



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. 586 OF 2006**

JOHN KIRIMI STANLEY.....APPELLANT

VERSUS

EVERGREEN AGENCIES LTD.....1<sup>ST</sup> RESPONDENT

KINGOO MWOLOLO MUSYIMI.....2<sup>ND</sup> RESPONDENT

*(Arising from the judgment and decree of the Principal Magistrate Hon. Mr. K. W. Kiarie delivered on 1st August, 2006 in the original Kiambu Senior Principal Magistrates' Court, Civil Case No. 34 of 2005).*

**JUDGMENT OF THE COURT**

**1. BACKGROUND**

This appeal arises from the judgment and decree of the Principal Magistrate Hon. Mr. K. W. Kiarie delivered on 1st August, 2006 in the original Kiambu Senior Principal Magistrates' Court, Civil Case No. 34 of 2005.

Brief facts of the case as presented in the subordinate court are that the Appellant, John Kirimi Stanley, was a pedestrian walking along the Kiambu-Nairobi road on 5<sup>th</sup> October, 2004, when near KIST or thereabout, he was hit from behind by the 1<sup>st</sup> Respondent's Motor Vehicle registration number KAJ 874H Peugeot 504 Pick Up, which was being driven by the second Respondent Kingoo Mwololo Musyimi, while in the cause of his employment with the 1<sup>st</sup> Respondent, Evergreen Agencies Ltd.

The Appellant was allegedly injured and blames the accident on the negligence or recklessness of the 2<sup>nd</sup> Respondent. The plaint dated 3<sup>rd</sup> February, 2005, and blamed the second Respondent for: -

- *failing to control or manage the said motor vehicle that he caused the iron rods that were being ferried thereon to seriously hurt the Appellant occasioning him severe injuries;*
- *driving without due care and attention;*
- *driving at an excessive speed in the circumstances;*
- *causing or permitting the said motor vehicle to go off the road and thereto causing the accident;*
- *failing to steer the motor vehicle or control it properly;*
- *failing to apply breaks in sufficient time;*
- *failing to stop, slow down, swerve or in any other manner manage or control the motor vehicle in question to avoid hitting the Appellant; and*

- *failing to take any regard to the lawful users of the road and particularly the Appellant.*

The 1<sup>st</sup> Respondent was sued for acts of negligence attributed to the 2<sup>nd</sup> Respondent while in the cause of his employment as the servant or agent of the 1<sup>st</sup> Respondent.

In their statement of defence dated 30<sup>th</sup> March, 2005, the Respondents jointly and severally denied all the allegations leveled against them by the Appellant in the plaint and contended that:-

- *no accident ever occurred or that if it did occur or at all, then the same was solely occasioned by or substantially contributed to by the Appellant;*
- *denied that the Appellant was ever injured as a result of the alleged accident;*
- *denied ownership of the motor vehicle registration Number KAJ 874H Peugeot 504 or that the 2<sup>nd</sup> Respondent ever drove the said motor vehicle;*
- *by the Appellant's own acts of negligence, he –walked along the road without regard to his own safety, the safety of other road users, obstructing the lawful path of the motor vehicle KAJ874H, walking on the road recklessly, failing to use the pedestrian path and failing to heed the conspicuous and persistent warning from the driver of motor vehicle KAJ 874H.*

The Respondents also pleaded contributory negligence on the part of the Appellant. The Appellant did not file reply to defence denying the allegations leveled against him in the defence that he contributed to or was wholly to blame for the accident.

The case was heard by the Principal Magistrate who found that the Appellant had not proved his case against the Respondents jointly and severally on liability on a balance of probabilities and dismissed it with costs to the Respondents. The Principal Magistrate then found that had he found the Respondents were liable in negligence for the injuries sustained by the Appellant, he would have awarded him Kshs. 30,000. The Appellant was aggrieved by the decision and findings of the Principal Magistrate and filed this appeal.

The Memorandum of Appeal raises eight (8) grounds of appeal/grievances challenging the decision and findings of the trial magistrate. These are that:-

1. *the trial magistrate erred in law and fact in holding that the Appellant had not proved negligence against the 2<sup>nd</sup> Respondent;*
2. *the manner in which the trial magistrate handled the issue of liability occasioned a serious miscarriage of justice to the Appellant;*
3. *the trial magistrate failed to properly consider and address the evidence of the Appellant and submission of the advocates on the issue of liability and quantum;*
4. *the trial magistrate relied on extraneous matters not brought out in the evidence in arriving at his judgment;*
5. *the trial magistrate was erroneous in failing to find the culpability of the Respondents in causing the accident;;*
6. *the decision of the trial magistrate was against the weight of the evidence and in dismissing the Appellant's suit on liability against the Respondents; and*
7. *the award of general damages was manifestly low and erroneous.*

The Appellant prayed for a review of the evidence on record and setting aside of the judgment of the lower court dismissing his suit, and substituting it with judgment in his favour with costs of the lower court and of this appeal to be borne by the Respondents.

Advocates for both parties to this appeal agreed to file and rely on written submissions to dispose of the appeal. The Appellant's advocates, Njoroge Baiya &Co advocates filed written submissions on 24<sup>th</sup> January, 2011 whereas the Respondent's advocates Mereka &Co. Advocates filed theirs on 3<sup>rd</sup> February, 2011.

In their submissions, advocates for the Appellant reiterated their grounds of appeal with highlights demonstrating how the trial magistrate had erred in the analysis of the evidence on record and in arriving at a faulty decision on liability and quantum that was against the weight of the evidence.

The Respondents opposed this appeal and in their written submissions summarized the Appellant's grounds of appeal as raising two issues for determination namely: -

1. *whether the Appellant proved his case on a balance of probability; and*
2. *whether the award made, had the appellant been successful was inordinately low.*

### **Re-evaluation of evidence**

This being the first appeal, this court is guided by section 78 of the Civil Procedure Act and the principles enunciated in the Court of Appeal case of **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER (1968) EA 123**, to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, this Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal in the above case further held that:

*“A Court on appeal will not normally interfere with the finding of 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 reaching his conclusion.*

***(See also Law JA, Kneller & Hannon Ag JJA in Mkube vs Nyamuro [1983] KLR, 403-415, at 403).***

From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

The main issues for determination before this court, as correctly put by the Respondents' counsel in his submissions, is, whether the trial magistrate erred in law and in fact or whether he misdirected himself when determining the issues before him, both on liability and on quantum of damages. A careful perusal of the grounds of appeal reveals that grounds 1-6 touch on the Principal Magistrate's finding on liability whereas ground 7 challenges the award of damages had the appellant succeeded in proving liability against the Respondents. I will therefore base my analysis of the evidence on the two issues as framed above.

#### **1. On who was to blame for the accident**

The Appellant testified that on the material day and time, he was walking beside the Kiambu-Nairobi road when he was hit by a motor vehicle which came from behind him. He only heard its sound and when he turned back, he was hit. He stated that he was hit off the tarmac. He did not hear any warning before he was hit. He found himself at Kiambu District Hospital where he was treated and discharged. In cross examination by the Respondent's advocate, the Appellant maintained that he was walking off the road. He also stated that the Pick Up was carrying some metals. He denied that he was on the road when he was hit. He also denied that he was approaching the road from the thicket.

The second Respondent's testimony was that on the material date and time, he had gone to clean the motor vehicle Registration number KAJ 874H, and was driving from Kiambu to Evergreen- the 1<sup>st</sup> Respondent's premises and on reaching KIST, while driving at 60km Kmp/hr, he heard a bang on the passenger door-left side of the motor vehicle. He applied breaks and saw a person whom he picked and took him to Kiambu District Hospital for treatment.

In his testimony before the traffic court where the 2<sup>nd</sup> Respondent was charged with failing to report an accident, as contained in the supplementary record of appeal, the Appellant maintained that he was walking off the Kiambu-Nairobi road when the accident motor vehicle suddenly hit him from behind. The 2<sup>nd</sup> Respondent too testified in defence before the said traffic court, maintaining that although an accident did occur involving the Appellant and the motor vehicle Registration No. KAJ 874 H along Kiambu – Nairobi road as stated, he failed to report the accident to the police because he was dissuaded by the Appellant not to, as the latter had not been injured. This testimony was similar to what he testified in the court below, giving rise to the appeal herein.

The Respondents in their statement of defence in the court below denied liability in negligence as pleaded and alleged in evidence by the Appellant and pleaded contributory negligence against the Appellant. The Appellant did not file reply to defence denying the allegations that he contributed to or was wholly to blame for the accident. The Respondents contended before the subordinate court that failure to file reply to defence rendered the allegations of negligence or contributory negligence against the Appellant uncontroverted and therefore he should bear full responsibility for the accident in question.

### ***Findings***

I have carefully perused the two records of appeal, the evidence adduced in the lower court and the detailed rival submissions by learned counsels for the parties to this appeal, together with the cited authorities.

I take cognizance of the fact that there was no independent witness to the accident that took place on 5/10/2004 involving the Appellant and motor vehicle Registration number KAJ 874H being driven by the second Respondent along Kiambu-Nairobi road at or about 2.00pm near KIST wherein the Appellant was injured and treated for the injuries he sustained as per the treatment notes from Kiambu District Hospital, the P3 form and the medical report by Dr. Manasseh Ndakalu all produced in evidence. I further note that from the testimonies of the Appellant and the 2<sup>nd</sup> Respondent, the occurrence of the accident is not denied.

On liability, the 2<sup>nd</sup> Respondent denied that the accident was caused by his acts of negligence as alleged by the Appellant. He blamed the Appellant for the accident, although he does not state in his testimony how the Appellant could have been responsible for the accident.

The Respondents' counsel in their submissions contend that the Appellant failed to prove that the 2<sup>nd</sup> Respondent was negligent in the manner he drove, managed or controlled motor vehicle KAJ 874H along the said Kiambu-Nairobi road. In their view, the evidence on record was clear that the 2<sup>nd</sup> Respondent was never charged in any court of law for causing an accident or the offence of careless driving. According to the Respondents, the only offence committed by the 2<sup>nd</sup> Respondent was failing to report an accident and that this alone could not be ground to find him liable.

They further submitted that the decision not to report the accident was by an agreement between the Appellant and 2<sup>nd</sup> Respondent as alluded to by the trial magistrate in the traffic case.

It is not in dispute that the 2<sup>nd</sup> Respondent took the Appellant to hospital for treatment after the accident, albeit the Appellant appeared to deny this fact in cross examination. I believe the 2<sup>nd</sup> Respondent's testimony that he is the one who took the Appellant to hospital following the accident. In any event, the Appellant maintained that he lost consciousness after the accident and that he did not even know who took him to hospital, contrary to what he told the traffic court that he was taken to hospital by the 2<sup>nd</sup> Respondent. Nonetheless, the central issue in this appeal is not who took the Appellant to hospital.

Counsel for the Respondents' submissions concentrated so much on comparing the testimonies before the traffic court and the court below. Upon careful consideration of his submissions, I find that most of the issues he raised are not critical to the determination of this appeal. I mention this among other issues in

his submissions, that the Appellant could have dissuaded the 2<sup>nd</sup> Respondent not to report the accident to police. In my view, the 2<sup>nd</sup> Respondent did not require permission from the Appellant to report the accident to the police, as the act of reporting is a statutory obligation under section 73 of the Traffic Act. He therefore did not require permission from the Appellant to comply with the relevant traffic law.

Further, I find that the evidence in the traffic court as presented does not disclose the existence of any agreement between the parties to this appeal not to report to the police the occurrence of the accident. The allegation made by the 2<sup>nd</sup> Respondent concerning the persuasion or dissuasion by the Appellant to the 2<sup>nd</sup> Respondent not to report the accident to the police, which was denied by the Appellant, although believed by the traffic court, however persuasive it was, could not change the spirit and letter of the law. I find the comments by the traffic court on this issue of agreement not to report the accident to the police an *orbiter dicta* to the main issues for determination in that case, and I am persuaded that the trial magistrate's postulation did not influence her determination of the 2<sup>nd</sup> Respondents' guilt, as she nevertheless found the 2<sup>nd</sup> Respondent guilty of failing to report an accident as required by law, and convicted him as charged. She only referred to the purported agreement in her sentencing remarks. I find that the Appellant's alleged dissuasion of the 2<sup>nd</sup> Respondent not to report the accident to the police had no bearing to the case below and the appeal herein.

I reiterate that there was no independent witness to the accident subject matter of these proceedings. It is therefore the Appellants' word against the Respondents and vice versa on how the accident took place.

Whereas the Appellant stated that he was walking off the road when he heard a motor vehicle from behind and on looking back, he was hit, the 2<sup>nd</sup> Respondent driver of the material motor vehicle stated that he only heard a bang on the passenger door and when he stopped, he saw a person had fallen. That person was the Appellant. The 2<sup>nd</sup> Respondent never saw the Appellant before the accident. In cross examination, the Appellant denied the suggestion that he could have emerged from the thicket when he was hit. Other than in cross examination, the 2<sup>nd</sup> Respondent's testimonies in chief as contained in the two records of appeal do not mention that he saw the Appellant emerge from the thicket when he was hit. Neither did the Respondent testify that the Appellant was crossing or attempting to cross the road when he was hit by the motor vehicle KAJ 874H. The statement of defence filed by the Respondents does not mention the act of the Appellant crossing the road or attempting to cross the road when he was hit by motor vehicle KAJ 874H.

I therefore find that the suggestion by the Respondents counsel in cross examination of the Appellant that the latter was emerging from the thicket far-fetched and unsupported by any evidence. In any event, answers in cross examination cannot form a basis of a party's case. They must tender evidence in support of the allegation. This is a principle espoused in the Court of Appeal in the case of **JOHN WAINAINA KAGWE VS HUSSEIN DAIRY LTD- MOMBASA CIVIL APPEAL NO 215 OF 2010, per Githinji, Makhandia&Murgor JJA.**

I believe the Appellant's testimony that he was hit from behind and that there was no warning of the approach of the motor vehicle before he was hit. Although the Respondents' written statement of defence averred that the Appellant failed to heed the persistent and conspicuous warning of the approach of the vehicle, the 2<sup>nd</sup> Respondent did not allude to any aspect of warning the Appellant before the accident in his testimony. In fact, his testimony was that he did not see the Appellant before the accident. There was no pleading in the Respondents' defence that the Appellant was attempting to cross or was emerging from the thicket when he was hit. It is trite law that evidence follows pleadings, and parties are bound by their pleadings. Further, I do not find any evidence on record that the 2<sup>nd</sup> Respondent persistently warned the Appellant of his approach. In any event, how could he have warned that which he did not see before hand?

Whereas I agree with the trial magistrate that the pedestrians must take care of their own road safety, I differ with his finding that the Appellant was hit when he was trying to cross the road as there was no evidence to prove the act of crossing the road or obstructing the path of the motor vehicle in question.

There was also no evidence to oust the Appellant's testimony on how he was hit. I find that the trial magistrate misdirected himself and made an erroneous finding that the Appellant was hit when trying to cross the road in the absence of any evidence to that effect on record. His finding on this aspect influenced him to find that the Appellant was wholly liable for the accident. I disallow and set aside the finding by the learned magistrate on how the accident occurred.

The Appellant also stated in his pleadings, cross-examination and in the traffic case that the Pick Up was ferrying iron rods which hurt him. The 2<sup>nd</sup> Respondent never raised any issue with this aspect of the Appellant's evidence. I am inclined to believe the Appellant that the part of the motor vehicle that hit him were the iron rods/ metals which were being ferried by the 2<sup>nd</sup> Respondent on the said Pick Up.

The Respondents' submission that the 2<sup>nd</sup> Respondent is not liable because he was not charged with any case of careless driving before the traffic court has no basis in law. It is trite law that the standard of proof required in criminal cases is higher than that in civil claims. As I have stated, earlier, there having been no independent eye witness to the accident, it is inconceivable that the police could have charged the 2<sup>nd</sup> Respondent with the offence of careless driving without an independent witness and with the accident having been reported to them by the Appellant one week after its occurrence and after he had recuperated from the injuries he sustained. The scene of accident could have been interfered with and it was unlikely that the police could have found sufficient material to charge the 2<sup>nd</sup> Respondent with the offence of careless driving. I also wish to state that, for purposes of civil liability, it is not necessary that the driver of the motor vehicle should be charged with a traffic offence for the accident in question for him to be found culpable, although a conviction for a traffic offence on the accident concerned may be tendered and considered as evidence in the civil case. The only requirement is that the plaintiff proves his case on balance of probabilities. I do not therefore consider an apt argument that non-charging of the 2<sup>nd</sup> Appellant with the offence of careless driving absolved him from any liability in negligence in the instant case.

Having found that the Appellant was not hit when he was trying to cross the road, and that he was hit by the iron rods which were being ferried by the 2<sup>nd</sup> Respondent, the next question I ask myself is whether there could have been any other cause that could have precipitated the accident other than the negligence of the 2<sup>nd</sup> Respondent driver of motor vehicle Registration number KAJ 874H. The Appellant in his pleadings and testimony inferred that the accident was caused by the 2<sup>nd</sup> Respondent, who in turn pleaded that the Appellant contributed to its occurrence. The law is that he who alleges must prove- section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya. It was therefore primarily upon the Appellant to tender evidence to prove the 2<sup>nd</sup> Respondent's negligence on balance of probabilities. On the other hand, for the Appellant to have contributed to or been solely responsible for the occurrence of the said accident as pleaded by the Respondents, the Respondents were under a duty, not only to plead that contributory negligence, but also to prove in evidence that indeed the Appellant was negligent while walking on the road.

The evidence of the Appellant was that he was hit from behind by a motor vehicle which he described as being driven at high speed when he looked back and saw it approach him while he was walking off the road. Although the 2<sup>nd</sup> Respondent denies being negligent, he does not deny that the appellant was walking off the road when he hit him. He testified that he never saw the Appellant on the road before being hit. He only saw him after the accident. This piece of evidence does not point out how the Appellant was negligent when walking off the road. I believe the Appellant's evidence that he was walking off the road when he was hit by the 2<sup>nd</sup> Respondent.

I do not find any scintilla of evidence pointing to the negligence on the part of the Appellant.

It was therefore not sufficient to plead particulars of contributory negligence on the part of the Appellant by the Respondents. They were enjoined to state and prove how the Appellant contributed to the occurrence of the accident. Whatever parties gathered in cross examination of could not be said to have built up their defence, **see MOMBASA CIVIL APPEAL NO 215 OF 2010, JOHN WAINAINA**

**KAGWEVS HUSSEIN DAIRY LTD per Githinji, Makhandia&Murgor JJA .**

Furthermore, accidents do not just happen. There must be a cause. The Court of Appeal in **EMBU PUBLIC ROAD SERVICES LTD VS RIIMI(1968)EA 22** stated that

*“ where the circumstances of the accident give rise to the inference of negligence then the defendants, 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.”*

It matters not, therefore, that there was no independent eye witness to the accident called to testify. It also matters not that the 2<sup>nd</sup> Respondent was not charged with the traffic offence of careless driving. It is clear that the accident was not reported to police within 24 hours to enable them visit the scene and investigate to determine what evidence was available to warrant such a charge. That is why the 2<sup>nd</sup> Respondent was charged and convicted by a traffic court for failing to report an accident. Would those proceedings for failing to report an accident *per se* impute liability on the Appellant or the 2<sup>nd</sup> Respondent? My answer is no. I am not oblivious to the fact that being a claim based on negligence, the Appellant was duty bound to prove negligence, as there can be no liability without fault in a case of this nature. I associate myself with the observations by the Judge in the case of **MUTHUKU VS KENYA CARGO SERVICES LTD (1991)KLR 464** that:-

*“In my view, it was for the Appellant to prove of course, upon a balance of probability, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault.”*

In **NANDWA VS KENYA KAZI LTD (1988) KLR 488**, the court of Appeal observed that:-

*“In an action for negligence, the burden is always on the plaintiff to prove the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence provides some answer adequate to displace that inference.*

The Appellant pleaded, among other acts of negligence, that the 2<sup>nd</sup> Respondent drove the accident motor vehicle without due care and attention, and failing to keep a proper look out. The obtaining circumstances contain a set of facts which raise a prima facie inference that the accident was caused by the 2<sup>nd</sup> Respondents' negligence, as there is no explanation why he did not see the Appellant while driving. The evidence before the trial magistrate established, on a balance of probabilities, that the Appellant was walking off the road when he was hit by the Respondents' motor vehicle. The 2<sup>nd</sup> Respondent stated that the impact was on the passenger door, at the left hand side of the road.

I find that there can be no excuse for the 2<sup>nd</sup> Respondent driver's complete failure to see the Appellant pedestrian in broad daylight. The predominant factor would be his failure to drive with care and attention. In this case, I find that the 2<sup>nd</sup> Respondent failed to keep a proper look out. I find that the Appellant did not cause the accident and that his contribution to its occurrence has was not proved. In the trial court, the Respondents counsel submitted asking the trial magistrate to find that the Appellant did not take any evasive action to avoid being hit. In the alternative, they asked the court to apportion liability at 50%/50%. As I have indicated, the Respondents did not provide any answer, adequate enough to displace the inference that they were negligent and neither did they prove, on a balance of probability, the level of contribution by the Appellant.

I reiterate that the 2<sup>nd</sup> Respondent failed to see the Appellant and does not state that the Appellant was walking in the path of the vehicle. In my evaluation, there can be no clearer evidence of negligence than this. The allegation by the defence, and as alluded to by the trial magistrate that the Appellant could have been emerging from the thicket or crossing the road when he was hit was not supported evidence and

remains forever an unproven allegation.

The Appellant's allegation and testimony as to the negligence of the 2<sup>nd</sup> Respondent were not ousted.

The defence did not discharge any proof as claimed in their pleadings. It remains that it was the 2<sup>nd</sup> Respondent who was in the wrong because he knocked the Appellant who was walking beside the road. What is it that made the 2<sup>nd</sup> Respondent not to see the Appellant walking on the road. It must be that he was not careful. The trial magistrate in disbelieving the Appellant's evidence said that the Appellant's version is not convincing for there is no reason on record why the motor vehicle had left the road. This was an erroneous finding. I am fortified by the Court of Appeal decision in **KENYA BUS SERVICES LTD VS DINA KAWIRA HUMPHREY, CA 295/2000 TUNOI, OMOLO&GITHINJI JJA** where the Court observed that ***"Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."*** See also **NYERI COURT OF APPEAL CIVIL APPEAL NO. 22 OF 2005** where the above principle was authoritatively upheld.

The Appellant testified that when he looked behind, he saw a motor vehicle in high speed before it knocked him. In my view, the Appellant could not have been expected to explain why the motor vehicle left the road and hit him as he was not in control of the said motor vehicle, not even remotely. It could only have been the 2<sup>nd</sup> Respondent to explain why the vehicle left the road. He did not. I therefore find the suggestion by the learned trial magistrate that the Appellant should have explained why the motor vehicle left the road erroneous and reject it.

The Respondents' counsel in the court below alluded to the fact that the Appellant did not file a reply to defence to deny the particulars of negligence or contributory negligence attributed to him by the Respondents. In their view, the Appellant admitted the negligence attributed to him and particulars thereof in the defence in terms of the provisions of (the then) Order 6 Rule 9 of the Civil Procedure Rules which provided

***"...Subject to sub-rule (4), any allegation of facts made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial.."***

A plain reading of **Order VI rule 9 (1)** shows that an allegation in a pleading may be traversed expressly by the opposing party or there may be a joinder of issue under **rule 10** of the same Order which joinder operates as a denial of the issue or issues. **Rule 10 (1) and (2)** reads as follows:-

***"10 (1) If there is no reply to a defence there is a joinder of issue on that defence (2) Subject to sub-rule (3)***

***(a) there is at the close of pleadings a joinder of issue on the pleading last filed, and***

***(b) a party may in his pleading expressly join issue on the immediately preceding pleading."***

It is true that the record shows that the Appellant did not file a reply to the defence which alleged he was negligent and or that he substantially contributed to the occurrence of the material accident. However, in the clear language of **Order VI rule 10 (1)** there was therefore a joinder of issue on the same. The Appellant needed not have expressly filed a subsequent pleading denying the negligence as the learned counsel submitted. Order 6 Rule 9 must be considered as a whole. The Court of Appeal case of **MOUNT ELGON HARDWARE -VS- UNITED MILLERS LTD [KISUMU CA NO 19 OF 1996]** relied upon by counsel for the Respondents for the proposition that failure to traverse allegations of negligence in a defence amounted to admission of the negligence by the plaintiff, is clearly distinguishable from this case. In that case, ***the plaintiff, who was the Appellant, did not plead any particulars of negligence in its pleadings and the only particulars of negligence pleaded were by the defendant/Respondent.(emphasis added)***

*added*) That is not the situation in this case where the Appellant not only particularized the allegations of negligence but also led evidence on the same. **See also the Court of Appeal decision in JOASH M. NYABICHA AND KENYA TEA DEVELOPMENT AUTHORITY VS KIPKEBE LIMITED & ATTORNEY GENERAL KISUMU CA 302/2010** where a similar issue of failure to file reply to defence arose and the court was emphatic that such failure was not fatal to the plaintiffs' case.

Counsel for the Respondents assailed the credibility of the Appellant and alluded to him as having lied on oath. This court has evaluated and re-examined the evidence on record, both in the traffic case and in the court below giving rise to this appeal. I do not find any evidence of perjury on the part of the Appellant and neither did the trial magistrate find any. If that were to be the case before the traffic case, I see no reason why the trial magistrate did not punish him for perjury. Further, if there was perjury, I see no reason why she went ahead to convict the 2<sup>nd</sup> Respondent on evidence that was found to be false. The 2<sup>nd</sup> Respondent could, furthermore, have challenged his conviction on that ground. He did not. I therefore reject the argument that the Appellant was not truthful. The idea that the Appellant could have lied concerning the allegation that he did dissuade the 2<sup>nd</sup> Respondent not to report the accident to the police is not supported,

I am conscious of the fact that this court is not dealing with an appeal arising from a conviction in a traffic case. I however find that all the insinuations of lying on oath were not proven, in as much as there were some minor discrepancies between the evidence adduced in the traffic court and in the court below which discrepancies in my view, were not material and do not vitiate my findings on liability.

I find that on a balance of probability, the Appellant adduced ample evidence to show that the accident was caused by the negligence of the 2<sup>nd</sup> Respondent who was driving motor vehicle registration number KAJ 874H. There is no evidence that the Appellant darted or ran into the road, or emerged suddenly from the thickets nearby. The evidence on a balance of probability shows that the Appellant was walking beside the road when struck. The trial magistrate was in error in finding that the Appellant was wholly to blame for the accident due to his negligence in trying to cross the road as there was no such evidence on record. There is also no evidence that the Appellant was in the path of the motor vehicle when he was hit, as the driver denied seeing him before the material accident.

The case of **PATRICK MUTIE** relied on by the trial magistrate concerned a clear case of a pedestrian who was hit when crossing the road. I do not find any reference in the parties' testimonies that guided the trial magistrate to form an impression that the Appellant was trying to cross the road when the road was not clear, in as much as I agree with him that pedestrians too must be conscious of road safety, it was not shown on a balance of probabilities that the Appellant pedestrian was not conscious of his own safety while walking on the road on the material day.

Having found that the 2<sup>nd</sup> Respondent was liable for the accident and with clear evidence that prima facie, the 1<sup>st</sup> Respondent was the registered owner of the accident motor vehicle as shown by the certificate from the Registrar of Motor Vehicles produced in evidence, I further find that the 1<sup>st</sup> Respondent is vicariously liable for the acts of the 2<sup>nd</sup> Respondent who was on duty acting in the cause of his employment of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent in his testimony admitted that he was driving the accident motor from Kiambu to Evergreen. He did not deny that he was in employment of the 1<sup>st</sup> Respondent. The Respondents are therefore jointly and severally liable at 100% in negligence. Grounds 1,2,3,4,5 and 6 of the appeal herein therefore succeed.

## ***2. On quantum of damages***

Having established liability, I now turn to the trial magistrate's assessment of damages.

The Appellant claimed both special and general damages. Had the Appellant succeeded, the trial magistrate would have awarded him Kshs.30, 000 as general damages.

Ground 7 of the Appellant's grounds of appeal is that the trial magistrates' award of general damages was

manifestly low and erroneous. The Respondents support the trial magistrate's award of Kshs. 30,000 as adequate compensation, as the injuries *sustained were not only soft tissue in nature, but minor*. He relied on the authority of **LOICE NYAMBEKI OYUGI VS OMAR HAJI HASSAN HCC NO. 4130 OF 1991(Angawa J** in which the plaintiff's injuries were described in her own testimony as an injury to the hand whereas the plaint described them as traumatic osteothesis of the elbow; multiple limbs(sic); stiffness and pain of left elbow and trauma shock.

The Appellant on the other hand prayed for an enhancement of the award to 120,000 and relies on the decision in **NAKURU HCC NO. 309 OF 1998. JOHNSTONE M. OCHIENG & 2 OTHERS VS C.C.LTD&ISAAC MBUGUA (D.M.Rimita J.)**

The issue for determination before this court is whether the assessment which was made by the trial magistrate was correct.

On whether or not to interfere with the quantum assessed by the trial court by the appellate court, this court relies on well established principles laid down in a plethora of decisions that, *assessment of quantum of damages in a claim for general damages is a judicial discretionary exercise. See **MBOGO & ANOTHER V SHAH, (1968) EA 93.** Consequently, an appellate court will not ordinarily interfere with the exercise of discretion by the trial court unless it is shown that the trial court misdirected itself in some matter and as a result arrived at a wrong decision, or it is manifest from the case as a whole that the court was clearly wrong in the exercise of this discretion, thereby occasioning an injustice.*

The above is the legal position setting the dimensions for the exercise of discretion which must be exercised judicially, with wise circumspect and upon some defined legal principles. Invariably, when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court. In other words, the discretion in assessing the amount of general damages payable will be disturbed if the trial court:

- a) *took into account an irrelevant factor or*
- b) *left out of account a relevant factor or,*
- c) *the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by our own Court of Appeal. For further illumination on this issue see:

- *Kanga V. Manyoka [1961] EA 705, 709, 7013*
- *Lukenya Ranching and Farming Co-op. Society Ltd V. Kavoloto [1979] E. A. 414, 418, 419*
- *Kemfro Africa t/a Meru Express & another v. A. M. Lubia & another (1982 – 88) 1 KAR 727*
- *C. A Civil Appeal No.66 of 1982 Zablon Manga v. Morris W. Musila.*

### **Applying the Test**

The trial magistrate gave an award of Kshs 30,000 on injuries which were clearly soft tissue injuries as described by the Doctor who medically examined the Appellant, and supported by treatment notes that were produced. The P3 form classified the injuries as harm. The Appellant was expected to heal with time. The point of contention, according to the Respondent's counsel, was that the Doctor's medical examination report and medical card and P3 form did not indicate that the Appellant lost consciousness. The Respondents' counsel has submitted that it would appear the Appellant was not being truthful in testimonies both before the traffic court and the court below touching on his injuries especially the aspect of loosing consciousness, and that he deliberately exaggerated the situation in order to mislead the court.

I have carefully perused the records containing the Appellant's testimonies. I do not find any evidence on

record that suggests that the Appellant lied about his injuries. He maintained in the two testimonies that he lost consciousness and when he came to, he was in Kiambu District Hospital. This aspect of losing consciousness was not recorded by the doctor and or medical personnel who attended to him. Neither was it pleaded in the plaint. The 2<sup>nd</sup> Respondent in cross examination stated that the Appellant was not talking when he took him to hospital, although he does not mention whether or not he was unconscious. He does not state that he never saw any injuries but nonetheless took him to hospital. In my view, the only reason that could have compelled the 2<sup>nd</sup> Respondent to take the Appellant to hospital was that he had injuries on him. As to the nature of those injuries, only the doctors or medical personnel could confirm. The initial treatment card attests that the Appellant was injured. It does not make sense that later when the 2<sup>nd</sup> Respondent met the Appellant, the latter told him that he was not injured. The aspect of losing consciousness not having pleaded, I find that the evidence adduced by the appellant that he lost consciousness, in the absence of a pleading to that effect, was inadmissible, as parties are bound by their pleadings, nothing less. In other words, one cannot prove what they have not pleaded. The trial magistrate did not refer to this state of the Appellant in assessing damages. However, in my considered view, the allegation by the Appellant did not merely become a lie simply because the Doctor did not record it, or because it was not pleaded. My take on this aspect is that the Appellant did not plead and further, that he was unable to prove this aspect with medical evidence.

I am bound to disturb the trial magistrate's award of general damages for the following reasons:- It is surprising how the parties and the trial magistrate reclassified the injuries sustained by the Appellant. In the trial magistrate's assessment, the Appellant sustained **very minor soft tissue injuries**. In their submissions, counsel for the Respondents describes the injuries as **not only soft tissue in nature, but also minor**. The Appellant on the other hand by his plaint describes his injuries as **severe**.

All the medical records produced in evidence agree on the injuries sustained by the Appellant, other than the aspect of losing consciousness. The trial magistrate's reference to the injuries as *very minor* soft tissue injuries, no doubt, influenced his assessment of damages. In my own assessment, without classifying the injuries as minor or serious, there is no doubt, those factors would affect an assessment of damages. In the Appellant's submission, the trial magistrate trivialized his injuries which affected his fair assessment. I agree with the submission and I find the trial magistrate to have erred in reclassifying the injuries as *very minor* soft tissue injuries, contrary to what the Doctor had found to be soft tissue injuries.

I believe the Appellants pleaded injuries as contained in the medical examination report produced in evidence by consent, as assessed by Dr. Manasseh Ndakalu. According to the doctor, the injuries which involved left healed scar right lower neck interiorly, multiple healed scars on both hands and multiple healed scars on the face were soft tissue injuries. The soft tissue injuries were expected to heal with resultant permanent scars. This evidence was not controverted and therefore, there was no reason to reclassify them. The Appellant stated that he still experienced pain in the head when carrying heavy objects due to the injuries.

As to how much damages the Appellant should have been awarded in the circumstances, I have examined the rival authorities cited by both parties. I take cognizance that it is not easy to assess general damages for personal injuries. The venerable Madan, JA (*as he then was*), aptly captured the difficulties that confront a judge in assessment of general damages in the context of personal injuries claims in the case of **UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575, at page 579** as follows:-

*“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.”*

In addition the Court of Appeal has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. **See JABANE V OLENJA, (1986) KLR 1.**

In **MOHAMED JUMA V KENYA GLASS WORKS LTD, CA NO. 1 OF 1986 (unreported) Madan, JA** again, aptly observed that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. In the same judgment, he addressed an argument tying the quantum of damages to an appellant's station in life:

*“It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons.”*

I am further guided by the fact that damages are not meant to enrich the victim but to compensate them for the injury suffered and try as much as possible to restore them to the position they were in before suffering the injury. I must also be guided by past awards but consider each case on its merits and peculiar circumstances. Where past awards are taken into account, their age and rate of inflation and strength of the Kenya shilling when the said awards were made and the time when the intended award is of paramount consideration.

I am inclined to interfere with the award by the trial magistrate as it was influenced by his reclassification of the injuries sustained by the Appellant **as very minor soft tissue injuries**. This was not supported by the medical evidence produced. I find the award was inordinately low and took into account irrelevant factors.

I find that the Appellant herein sustained soft tissue injuries involving-multiple skin lacerations on the face, neck, blunt injuries on the chest and bruises on the hands. They are so described in the treatment card and medical report. They have healed leaving scars. The P3 form describes the injuries as harm, which is defined on the said form as meaning *any bodily hurt disease or disorder whether permanent or temporary*. There is no definition of soft tissue injuries. I am fortified by the decision in **BUNGOMA HCCA 6 of 2012 PAUL KIPSANG KOECH GLOBAL TRUCKS LIMITED VS TITUS OSULE OSORE** by my brother Judge Gikonyo J. who, when confronted with a similar question to determine between **minor soft tissue injuries and soft tissue injuries** observed that:-

*“looking at the reports by the doctors, I am of the opinion that, their individual findings support the particulars of the injuries as contained in the plaint. They both agree those injuries were soft injuries, except; Dr. Andai classifies them as "serious soft injuries", and Dr. Malik as "minor soft tissue injuries". This is the fundamental issue the court must consider, and should be the gist on which the judgment of this court should turn.....”*

The Respondents counsel submitted that the Appellant had suffered minor lacerations and urged the court to find 30,000 as adequate compensation. He relied on the authority of **PETER KARIUKI VS KIGURU HCC 217/91** and **EVANS MBAABU NJURU VS PAUL NYAMBENYI HCC 778/91, Angawa J.** where Kshs. 20,000 was awarded. The Peter Kariuki authority, though cited, was not availed to the court for comparison. However, the Evans Mbaabu case does not specify whether the injuries involved any bruises or lacerations or blunt or swellings.

The Appellant's counsel on the other hand submitted that the Appellant had sustained serious injuries as contained in the medical report, P3 form and treatment notes than the ones in the authorities submitted by the Respondents. She relied on the case of **JOHNSTONE OCHIENG VS CC LTD CA309/98** where the third plaintiff was awarded 80,000. She prayed for 120,000.

If one considers the cases to which the learned magistrate was referred to, and if one assumes that those cases were the only material cases to which he had access to, I would conclude that the learned magistrate's assessment was by no means penny-pinching. Whatever the reason, material assessments made in other cases decided in 1991, to which I have been referred, suggest, even after making a downward allowance for inflation, that the assessment made by the learned magistrate was too low.

I find the injuries sustained by the **third plaintiff** in the **JOHNSTONE OCHIENG VS CC LTD**

**CA309/98 Rimita J** case as cited by the Appellant's counsel similar to those sustained by the Appellant herein. The injuries included:-bruises on the face; soft tissue injuries to the right leg; and soft tissue injury to the chest. He was awarded Kshs. 80,000 general damages.

The judgment subject matter of this appeal was delivered in 2006, eight (8) years after the Johnstone Ochieng decision. The Appellant at the hearing in the court below complained of numbness on one part of the head and a painful neck when carrying anything on it. He was a farm hand whose tasks were manual in nature. The injuries were however expected to heal with time as per the Doctor's prognosis. This evidence was uncontroverted. I therefore set aside the trial magistrate's award of Kshs 30,000 as general damages and substitute the award with Kshs. 100,000 for pain and suffering and loss of amenities.

**3. On the claim for special damages**

The Appellant sought Kshs. 3,679 for medical report, medical expenses and police abstract. Receipts produced in support of the pleadings were in respect of police abstract-Kshs. 200, 700 paid to the hospital at Kiambu and 1500 paid to Dr. Manasseh Ndakalu for medical examination report. I find that he specifically pleaded and proved Kshs. 2400 as special damages as required by the law. The trial magistrate did not make any finding or reference to special damages as pleaded and proved. This was erroneous on his part. I accordingly award the Appellant Kshs. 2400 special damages. I decline to grant the Kshs. 3000 as per PEx 2(b) produced by the Doctor as this was not specifically pleaded. As I have stated before, one cannot prove what they have not pleaded. In any event, in my view, a witness attendance expense falls in the category of costs of the suit to be considered at the appropriate stage of the appeal.

Taking into account all that I have said in the foregoing paragraphs, I allow the appeal, set aside the judgment and decree of the subordinate court made on 1/08/2006 by the Principal Magistrate Hon. Mr. K. W. Kiarie delivered in the Kiambu Senior Principal Magistrates' Court, Civil Case No. 34 of 2005, and substitute there for a judgment holding the Respondents 100% liable in negligence. I award to the Appellant Kshs. 100,000 general damages for pain and suffering and loss of amenities for the injuries sustained in the accident. I also award him Kshs. 2400 as pleaded and proven special damages. In addition, I award the Appellant costs of the subordinate court and this appeal. General damages to attract interest at court rates from the date of judgment in the subordinate court until payment in full. Special damages to attract interest at court rates from the date of filing of suit in the subordinate court until payment in full.

**Dated, signed and Delivered at NAIROBI this 24<sup>th</sup> day of September, 2014.**

**ABURILI, ROSELYNE EKIRAPA**

**JUDGE**

**In the presence of**

.....**for the Appellant**

.....**for the Respondent**

**Virginia Kavata .....Court Clerk**