of negligence in the absence of a proper explanation on how the accident occurred. The doctrine applies in situations where surrounding circumstances may permit an inference or a presumption of negligence on the part of the defendant if such defendant cannot offer an explanation in rebuttal."[emphasis added].***

80. Thus, I find that the defendants were liable for the occurrence of the accident as it was stated that the children were running on the road and in my view the prudent thing that the driver ought to have done is to stop and ensure that the children were out of the way before driving off. The Respondent does not even state that he slowed down despite seeing very young children of age 3-4 years playing by the roadside.

81. I refuse to be persuaded that a child aged 3-4 years knew or ought to have known the risks or consequences of playing along the road. From the defendant's driver's own testimony, this court is able to make an inference and a finding of culpability on his part in the manner in which he drove, managed and or steered the motor vehicle in that he drove on the wrong side of the road contrary to the established norm in Kenya that a vehicle should be driven on the left side of the road unless overtaking. Further, the defendant's driver did not demonstrate that he drove safely and or took an avoidance act to ensure that the minor child was safe, having seen the child play in the road.

82. Addressing the question of whether in every case there must be an eye witness, the Court of Appeal in **Abbay Abubakar Haji v Marain Agencies Company &Another[1984]4 KCA 53** dealt with the matter where all parties to a motor accident were killed leaving no witnesses. The Court stated:

> ***"It is the clear duty of the court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible, although that duty does not extend to supplying a theory as to what happens when the inferences from the primary facts do not inevitable point that way."***

83. Therefore, it follows that a case cannot collapse merely on the basis that there were no eye witnesses. The court, on the basis of circumstantial evidence or evidence adduced by the defendant that tends to prove his involvement in the alleged act can infer culpability on the part of the defendant.

84. In this case, the defendant's driver does not deny driving on the material road at the material time. He does not deny seeing the children play along the road by way of chasing one another. Neither does he deny that after he had passed the children by driving on the wrong side of the road, he saw, through the side mirror, one child lying on the ground. He claimed that he was driving at 80km/hour. He did not state that he even slowed down or found it necessary to stop to allow the children pass before he drove into the right side of the road to avoid hitting them.

85. On whether a child aged 3-**4 years could be liable or to have contributed to the occurrence of the accident in issue,** in **Bottorff v. South Construction Company,184 Ind. 221, 110 N.E. 977 (1915),** although the holding was based on proximate cause, the Indiana Supreme Court stated:

> ***"It has been laid down by law writers and the courts that the time of infancy is divided into three distinct periods, <u>during each of which different presumptions prevail; the first period is that up to the age of seven years, during which the infant is conclusively presumed to be incapable of understanding the nature of crime and can in no way be held responsible therefor</u>; the second is that between the ages of seven and fourteen years. An infant between these ages is presumed to be incapable of committing crimes, but the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act. The third period is after the age of fourteen years when the infant is presumed to be capable of committing a crime and can be held the same as an adult. It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases. (Emphasis added.).***

86. In the persuasive case of **Miller v. Gr Miller v. Graf 196 Md. 609, 78 A. 2d 220 (1951), t**he Plaintiff, a little girl age four, was struck by the Defendant's westbound taxicab as she was crossing a street from South to North in the middle of the block. From a directed verdict for the Defendant, the Plaintiff appealed. The Court, after deciding that there was sufficient evidence of negligence, from skid marks and other evidence of speed, to allow the case to go to the jury, said:

> ***"It is also plain that the child in this case cannot be held guilty of contributory negligence as a matter of law. In considering the question of contributory negligence, the Court recognizes that a child is required to exercise only that degree of care which a reasonably careful child of the same age and intelligence would exercise under similar circumstances. The mere fact that a young child, when frightened or bewildered, turns around in the street near one sidewalk and starts to come back to the other sidewalk when called by the screams of a parent is not necessarily evidence of negligence. In this case the child was only four years old at the time of the accident. We have definitely held that a child four years old cannot be guilty of contributory negligence under any circumstances."***

87. In support of the above holding the Court cited **Mahan v State, 172 Md. 373, 172 Md. 151, 9 A. 2d 60 (1939), and Bozman v. State 177 Md. 151, 9 A. 2d 60 (1939).** The Mahan case dealt with a three year old boy who was killed while walking along a rural street. The Court, in discussing the appeal from the refusal of the Defendant's contributory negligence prayer, said:

> ***"For while in this state a child of tender years may be guilty of negligence . . ., it is not held to the same measure and kind of care that would be required of a normal person of full age..., but only to that degree of care which should be exercised by one of his age....***

88. The Court nevertheless went on to say:

> ***"The great weight of authority is opposed to the proposition that a child a little over four years of age can be guilty of contributory negligence."***

89. In the **Bozman** case the child was a boy of eight years. As part of its discussion of the lower court's refusal of a directed verdict for contributory negligence, the Court said:

> ***"Moreover, a child of tender years is not held to the same measure and kind of care required of a reasonably prudent adult, but only to that degree of care which children of the same age would be expected to use under similar circumstances. Thus, a child four years of age cannot be guilty of contributory negligence under any circumstances."***

90. In **Gough vs. Thorne (1966) WLR 1387** Lord Denning stated that:

> ***"A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elder. He or she is not to be found guilty unless he or she is blameworthy."***

91. Back home in Kenya, several pronouncements on the liability of children of tender years have been made in the following cases: In the case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982 – 88) IKAR 1 (1981) KLR 349** the Court of Appeal held that:

> ***"It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness…A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child....***
>
> ***Clearly each case must depend on its peculiar circumstances. In the instant case the learned judge was right in finding that the***

defendant had been negligent, and that the plaintiff was struck when almost half-way across the road, and that at the most the plaintiff had committed an error of judgment for which contributory negligence should not be attributed to him....

The practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of doing the act or making the omission he had capacity to know that he ought not to do that act or make the omission....

High speed can be prima facie evidence of negligence in some cases. A person travelling within or at the permitted speed limit may be immune from prosecution for traffic offence. It is another matter as far as the question of negligence is concerned. Even 15 mph may not be a safe speed in the early hours of the morning when children go to school along and across a road which known to the driver as in the instant case, serves an area with several schools in it. In a manner of speaking there would be children here, children there and children everywhere. The safe speed on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the Traffic Act is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half that speed may not afford a defence in a case of negligence."

92. In **Rahima Tayab & Others vs. Anna Mary Kinanu (1983) KLR 114 & I KAR 90** it was held:

"The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission....

The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy."

93. The Respondent's driver by his own admission did see the children playing on the road with one child chasing after another, prior to the accident. As a prudent driver he should have reasoned consciously and appreciated the possibility of any of the children crossing the road suddenly. He had an extra duty of care to exercise. The driver acted by driving on the wrong side of the road but he does not say he did so in a bid to avoid knocking the child. In my view, driving at 50km/hour on a road which had children playing and chasing each other across the road is excessive speed. In his testimony, he states that "***after he had passed the children it seemed that the child he had passed rammed into the rear side of the Bus***." This court is not persuaded that the defendant's driver avoided hitting the child who ***"ran into the path of the Bus as he was being chased or that to avoid the accident, the driver managed to pass the child without knocking him.***"

94. In my humble view, therefore, the appellant had discharged the burden of proof and proved on a balance of probabilities, that the Respondent's driver was negligent. I find that there is no material to apportion liability between the plaintiff minor and the Respondent's driver.

95. This appeal is thus allowed. The decision of the trial magistrate dismissing the plaintiff's suit on liability is hereby set aside and substituted with judgment finding and holding the defendant/ Respondents is liable for the accident at 100 percent.

96. The quantum of general damages as assessed by the trial court was not challenged and considering the serious injuries sustained by the plaintiff minor, I find no reason to interfere with the figure of Kshs 800,000/= awarded. I therefore uphold it.

97. The award of general damages as awarded will also have interest at court rates, from the date of judgment in the lower court until payment in full.

98. Orders accordingly.

Dated, signed and Delivered in open court at Siaya this 18th Day of December 2018.

R.E.ABURILI

JUDGE

In the presence of:

Mr Mirembe h/b for Nyanga for the Appellant

Miss Ochieng for the Respondent

CA: Brenda and Modestar