REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HCCA NO. 1 OF 2012

(Appeal from the Ruling of Hon. WERE (SRM) dated and delivered on 30TH May , 2012, in the original Keroka SRMCC No.236 of 2010)

JAMES GIKONYO MWANGI……APPELLANT

VERSUS

D M (***Minor Suing through His Mother and next Friend***,

I M O)…….....….....……....RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of Hon. Were SRM delivered on 30th November, 2011 in Keroka SRMCC 236 of 2010.

2. The appellant, who was the defendant before the lower court is James Gikonyo Mwangi.

3. The Respondent, who was the plaintiff before the lower court filed a civil suit against the appellant on 30th June 2010 for the recovery of damages arising out of injuries sustained in a road traffic accident. He prayed for judgment against the appellant for general damages, special damages, costs of the suit and interests at court rates on each of the three items.

4. In the plaint, filed by M/S Khan & Associates on 30th June, 2010 in Keroka SRM CC No. 236 of 2010, the appellant was sued in his capacity as the owner of motor vehicle registration number KAY 408Z *(hereinafter in this judgment referred to as the "suit motor vehicle").*

5. The respondent's case was that on or about the 30th day of April 2010 he was a lawful passenger travelling in the suit motor vehicle along Keroka- Sotik Road when near Ribwago area or thereabouts the appellant, his driver, servant, or agent negligently drove, managed and controlled the appellant's said motor vehicle along the said road thereby causing or permitting it to violently to collide with another motor vehicle Registration number LH 1231011209 and as a consequence thereof the respondent sustained injuries and suffered loss and damage. The respondent averred that the appellant was vicariously liable for the tortuous acts of his driver, servant or agent.

6. A defence was filed by M/s Kairu McCourt advocates on 20th September, 2010 in which the appellant denied that he was liable for the said accident. The appellant further denied that the respondent was a passenger in the suit motor vehicle.

7. The appellant stated that if indeed the respondent was a passenger in the suit motor vehicle, then the

accident occurred or was substantially contributed to by the respondent's own negligence in failing to take adequate precautions for his own safety, and failing to heed traffic rules and regulations.

8. In addition to the above denial and claim of contributory negligence against the respondent, the appellant contended that the accident was solely caused and/or substantially contributed to by the negligence of a third party motor vehicle chassis number LH 1231011209 (*hereinafter in this judgment referred to as the unregistered motor vehicle*).

9. The case proceeded for hearing on 17th August, 2011 and judgment was delivered on 30th November, 2011 in which the respondent was awarded Kshs. 100,000/= general damages, Kshs. 6,500/= special damages together with costs and interest.

10. It is this judgment that has precipitated the instant appeal in which the appellant has set down the following grounds of appeal:

> **(1) The Learned Magistrate erred in fact and in law in finding the Defendant negligent for the alleged accident in the face of the nature of the evidence before her.**
>
> **(2) The Learned Magistrate erred in fact and in law in finding in failing to consider that the driver of motor vehicle Mark LH 1231011209 was held primarily liable or responsible for the accident.**
>
> **(3) The Learned Magistrate erred in fact and in law in failing to consider the evidence of the witnesses.**
>
> **(4) The Learned Magistrate erred in fact and in law in making an award for damages and/or awarding an excessive sum of general damages for pain, suffering and loss of amenities in the face of the evidence adduced and submissions made by Defence Counsel.**

11. When the appeal came up for directions on 12th October, 2015, the court directed inter alia, that this appeal be canvassed by way of written submissions.

Appellant's Submissions

12. The appellant's submissions was directed to the question of whether the appellant's driver was liable for causing the accident in question and if the trial court was justified in entering a judgment against the appellant. The appellant also took issue with the award of Kshs. 100,000/= made to the respondent for general damages which he stated was excessive and therefore on the higher side.

13. According to the appellant, the accident involved two motor vehicles namely: the suit motor vehicle and the unregistered motor vehicle. The appellant argued that since the police preferred traffic case charges against the driver of the third party motor vehicle, for the offence of careless driving contrary to **Section 49 of the Traffic Act**, the said third party was therefore solely liable for the accident and therefore the respondent ought to have directed her claim towards the owner of the unregistered vehicle (third party) and not the appellant.

14. The appellant further argued that the trial court misinterpreted the provisions of **Order 1 Rule 24 of the Civil Procedure Rules** relating to third party proceedings and their applicability in the instant case. In this regard, the appellant took issue with the trial court's findings that it was the appellant's responsibility to enjoin the owner of the unregistered motor vehicle to the suit when the respondent had not proved his case against the appellant.

15. The appellant supported his arguments with the following authorities: **Associated Electrical Industries LTD vs. Otieno [2004]** and **Eastern Produce Limited vs Christopher Atrado Osino High**

Court at Eldoret Civil Appeal No. 43 of 2001.

16. On liability, the appellant reiterated that its driver was not to blame for the accident and that by virtue of the fact that the driver of the unregistered Motor Vehicle was charged with a traffic offence following the accident, it followed that the owner of the suit Motor Vehicle was exonerated from any blame.

17. The appellant argued that the mere fact that the suit motor vehicle was alleged to have been moving at a high speed was not sufficient proof of culpability as mere speed does not connote negligence.

18. The appellant relied on the case of **Peter Muraguri vs James Njogu Mwangi & another Nairobi HCCA No. 184/1999**. In which it was held that evidence of speed alone cannot be held to be proof of negligence.

19. In his further submissions filed on 2nd February, 2016, the appellant revisited the isue of which party was to enjoin a third party to the suit and submitted that it was not its duty to enjoin a third party, but rather, it was the duty of the respondent to sue the correct party who was to blame for the accident. On this point, the appellant relied on the findings of the Court of Appeal in the case of **Sammy Ngigi Mwaura vs John Mbugua Kagai & Another [2006] eKLR** in which an appellants appeal was dismissed on the ground than he had sued a wrong party who was not to blame for the accident.

20. The appellant urged this court to similarly make a finding that the respondent, who was the plaintiff on the lower court, sued the wrong party and allow the instant appeal.

Respondent's Submissions

21. The respondent submitted that there was compelling and unimpeached evidence of the respondent who was eye witness to the accident to the effect that the appellant's suit motor vehicle was not only being driven at a high speed, but also veered off its lane on to the right side thereby ramming into an oncoming vehicle which happens and have been the unregistered third party motor vehicle.

22. The Respondent argued that under **order 1 Rule 14 of the Civil Procedure Rules** (***Now order 1 Rule 15 of the Civil Procedure Rules 2010***), it was the appellant's responsibility to enjoin the third party owner of the unregistered motor vehicle if his case was that the third party contributed to the said accident.

23. The respondent added that the appellant was fully aware of his duty to enjoin a third party to the suit as he had alluded to the same at paragraphs 5 and 7 of his defence before the lower court.

24. The respondent relied on the findings in the case of **Zakaria Mwangi Kagai vs Barnabas Mwisunji and Another. Nairobi HCCC 1053 of 1998** in which it was held that no orders can be made against a third party if he is not enjoined to the suit.

25. The respondent urged this court to dismiss this appeal and uphold the findings of the trial court on both liability and quantum.

ANALYSIS AND DETERMINATION

26. I have perused the entire record of appeal and considered the submissions of counsels for both parties together with the authorities cited. I note that the entire appeal revolves around the twin questions of liability and quantum, that is; whether the respondent proved his case against the appellant on a balance of probabilities or whether a third party was solely to blame for the accident in question and whether the trial court was justified in making an award of Kshs. 100,000/= general damages to the respondent.

27. To demystify the above issues, this court is duty-bound, as a first appellate court, to re evaluate the entire evidence adduced before the trial court in order to come to its own independent findings over the same while bearing in mind the fact that it neither heard nor saw the witnesses testify.

28. In this appeal, it has not been disputed that an accident occurred on 30th June, 2010 involving a collusion between the appellant's suit Motor Vehicle and the unregistered Motor vehicle. It is further not in dispute that the respondent who was a fare paying passenger in the appellant's said Motor Vehicle sustained injuries in the said accident.

29. What is in contention however, is who, between the owners of the two motor vehicles was responsible/liable for the said accident or further, whether the respondent was responsible for his own misfortune.

30. The appellant has argued in his submissions that the owner of the unregistered Motor vehicle, or simply put, the third party Motor Vehicle was wholly liable for the said accident since the police preferred charges of **careless driving contrary to section 49 (1) of the Traffic Act** against his driver in a traffic case initiated before Keroka Law Courts which case was later withdrawn under **Section 87 (a) Civil Procedure Code** when the accused absconded from court.

31. The appellant holds the view and indeed it was his submission before this court, that the initiation of the traffic case charges against the driver of the unregistered motor vehicle was proof that the appellant's driver had been fully absolved of all and any blame in the accident and as such, the respondent had no business suing the appellant before the lower court as he should have gone for the third party driver instead.

32. At this juncture, this court needs to determine the question of whether the initiation or filing of traffic case charges against a party automatically connotes his guilt or full responsibility in an accident claim. My answer to this question is to the negative for the following reasons:

33. Firstly, any time a person is charged with any offence before the court, that person is deemed innocent until proven guilty and in the instant case, the traffic case was withdrawn before it was heard and as such, this court cannot speculate on whether the outcome could have been a conviction or an acquittal.

34. Secondly, even assuming that the driver of the unregistered motor vehicle was convicted of the charge careless driving before the traffic court, such a conviction would not automatically translate into full liability against the third party in the Civil case for the claim of damages as the civil court would still have to take evidence on the question of negligence and thereafter apportion liability accordingly between two motor vehicles. Evidence would still have to be led by the appellant to prove that the third party vehicle was wholly to blame for the accident and that the appellant made no contribution to it or that the circumstances were such that the appellant could not avoid or be blamed for the accident.

35.In the instant case, the appellant called no evidence to prove that the unregistered motor vehicle was to blame for the accident save for the traffic case charge sheet and proceedings that were produced by **DW1** Joseph Morema the Executive Officer of Keroka Law Courts.

36. The respondent on the other hand, led evidence through PW1, an eye witness to the accident to the effect that the appellant's driver was solely to blame for the said accident.

37. In the case of **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu [1982-88],KAR 278** a principle was laid that a court on appeal will not normally interfere with a finding on fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles. In this case, I find no reason to interfere with trial court's findings on facts regarding who was to blame for the accident.

38. The point to be considered is the effect of the institution of traffic offence proceedings against the third party's driver on the weight of the evidence in the civil case proceedings.

39. In this appeal, this court has to rely on the evidence placed before it regarding the circumstances under which the accident occurred. As I have already stated hereinabove, the evidence can be seen only in the testimony of PW1. The appellant did not call any witness to counter the testimony of PW1 on the

circumstances under which the accident took place and who was to blame for it.

40. The circumstances in the instant case are completely different and can be distinguished from the facts in the case of **Peter Muraguri vs James Njogu** *(supra)* cited by the appellant to support his submissions that evidence of speed alone does not connote negligence. In the instant case, the respondent attributed the accident directly to the negligence of the appellant's driver while in the cited case of **Peter Muraguri** *(supra)*, the plaintiff's own witnesses absolved the defendant's driver of any blame and instead blamed the driver of a third party.

41. I further find that the respondent had no reason to enjoin a third party to the suit as the respondent was positive that it was the appellant's driver to blame for the accident and nobody else. . On cross-examination PW1 stated as follows:

> ***"I blame our driver for speeding and veering off its lane. That is why I did not enjoin the other Motor Vehicle"***

It is worthy to note that it was the appellant who has introduced the aspect of a third party in this proceeding and I find that under those circumstances it was incumbent upon the appellant, if his case was that a third party was to blame for the accident, to enjoin the said third party as he had already alluded to in his own pleadings (defence) at paragraphs 5 and 7.

Order 1 Rule 15 provides for an elaborate procedure to be undertaken by a defendant claiming against a person not already a party to the suit. **Order 1 Rule 15** provides as follows:

> **" 15.(1) Where a defendant claims as against any other person not already a party to the suit (*hereinafter called the third party*)—**
>
> **(*a*) that he is entitled to contribution or indemnity; or**
>
> **(*b)* that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and**
>
> **substantially the same as some relief or remedy claimed by the plaintiff; or**
>
> **(*c*) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and**
>
> **should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and**
>
> **defendant and the third party or between any or either of them,**
>
> **he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice(hereinafter called a**
>
> **third party notice) to that effect, and such leave shall be applied for by summons in chambers**
>
> ***ex parte* supported by affidavit.**

42. To my mind, the appellant was under an obligation, if he felt that someone else was responsible for or contributed to his predicament in the case, to enjoin that someone else so that he can claim from him any loss or award that he may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear before it.

43. I find the suggestion or contention by the appellant that the respondent should have sued the third party owner of the unregistered motor vehicle to be erroneous and misguided. This is so because passengers have no contract with third party vehicles on the road. The contract is with the owner and/or driver of the vehicle they are travelling in to drive them safely to their destinations. It is the appellant who had a contract with 3rd party vehicles on the road in respect to safe-driving and if the third party acted to his detriment, then I reiterated that the appellant should have called him to account through the third party proceedings. (See **Boniface Klaiti & Another vs Michael Kariuki Kamau [2007] eKLR**).

45. The appellant failed to pursue the third party proceedings and cannot be allowed to evade his responsibilities towards his passengers. I therefore find that the trial court was justified to hold that the appellant was 100% to blame for the accident.

46. Counsel for the appellant submitted that there was no evidence adduced before the trial court to prove liability and that the mere fact that the appellant's vehicle was alleged to have been moving at a high speed at the time of the accident was not sufficient proof of negligence. From the record however, I note that PW1 Irene Moraa Ondimu who was a passenger in the suit motor vehicle testified on negligence as follows:

> ***"Our Motor Vehicle was at a high speed. The passengers complained. There was an oncoming Motor Vehicle. Our Motor Vehicle veered to the right and they collided head on."***

47. On the speed of the suit Motor Vehicle, PW1 testified as follows**: *"The Motor Vehicle was going at 100 Kph. I saw the speedometer."***

48. I find that the evidence of PW1 was consistent and candid. She testified that she was sitting with her son (the appellant) right behind the driver of the suit Motor Vehicle and therefore, she was able to witness the entire accident as it unfolded right before her own eyes. Her testimony was that the appellant's driver was not only going at a high speed, but also veered off its lane and hit the on-coming unregistered Motor Vehicle on its lane.

49. To my mind, the respondent proved that the appellant's driver was negligent on a balance of probabilities. In the Court of Appeal decision in **Kenya Bus Services Ltd. vs Dina Kawira Humphrey, CA 295/2000 (*unreported*),** the court observed that ***"Buses, when properly maintained, properly serviced and properly driven, do not just run over bridges and plunge into rivers without explanation.***

50.The above observation is applicable to this case as l can safely state that the appellant, in this instant appeal, has not given any explanation as to why his motor vehicle veered off its lane and rammed into an on-coming motor vehicle.

My position is further fortified by the Court of Appeal's findings in the case of **Embu Public Road Services Ltd. vs Riimi (1968) EA 22** where it was stated:

> ***".....Where the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence....."***

51. The appellant and his driver did not furnish the court with any testimony to counter the allegations that he was negligent in the manner in which he drove managed or controlled the suit motor vehicle thereby allowing it to veer off its lane and ram into an oncoming motor vehicle.

52.In his defence filed in the lower court, the appellant alluded to the fact the respondent was guilty of contributory negligence. The respondent was a passenger in the suit motor vehicle and as such I find that there is no way that he could have caused or contributed to the said accident.

Charlesworth and Percy on Negligence states at page 1943-04 as follows on contributory negligence:

> ***"The expression contributory negligence ..... applies wholly to the conduct of the plaintiff. It means that there has been some act or omission on the plaintiff's part which has materially contributed to the damage."***

53.The appellant did not give any evidence to show how the respondent contributed to the suit motor vehicle veering off its lane and ramming into an oncoming vehicle. The version of PW1 on how the accident happened has not been contradicted by any other evidence. The respondent was a passenger in the appellant's motor vehicle and therefore the appellant's driver was primarily 100% responsible for his safety and the safety of the rest of the passengers in order to ensure that they arrived at their destinations safely.

54. The standard to be applied on a prudent driver was set in the case of **Embu Public Road Services vs Riimi** (**supra)** in which it was held that in order to escape liability, the driver has to show that:

a. **There was a probable cause of the accident.**

   In the instant case, the appellant has blamed a third party unregistered motor vehicle and have been the cause of the accident. It was, as I have already stated, the responsibility of the appellant to enjoin the third party to the suit as he had alluded to in his defence**.**

b. **The explanation should be consistent with absence of negligence.**
c. **It has to be shown that although perfect action is not expected of the driver, nonetheless he has to show that the emergency was so sudden that he could not have taken any amount of corrective measure expected of a competent driver.**

55.I find that the appellant did not meet the threshold set in the above case so as to entitle him to avoid liability. Consequently I find that the trial court was justified in holding that the appellant was 100% liable for the accident.

55.The appellant also contended that the award of Kshs. 100.000/= general damages made to the respondent was excessive. The appellant did not however make any proposals before the trial court or this court on what it deemed could have been the most appropriate award. The principles for assessment of damages were set out by the Court of Appeal for East Africa, and subsequently adopted by our Court of Appeal in the following cases:

1. **Kanga vs Manyoka [1961] EA 705, 709, 7013.**
2. **Lukenya Ranching and Farming Co-op. Society Ltd vs Kavoloto [1979] EA 414, 418, 419.**
3. **Kemfro Africa t/a Meru Express & Anor. vs A.M.Lubia & Anor [1982-88] I KAR 727.**
4. **C.A. No.66 of 1982 Zablon Mangu vs Morris W. Musila (unreported)**

56.From the above authorities, Appellate Court will interfere with the exercise of discretion by the trial court when assessing damages if the trial court;

a. ***Took into account an irrelevant fact or,***
b. ***Left out of account a relevant fact or,***
c. ***The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

57.I find that the trial magistrate's exercise of discretion was in tandem with the principles stated hereinabove and was therefore exercised judicially. The trial magistrate based his assessment on damages on the medical evidence adduced in respect to the respondent's injuries which were as follows:

a. Deep cut wound on the scalp.

b. Bruises on the face.

c. Cerebral concussion.

58. The trial court further took into account resultant effects of the said injuries on the respondent's health, the awards proposed and the judicial authorities cited by both parties. I have noted that the appellant did not make any proposals on quantum of damages before the lower court.

59.On quantum therefore, I find that the award made to the respondent for Kshs. 100,000/= general damages was modest and commensurate with the injuries sustained in the accident. I court finds no reason to interfere with the award made by the trial court for general damages.

60. In a nutshell, I find that the instant appeal lacks merit and the order that commends itself to me is to dismiss the said appeal with costs to the respondent.

Dated, signed and delivered in open court this 18th day of April, 2016

HON. W. OKWANY

JUDGE

In the presence of:

- Nyangweso for Kairu MC Court for the Appellant
- No appearance for the Defendant
- Omwoyo court clerk