REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 144 OF 2011

LOCHAB TRANSPORT (K) LIMITED

ELIAS ARCHAGA ADOLO.....APPELLANTS

V E R S U S

DANIEL KARIUKI GICHUKI…….....RESPONDENT

(Being an appeal against the judgment of Honourable Oganyo P.M. delivered on 1st March 2011 at Nairobi CMCC No. 13756 of 2004)

JUDGMENT

The cause of action in this appeal arose out of a road accident which occurred on 12th May 2002 along Lunga Lunga Road in Nairobi between motor vehicle registration number KAN 941R driven by the Respondent and KAK 830A driven by the 2nd Appellant as an agent/driver of the 1st Appellant. Damages were claimed by the Respondent for injuries suffered in the accident and after a full trial, the learned trial magistrate found in favour of the Respondent and awarded him Kshs. 862,496/80 general and special damages.

The Respondent aggrieved by that order preferred this appeal through the memorandum of appeal filed on 29th March 2011 on the following grounds –

1. That the learned trial magistrate erred in law and in fact by finding the Appellant 100% liable for causing the accident herein.
2. That the learned trial magistrate erred in law and in fact by making a finding on liability in favour of the Respondent when he had failed to produce in court the judgment and the proceedings of the traffic case whereat he was allegedly acquitted.
3. That the learned magistrate erred in law and in fact by making a finding on liability in favour of the Respondent without considering the evidence on record and or at all.
4. That the learned trial magistrate erred in law and in fact in failing to find that the Respondent had not proved his case on quantum of damages against the Appellant on a balance of probabilities.
5. That the learned trial magistrate erred in law and in fact in failing to consider adequately or at all the submissions by the defence, and in particular the authorities cited on quantum of damages.
6. That the learned trial magistrate erred in law and in fact in making an award for damages that was inordinately high and excessive in the circumstances.

7. That the learned trial magistrate erred in law and in fact in taking into account extraneous matters which were outside the pleadings.
8. That the learned trial magistrate erred in law and in fact by not considering the Appellants counterclaim and or at all.

The Appellant prayed for the appeal to be allowed and the dismissal of the Respondent's claim. The Appeal was heard by way of written submissions which this court has duly considered. The duty of this court, being the first appellate court is to re-evaluate the evidence on record and come up with a finding of its own bearing in mind that it has neither seen nor heard the witnesses. *See* **Sumaria & Another - Vs- Allied Industrial Limited (2007) 2 KLR 1**.

The only evidence before the court regarding the happening of the accident is that of the 2nd Appellant (DW1) and the Respondent (PW3). The Respondent explained that when his vehicle stalled, he had to park it on the right side of the road as the left lane was flooded. He explained that he removed his life saver triangles and stationed them 10 metres ahead and behind his vehicle. (It is curious how feasible this was as he mentioned that the flood water reached his knees when he stepped out of the car). He averred that he switched on the motor-vehicle's hazards though the headlights were also on. He proceeded to open the bonnet whereby he checked to see if the distributor was working and that is when the 2nd Appellant hit him and his vehicle as he was moving towards the opposite direction. He concurred that it was at the time raining heavily.

According to the 2nd Appellant, when he joined Lunga Lunga Road to go to town after leaving work, he was surprised to find a black vehicle parked about 100 metres from the Sasio- Lunga Lunga junction with its bonnet opened. That there was no indication of a hazard ahead and there were no road lights. He suddenly braked and hooted and as the person on the bonnet tried to get back on the road, the 2nd Appellant's motor-vehicle hit him and pushed beneath the vehicle. That the Respondent had parked on the 1st Appellant's side of the road but this was attributed to the flooding on his lane. The evidence by DW1 and PW3 has not been challenged by any other evidence.

These two testimonies are clear that the Respondent's motor-vehicle was parked on the wrong side of the road. Whether there was a warning sign or not, it was raining heavily and the road was not well lit. It was at night, about 9.00 p.m. The 1st Appellant ended up ramming into the Respondent and his motor-vehicle as he did not have the opportunity to divert. He could not avoid the accident despite applying emergency brakes. Because the road was wet his motor vehicle must have skidded. He however conceded that the Respondent had no alternative but to park where he did as the road was flooded.

There is no evidence that the 1st Appellant was speeding, or otherwise driving without due care and attention. However, when driving in a heavy down-pour one ought to exercise due care and attention on the road. Consequently it would have been prudent for the Learned Magistrate to apportion liability between the Respondent and the 2nd Appellant equally at 50:50. On liability therefore, I substitute the finding of the learned magistrate with equal liability for both the Appellant at 50% and the Respondent at 50%.

As for injuries suffered by the Respondent**,** PW1 (Dr Wokabi) examined the Respondent about two months after the accident. He prepared and signed a medical report in that respect. He verified the injuries received by the Respondent in the accident. The main injury was fracture of the shaft of the left femur. It was a serious injury that caused considerable pain and blood loss. The Respondent underwent a major surgical procedure whereby a metallic plate was inserted. He continued treatment as an outpatient. According to PW1, he must have suffered considerable pain even after surgery.

At the time of examination, he still experienced weakness in the left leg due to the fact that it had not been reasonably rehabilitated which according to him would take approximately one year, and during which time he would suffer disability of approximately (18%) eighteen percent. In the end, he would require surgery to remove the metallic plate at an estimated cost of Kshs. 80,000/-. The chest injury which brought about contusion of both lungs caused him pain and breathing problems for a few days but

fortunately he recovered quite well from that injury. The opinion of Dr. Joab Bodo who examined the Respondent about four years after the accident (P. Exh. 10) was consistent with that of PW1 and according to him, the Respondent had fully healed though the plate still required removal at an estimated cost of Kshs. 80,000/-.

The Learned Magistrate awarded Kshs. 500,000/- general damages for pain, suffering and loss of amenities. The Appellants suggested an award of Kshs. 100,000/- citing the case of **Nairobi HCCC No. 265 of 2004 Kinyanjui Wanyoike vs Jonathan Muturi [2004]eKLR**. Here the Judge complained that the Doctor's report was very sketchy and did not accurately describe the injuries suffered besides, the doctor was disqualified from testifying. I cannot fault the learned magistrate for the award as it was not inordinately high as to represent an erroneous estimate in view of the medical reports. Accordingly, I will not disturb the award of Kshs. 500,000/- granted for pain, suffering and loss of amenities. The claim for future medical expenses was for Kshs. 80,000/- in accordance with the Doctors' medical reports (P Exh 1. and P Exh. 10). This court awards the same.

As for special damages –

Kshs. 186, 121/- was proved strictly by way of receipts. These expenses were incurred for procuring medical services, medical report, police abstract and copy of records at Kenya Revenue Authority.

Respondent claimed that he incurred expenses in repairing his motor-vehicle Reg. No. KAN 941 R which was damaged in the accident. However, he did not produce any documentation showing a relationship between him and the motor-vehicle. Upon cross-examination in the lower court, the Respondent stated –

> **"my vehicle's logbooks copy was given to the advocate. I was not asked to carry it to court. The vehicle's ownership was not yet changed then from the one who sold to me known as Peter Mutua Muthiki. I did not bring the copy of records to show the vehicle was mine. As per now I have no logbook so court cannot know if it was mine"**

In Civil Appeal No. 260 of 2004 Wellington Nganga Muthiora V Akamba Public Road Services Ltd & Another (2010) eKLR the Court of Appeal sitting at Kisumu opined -

> ***"Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"***

In this case, the ownership having been challenged, the Respondent ought to have produced proof that he was the beneficial owner of the motor-vehicle which he did not. Failure to produce such documentation in evidence meant that he could not have been entitled to repair costs merely because the receipts were issued in his name.

As to the Appellants' counter-claim, the same was pleaded on the basis that repair work was done to the motor-vehicle KAK 830A. This is a special damages claim which ought to be pleaded and proved strictly. Kshs. 491,784/- was pleaded but only Kshs. 15,000/- (the receipt issued by the motor-vehicle assessor) was strictly proved. I will award that sum.

In summary, the lower court award is altered and substituted as follows,

(i) For pain suffering and loss of amenities: KShs. 500,000/-

(iii) For future medical expenses: KShs. 80,000/-

(iv) Special damages: Kshs. 186,121/-

Less 50% contributory negligence <u>Kshs. 383,060/50</u>

Judgment is also entered for the Appellants on their counter-claim on the proved amount of Kshs. 15,000/- less 50% contributory negligence. Therefore, Kshs.7,500/- is awarded.

There will be interest on general damages at court rates from the date of judgment in the lower court until payment in full. There will be similar interest on special damages from the date of filing suit. The Respondent shall have half of his costs of the suit as against the Appellants.

Dated, signed and delivered at Nairobi this 13th Day of October, 2016.

A. MBOGHOLI MSAGHA

<u>JUDGE</u>