REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 574 0F 2011

SAMMY NGUGI MUGO……..……....……...APPELLANT

VERSUS

MOMBASA SALT LAKES LTD……..…….……1ST RESPONDENT

RICHARD WAWERU……..2ND RESPONDENT

(Arising from the Judgment and Decree of Hon. Mr. M.W.Murage Senior Principal Magistrate in Limuru SPM CC NO. 179 OF 2010 delivered on 11th October, 2011)

JUDGMENT OF THE COURT

From the onset, the appellate court's responsibility under Section 78 of the Civil Procedure Act is to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction. As the first Appellate Court iam also guided by the decision in **SELLE –Vs- ASSOCIATED MOTOR BOAT COMP [1968] E.A. 123**, to evaluate the trial Court's evidence, analyze it and come to my own conclusion, but in so doing, I must give allowance of the fact that I neither saw nor heard the witnesses. However, this court is not bound to follow the trial court's findings 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.

Background

This appeal arises from the Judgment and Decree of Hon. M.W.Murage, Senior Principal Magistrate, delivered on 11th March, 2011. The Appellant Sammy Ngugi Mugo claimed in the subordinate court that on 4/12/2009, he was a lawful fare paying passenger in the 1st Respondent's motor vehicle Registration No. KAQ 210S Toyota Matatu along Waiyaki Way when near Cooperation area or thereabout, the 2nd Respondent driver, agent, servant of the 1st Respondent, while in the course of his employment with the 1st Respondent drove, managed and or controlled the said motor vehicle that he caused an accident after losing control and veering off the road and hitting an electricity post as a result of which the Appellant was injured and he suffered loss and damage. He claimed for general damages, special damages, cost of medical expenses, costs and interest.

The plaint set out particulars of negligence on the part of the Respondent as:-

a) allowing or permitting an unqualified personnel to drive and or control motor vehicle KAQ210S

Toyota Matatu on a public road;

b) allowing and or permitting motor vehicle KAQ210S to be driven on a public road whilst the same was defective and brake-less;

c) failing to adhere to regulations under the Traffic Act;

d) driving at an excessive speed in the circumstances;

e) driving without due care and attention;

f) losing control of a motor vehicle and hitting a tree;

g) failing to brake, swerve, stop, slow down and or avoid hitting an electric post and or rolling;

h) allowing an accident to occur

i) Res ipsa Loquitur.

The Respondents entered appearance and filed a defence on14/6/2010 through the firm of Kairu &McCourt Advocates, denying all allegations leveled against them by the Appellant and putting the Appellant to strict proof thereof. In the alternative to the denials, the Respondents contended that the said accident, if at all it occurred involving the said motor vehicle and the Appellant(though denied)then the same was solely caused by or substantially contributed to by the Appellant's negligence or carelessness.

The Respondents particularized the negligence/ carelessness of the Appellant as:-

a) Failing to take any or any adequate precautions for his own safety;

b) Failing to heed the instructions on safety precautions when travelling;

c) Failing to heed the traffic rules and regulations when travelling.

The Respondents also pleaded that *in the alternative, the accident(if at all it occurred) was caused by an inevitable accident as a salon car which was on the left lane overtook Motor Vehicle KAQ210 S and the driver had to move to the left in the process hit the pavement and lost control.*

Particulars of injuries, loss and damage claimed by the Appellant were vehemently denied by the Respondents. They also denied the applicability of the doctrine of *Res ipsa Loquitur* in the circumstances. They denied liability and ever receiving notice of intention to sue from the Appellant and prayed for dismissal of the Appellant's suit with costs.

The Appellant filed reply to defence to counter the allegations by the Respondents that he was responsible for the accident or that he contributed to its occurrence and reiterated the contents of the Plaint.

The Affidavit of Documents and Discovery under the provisions of Order 10 Rule 11 were filed by the parties and the matter was set down for hearing after pleadings closed.

Later by notice of motion dated 6/5/2011, the Respondents sought to amend their defence on account of new and important information which had come to their knowledge necessitating the amendments to settle all issues in dispute. The draft amended defence introduced particulars of fraud and misrepresentation on the part of the Appellant. When the application came up for hearing, the parties consented to have it granted as prayed, with corresponding leave to the Appellant to file amendments to the plaint or reply to the amended defence. The Appellant filed a reply to the amended defence denying the allegations of fraud, and or forgery on his part and maintained that he was involved in the accident as pleaded and challenged the Respondents to prove those allegations which he termed bad in law,

prevaricative, and lacked candidness and did not disclose a reasonable defence.

1. Hearing

a. Appellant's case

The hearing commenced on 27/7/2011 with the Appellant testifying as PW3 that he was technician and that on the material date and time he was travelling in Motor Vehicle Registration No. KQ210 S going to work from Kinoo to Kangemi. That the driver of the said motor vehicle was driving in an inner lane and when he tried to change lanes to the left, there was another motor vehicle coming from behind so he lost control of the motor vehicle KAQ210S and hit a pavement. The Appellant was injured and taken to Avenue Hospital by a Good Samaritan where he was admitted for 5 days and discharged. He paid Kshs. 180,000 using NHIF and produced an invoice and receipts. He later reported the accident to Kabete Police Station and was issued with a P3 form which was filled by the Doctor and an Abstract of the accident. He also produced records from the Registrar of Motor Vehicles showing that the accident Motor Vehicle belonged to the 1st Respondent. He stated that the motor vehicle was being driven by the 2nd Respondent. He blamed the occurrence of the accident on the negligence and or carelessness of the 2nd Respondent and stated that the vehicle was driven at high speed at the material time, about 100kmp/h making it impossible to prevent the accident. He stated that for some time, he could not work due to the injuries and sought damages.

In cross examination the Appellant maintained that the vehicle was driven at over 100km/h and that although he did not check on the speedometer, he, being a driver he could tell the speed. He also stated that he and other passengers warned the driver to slow down but the driver did not heed their calls. That the driver swerved to avoid hitting a motor vehicle ahead and went off the road as the other vehicle was in motion. He stated that he was taken to Avenue Hospital with one other passenger by an unknown Good Samaritan and that only reported to the police after being discharged from hospital and was issued with a P3 form and an Abstract. He stated that the record in the Occurrence Book at the police station was made in January.

The Appellant called three other witnesses. Dr. Moses Kinuthia testified that he examined the Appellant who had a history of being involved in a road traffic accident on 4/12/2009. He confirmed that the Appellant had injuries which he recorded in the medical report and produced as exhibit 1a. In his opinion, the Appellant suffered grievous harm and had temporary incapacity requiring further surgery. He also produced the receipts for the amount he charged for the medical report and court attendance. In cross examination he stated that he examined the Appellant 3 months after the injury accident and that the Appellant had a fractured left arm.

Dr. Raji Halai from Avenue Hospital also testified for the Apellant to the effect that the Appellant was first seen at their hospital on 4/12/2009 with a swollen tender left arm and fracture, after being involved in a road accident. He was admitted and taken to theatre where screws and plates were inserted in his arm. He was discharged on 9/12/2009. Dr Halai produced the hospital discharge summary for the Appellant as exhibit 2. In cross examination, he stated that he did not know the person who had taken the Appellant to hospital but records indicated that he was received at 8.45 am while in pain and a swollen hand in a sling and gave a history of being involved in a road traffic accident. The witness did not know where the accident took place or which motor vehicle was involved. He produced a receipt for Kshs. 10,000 court attendance fee which he had charged the Appellant.

The Appellant's third witness was NO. 35281, PC Okemo Ombui of Kabete Traffic Police Station. He testified that on 4/12/2009 he received a report of an accident at Cooperation area. That the accident occurred at 8.30 am. The report concerned a self involved accident involving motor vehicle Registration No. KAQ210S Toyota Matatu. The scene was visited by PC Wangombe who investigated the case and was later transferred to Turkana. According to this witness, the driver of the accident motor vehicle was Richard Waweru who was travelling to the city centre at the material time and was obstructed by a motor vehicle making him veer off the road and land in a ditch. He stated that the Appellant was one of the passengers in the said motor vehicle at the time of accident and suffered a fracture and was taken to

Avenue Hospital. That he had recorded a statement on the occurrence of the accident and was issued with a P3 form and a police Abstract. He produced the two documents as exhibits together with the OB where the report was made.

In cross examination the witness reiterated that the report indicated that the accident occurred at Cooperation area near Uthiru and 8 people were injured. Their names were recorded in the OB, and that that the Appellant's name was not recorded in the column of ***"nature of occurrence"*** but that there were three other names inclusive of the Appellant's recorded. He responded that the Appellant was taken to hospital immediately after the accident and that his name was recorded after he was discharged from Hospital and went to report to the police, that is when his name was included in the column of signature of officer, although it should have been in the nature of occurrence column. He denied the assertion by counsel for the Respondents that the recording of the Appellant's name was an afterthought as it was not indicated that the other victims of the accident were at the scene of accident. He conceded that procedurally, names of victims should have been recorded in the nature of occurrence column as a follow up but denied that there was any fraud in recording the names of the other victims in the signature column as this was done for those who came to report the accident later. In re-examination, the witness stated that he only issued the Appellant with the P3 form and Abstract after satisfying himself that the victim was involved in the said accident.

b. Respondent's defence

At the close of the Appellant's case, the Respondents called one witness, NO. 455534, Corporal Koboga from CID Central who testified on behalf of the Deputy Provincial Police Officer, Nairobi. He testified that on instructions to investigate the accident in question, he proceeded to Kabete Police Station to confirm OB entry No. 8 of 4/12/2009 and confirmed that a report had been made of a self involved motor accident involving motor vehicle registration No. KAQ 210S Toyota Matatu. He perused the OB and found a record of 5 persons listed as injured as per the OB produced in court, and stated that these passengers were treated and discharged from MP Shah Hospital. According to the witness, the name of the Appellant appeared in the remarks column which was unprocedural. According to him, the investigating officer should have followed up passengers and written a follow up OB entry in the nature of occurrence column.

In cross examination, the witness informed the court that he did not investigate if the Appellant was involved in the accident and only investigated if the names were correctly inserted. The witness was recalled to produce two letters authored by the Deputy PPO Nairobi dated 8/5/2010 and 15/8/2010 as DWEx-1a and 1b. In the former letter addressed to the Managing Director of Directline Assurance Co. Ltd, the Deputy PPO was categorical that the names of Sammy Ngugi and 2 others did not appear in the initial OB entry pertaining to the accident. He concluded that therefore, their inclusion in the remarks column was deemed an afterthought and he had accordingly revoked the P3 forms and Police Abstracts issued to them.

In cross examination, the witness stated that he investigated the allegations of fraud, not the accident, by perusing the OB pointing out that only 5 names were recorded as victims and the record showed **" and others to follows"(sic)** after naming the 5 and that the **phrase meant investigations not names**. He blamed the report office for making entries in the remarks column not in the nature of occurrence column and added that the report was made on the same day. He stated that he did not speak to the driver of the motor vehicle and that as the Appellant's name was on the wrong side, he was not in that particular accident. In re-examination, he maintained that the Appellant could not have been involved in the accident as it was not known when his name was inserted in the margins.

c. Written submissions and authorities

At the close of the hearing, the parties agreed and filed written submissions on 1/9/2011.

i. Appellants' submissions

The Appellant's counsel in his submissions reiterated the pleadings on record as per the plaint and reply to defence and submitted that the Appellant had proved his case on a balance of probability, that he was involved in the accident in question, that he was travelling in the accident motor vehicle at the material time and that he was injured and suffered loss and damage. He prayed for judgment in favour of the Appellant with costs and interest. He further urged the court to disregard the defence case as they were unable to prove fraud, misrepresentation and or contributory negligence as pleaded in the defence and amended defence. According to counsel, the Appellant had discharged the burden of proof and that his evidence was uncontroverted. He challenged the testimony of the defence witness not being sufficient to prove fraud and that the purported revocation of the P3 form and Abstract by the Deputy PPO Nairobi was non-consequential as he was not the author of the said documents. He also took issue with the 2nd Respondent not taking the witness stand to challenge the Appellant's evidence.

On quantum, counsel submitted that an award of 500,000 would be sufficient compensation for the Appellant. He relied on the authority of **JOEL JUMA MULATYA VS KENYA RALWAYS CORPORATION MBSA HCC 113/1999.** He also prayed for special damages, costs and interest.

ii. Respondents' submissions

The Respondent's counsel submitted that albeit the occurrence of the accident was not denied in the circumstances, the Appellant had not discharged the burden of proving, on a balance of probabilities, that he was involved in the material accident or that the said accident was occasioned by the negligence or carelessness of the Respondents. He maintained that since the Appellant's name appeared in the signature column, whereas the names of the other victims of the accident appeared in the correct column of nature of occurrence, then the Appellant's name must have been entered in the OB fraudulently and through misrepresentation of facts, as it was not even indicated who inserted it and when it was done. In his view, the failure to record the particulars of the Appellant's involvement in the accident in the nature of occurrence column and instead in the margin was an afterthought and a way of perpetuating fraud. He also took issue with the Appellant having gone to Avenue Hospital whereas all the other victims of the accident were taken to MP Shah Hospital.

In the absence of any other evidence from the police to prove his involvement in the accident, it was submitted that the Appellant's claim was a sham and that there was a possibility of him having been injured in a different accident. It was further submitted that the police abstract and P3 form issued by the police had been investigated and found to have been irregularly issued and revoked by the Deputy PPO, the Appellant had nothing to show that he was involved in the material accident.

On liability, counsel for the Respondents reiterated what was pleaded in the defence and amended defence that the accident occurred when an unidentified driver obstructed the 2nd Respondent and on avoiding ramming into the rear of that other vehicle, and to avoid colliding with another motor vehicle on the other lane, he swerved to the left and landed in ditch. In his view, the allegation that the 2nd Respondent driver was over speeding was not supported by any evidence as it remained an allegation.

2. Judgment by the subordinate Court

By a judgment of the SPM M.W.Murage delivered on 11th October, 2011. The Appellant's suit was dismissed with costs to the Respondents. The trial magistrate found that the Appellant had not discharged the burden of proving that on a balance of probability, he was involved in the accident in question as the entry in the OB showed that his name was not correctly inserted in the column on nature of occurrence or follow up in a new OB entry after the initial report had been made, although it ought to have been and instead it was inserted on the margin of the signature column as testified by PW4 and DW1. In his view, since the Abstract and the P3 forms issued to the Appellant had been revoked by the Deputy PPO Nairobi because of the anomalies, in the absence of any other evidence, and as the Appellant's report was made late, it raised doubts as to whether the Appellant was involved in the accident. The trial magistrate did not make any finding on liability. He concluded that had the Appellant proved liability, he would have awarded him Kshs. 250,000 general damages for the injury sustained.

3. Appeal

Being dissatisfied with the Judgment and Decree of the Subordinate Court, the Appellant filed this appeal on 4th November, 2011 setting out six(6) grounds of appeal as flows:-

> *1. That the learned trial magistrate erred in law and fact in failing to consider the issues before his and thereby making a decision based on the wrong principles;*
>
> *2. That the trial magistrate erred in law and fact in writing a judgment which fails to meet the criteria set out in the civil Procedure Rules;*
>
> *3. That the trial magistrate's findings were against the weight of the evidence advanced at the trial;*
>
> *4. That the trial magistrate erred in law and fact by disregarding totally the Appellant's evidence and submissions;*
>
> *5. That the trial magistrate made a wholly erroneous estimate of the damages suffered; and*
>
> *6. That the trial magistrate failed to weigh properly or at all the evidence tendered before the court.*

The Appellant prayed for setting aside of the findings on liability and substitution with a judgment in favour of the Appellant, enhancement of the general damages, costs of the appeal and the subordinate court.

The Appeal was admitted to hearing on 16th august, 2013 and directions given on 21st July, 2014. On the latter date, parties agreed to file written submissions to dispose of the Appeal.

The Appellant filed his submissions on 4/8/2014 whereas the Respondents filed theirs on 21st August, 2014.

In support of the grounds of appeal, the Appellant reiterated the testimony of parties before the subordinate court. In his view, the trial magistrate ought to have decided in his favour as there was sufficient evidence to determine liability against the Respondents. He also complained that the award of damages by the trial magistrate was too low.

In opposition to the Appeal, the Respondent's counsel submitted that the trial magistrate did not err in dismissing the Appellant's suit as the Appellant did not discharge the burden of proving that he was involved in the material accident which, admittedly, took place.

4. Issues for determination

I shall in deciding this appeal bear true adherence to those principles outlined at the commencement stage of writing this judgment 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 of fact or law in reaching his conclusion. Per ***LAW JA, KNELLER & HANNOX AG JJA IN MKUBE VS. NYAMURO [1983] LLR, 403-415, AT 403)***

Having carefully re-evaluated the pleadings, evidence on record and submissions by the parties' advocates and taking into account the authorities cited, I frame the following issues for determination:-

> ***1. Whether there was an accident on 4/12/2009 involving motor vehicle KAQ 210S Toyota Matatu along Waiyaki Way near Cooperation area***

The occurrence of the material accident though denied by the Respondents in their defence is supported by the evidence of the Appellant and corroborated by PW4 a police officer who confirmed with the production of the OB entry No.8 of 4/12/2009 at 8.45 am that indeed a self involved accident in question was reported to Kikuyu Police Station, scene visited and the motor vehicle Registration No. KAQ210S Toyota Matatu towed to Kabete Police station for inspection. DW1 also confirmed the entry in the OB for the said accident upon being instructed by the Deputy PPO to investigate the entry, and whether the Appellant's name was correctly inserted in the OB. The trial magistrate did not make any contrary decision either, and as the Respondents did not adduce any evidence to the contrary despite denying in the written defence the occurrence thereof, I find that an accident did occur on the material date, place and time pleaded, involving motor vehicle Registration No. KAQ 210 S Toyota Matatu.

2. Whether the Appellant was a passenger in the ill-fated motor vehicle at the time.

The Appellant pleaded in his plaint and reply to defence and amended defence, and testified in court that he was in the said motor vehicle enroute to his place of work in Kangemi from Kinoo. He sat on the third seat behind the driver. Reaching Cooperation area near Uthiru, an attempt by the driver (2nd Respondent) to change lanes and the emergence of another vehicle from behind on the same lane made the driver lose control of the vehicle and land in a ditch. The motor vehicle was KAQ 210S Toyota Matatu. On cross examination, he added that he and other passengers had warned the driver not to over speed but their calls were not heeded. According to him, the driver of KAQ210S drove at about 100km/hr and over. He stated that he himself was a qualified driver. That he was taken to Avenue Hospital by a Good Samaritan whom he did not know and after being discharged is when he reported to the Kabete Police station and recorded his statement. He was issued with a P3 form and Police Abstract by the said station which was produced in evidence.

The Appellant's witness PW4, a police officer from Kabete Police Station testified that the Appellant had reported his involvement in the accident to the Kabete police station after being discharged from hospital and that he was issued with P3 form and Abstract. He produced an OB entry that confirmed that the Appellants' name was recorded in the OB save that it was entered in the margin-signature column as opposed to the usual entry in the nature of occurrence column. He conceded in cross examination that the entry in the signature column was in error as the usual practice would have been to make a follow up entry in the OB for victims who reported late.

DW1 testified that on instructions of the Deputy PPO Nairobi, he investigated the OB subject of the material accident and found that the Appellant's name was incorrectly entered in the OB at *the margin area of signature as opposed to the nature of occurrence column and as a follow up, which act was irregular and an afterthought.* He concluded that because of the irregularity, the Appellant was not involved in the accident. The witness produced a letter written by the Deputy PPO Nairobi revoking the P3 form and Abstract issued to the Appellant, following the findings that his name was not entered correctly into the OB as required. Counsel for the Respondents relied on the testimony of DW1 to persuade the trial magistrate to disallow the Appellant's claim on account that the Respondents had pleaded fraud and misrepresentation and apparently, DW1 had testified to prove this fraud on behalf of the Respondents.

The law and my findings on the above issue

On analyzing the above evidence, first and far most, this court appreciated that the OB entry for 4/12/2009, P3 form and Abstract were entries in public records or official book or register stating facts in issue or relevant facts and were made by public servants in the discharge of their official duties and were therefore admissible in evidence (see section 38 of the Evidence Act). These documents were produced in evidence by PW4 without any objection being raised by the Respondents. The documents were admissible under section 35 of the evidence Act. Although fraud and misrepresentation of facts was pleaded by the Respondents, it was upon them to prove that the entries in the OB and the filling of the P3 form and Abstract were made with any incentive to conceal or misrepresent facts. (see Section 36(1) of the Evidence Act).

PW4 a police officer testified that he was on duty when the report was made concerning the accident and that before the P3 form and Abstract were issued to the Appellant, as a police station in the service of the public service, they were satisfied with the Appellant's statement that he was involved in the material accident. The matters that this witness was testifying about were within his personal knowledge in the performance of duty and no contrary opinion was raised concerning his competence in giving evidence. According to his testimony, the information received was that there were 8 passengers involved in the accident. The initial OB entry clearly named 5, with ***" and others to follows(sic)."***

The Respondents' contention is that as the name of the Appellant was written in the wrong place (margin) as opposed to nature of occurrence follow up report, and that, as the Appellant had reported the accident late, and that having been taken to a different hospital (Avenue Hospital) from that where other passengers were taken (MP Shah Hospital) , it was doubtful that he was involved in the accident in question. The court believed this version. I find that the trial magistrate was clearly in error in relying on this kind of machination to dismiss the Appellant's case, in view of the evidence adduced by the Appellant and his witness. I say so because other than the evidence of DW1who investigated the OB entries, the Respondents who pleaded fraud and misrepresentation on the part of the Appellant, and especially the driver of the accident motor vehicle did not tender any evidence to counter the Appellant's evidence that he was indeed present in the said motor vehicle at the material time of the accident, where exactly he was seated, how other passengers called on him to slow down and the subsequent injuries that he sustained. DW1 admitted that he only investigated the OB entry on whether the names were inserted correctly and that he did not investigate the accident's occurrence. There is no evidence on record that DW1 spoke to the driver of the accident motor vehicle to determine the genuity of the Appellant's claim. DW1 did not state whether he interrogated the Appellant on his allegation of involvement in the material accident before reaching a conclusion that he could not have been involved in that particular accident as claimed.

I find that the trial magistrate arrived at a wrong conclusion when he stated that the police themselves investigated the case and found that the Appellant was not involved in the accident. This was a case of police officers each testifying for adverse parties in a case. DWI admitted that he did not investigate the occurrence of the accident and neither did he speak to the Appellant, the prime suspect in the alleged fraud. What kind of investigations did he undertake? Whom did he find culpable for the alleged fraudulent misrepresentation as pleaded by the Respondents and on what account? I do not think that checking the OB entry amounted to sufficient or thorough investigation to unravel a fraud as alluded to by the Respondents' counsel in their submissions. Neither do I find any evidence on record to suggest that the OB entries complained of were tampered with by the Appellant or at his instigation. The Police witnesses did not suggest that making entries on the margin was tantamount to tampering with the records with a view to perpetuating or committing a fraud in favour of the Appellant.

In the absence of any evidence that the Deputy PPO or his representative investigated the accident and found that the Appellant's claim was fraudulent, its causation and those involved, there was no basis for determining that the Appellant was not involved in the material accident.

In so finding, I am conscious that in our legal system, the burden of proof lies with he who alleges. In this case, the Appellant alleged that he was a passenger in the accident motor vehicle at the material time. He was therefore under a duty to prove his allegations. On the other hand, the Respondents denied that the Appellant was involved in the accident, and pleaded fraud and misrepresentation on his part. The Respondents were, therefore, equally bound to proof their allegations against the Appellant. Yet, surprisingly, the 2nd Respondent who was the driver of the accident motor vehicle chose not to testify with regard to the occurrence of the accident and how many passengers he was carrying to counter the narration by the Appellant. My conclusion is that the allegations in the Respondents' defence with regard to the Appellant's fraud and misrepresentation of facts that he was a passenger, remained allegations. Iam fortified by the decision of the Court of Appeal in the case of ***RATILAL GOVEDHABHAI PATEL VS LALJI MAKANYI (1957) EA 314*** that:-

"There is one preliminary observation we must make on the learned Judge's treatment of this evidence, he does not anywhere in the judgment expressly direct himself on the burden of proof or on

the standard of proof required. Allegation of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned Judge had this in mind."

In a more recent Court of Appeal case of **PRAFULLA ENTERPRISES LTD VS NORLAKE INVESTMENTS LTD &THE ATTORNEY GENERAL, KISUMU CA per -ONYANGO OTIENO, AZANGALALA& KANTAI JJA in KISUMU CA 117 OF 2006** delivered on 21/2/2014, the Court quoted with approval the decision in the Ratilal Govedhabhai Patel case above cited and added that :-

"We do not think it is enough just to allege fraud simply because there is a letter from the Survey office such as the one we have reproduced above stating there could have been a mix up in the production of survey plan maps. The mix up, if any, could have resulted from incorrect activities and honest mistake and that may very well have explained why the appellant at first thought there was a fundamental mistake in the entire transaction. We perused all documents on record and we saw none of them admitting or proving fraud by the two respondents either jointly as alleged or severally. On our own, we are not persuaded that the allegations of fraud were proved within the standards required in law and we find it difficult to fault the learned Judge in his finding on that aspect. He was plainly right."

As I have stated, there is no evidence that DW1 ever investigated the accident to assist the court on who was and who was not involved in the accident, or to determine whether a fraud had been effected by the Appellant. In other words, there was no evidence led to prove that he was responsible for making the entries in the OB. DW1's perusal of the OB entry cannot, by any means be said to have been an investigation as it unraveled nothing unusual. The error in the OB was apparent and PW4 who produced the OB copy ably explained it to court. The Appellant was emphatic that he reported the accident long after recuperating and leaving hospital and that is when he was issued with the Abstract and the P3 form. I am therefore not persuaded that the allegations of fraud against the Appellant were proved within the standards required in law as pleaded. **Allegation of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.**

The Respondents never tendered any evidence to prop up their defence. Whatever the Respondents gathered in cross-examination of the Appellant and his witnesses could not be said to have built up their defence. As it were, therefore, the Respondent's defence of fraud and misrepresentation against the Appellant was a mere bone with no flesh in support thereof. The driver of the motor vehicle chose not to testify to assist the court in determining what exactly happened, and whether he counted all the victims involved in the accident in question, or whether he was the one who took or directed the taking of all the victims of the accident to one hospital-MP Shah, thereby ruling out the probability that the Appellant was one of the victims.

Iam inclined to believe the Appellant's evidence that after the accident, he was taken to Avenue hospital by a Good Samaritan and only went to report after being discharged. His testimony was also consistent with the report contained in OB No. 8 of 4/12/2009 at Kabete Police Station on the occurrence of the accident, although the reportee is not disclosed.

The Respondents too pleaded in their defence that the accident occurred due to an obstruction caused by a saloon motor vehicle which was on the left lane when the 2nd Respondent was attempting to avoid hitting it. This pleading is similar to the appellants' version of how the accident took place, though not exactly the same. The 2nd Respondent chose not to testify to be cross examined on the same. Only a person who was in contact with those facts could narrate the occurrence as the Appellant did. There was no other alternative version placed before the court on how the accident took place and on who was and who was not involved in the accident to displace the Appellant's testimony. I accept his version that he was involved in the material accident.

Iam further fortified by the decision of my learned brother Judge Asike Makhandia J, (as he then was) in

MACHAKOS HCCA NO.130 OF 2008, DOMINIC GITHAE VS SUSAN KANYI(CONSOLIDATED WITH HCCA 129 OF 2008) where the learned Judge was faced with a similar situation in which the Appellant's name was inserted in the margin of the OB and in a different handwriting at a much later date. The learned Judge chose to believe the explanation of a police officer that:-

"in an accident situation, there is likelihood that some people can go to different hospitals and therefore reports can be made on different dates, time and by different passengers. It also goes without saying that on such occasions such reports would be handled by different police officers."

I wholly associate myself with those words for reasons that the Appellant was clear in his evidence that he only went to report the accident after being discharged from the hospital. In addition, I believe PW4 that the Appellant was taken to hospital immediately after the accident and only when he was discharged did he come to report so his name was added at the column of the signature column. This officer was on duty and the information he testified about came to his knowledge in the course of his duties. I do not find anything that would indicate he was not genuine in testifying on the facts that do not show he had reason to favour the Appellant. I find PW4 to have been truthful. He had no difficulty admitting that it was indeed unprocedural for the entry concerning the Appellant's report to have been entered at the signature area in the margin but nonetheless, he was satisfied that the Appellant was involved in the material accident as the report on 4/12/2009 showed that…….

…..*and the following passengers were injured (1) Rose Motikoya sustained injuries on both legs (2) Hudson Shimanga Kubasu pain on shoulder(3)Anna Wambure Njeru right leg (4) George Osore head cut (5) Peris Kamau fracture on right leg all were treated at MP Shah hospital and discharged "**and others to follows"(sic).***

I believe that the entry in the OB's nature of occurrence indicating 5 passengers and ***" and others to follows"*** (sic) created a clear and uncontroverted indication that the list of victims as enumerated was not definite, and that more were expected.

I do not believe DW1 evidence that the clear intention of the author of the phrase " and ***others to follows"*** (sic) *meant investigations as opposed to people* and reject it for reasons that my perusal of the OB report shows that those words came immediately after naming the five victims and therefore formed the same transaction as opposed to the insinuation that they meant ***"investigations"*** to follow. It was clear that the *subsequent words* read ***"scene visited and necessary action taken,"*** which would be the commencement point for investigations. I make these inferences because iam persuaded that those words are so connected to passengers or ***"people"*** as to form part of the same transaction, and are more relevant ***to people*** or passengers than ***investigations***. In my view, DW1's insinuation that the words ***"and others to follows" (sic)*** meant investigations was imprudent, subjective against the Appellant and lacked basis. The trial magistrate should have given consideration to this piece of evidence, which he did not. I find that he was in error in failing to make a finding on what those words meant in the circumstances.

The OB entry report, the P3 form and the Abstract issued to the Appellant by the Police at Kabete Police Station were done by the police upon satisfying themselves that the Appellant was one of the victims of the material accident. These documents were produced in evidence without any objection. The Appellant's counsel has submitted that the purported subsequent revocation by the Deputy PPO lacked any legal basis and that the action of revoking the documents was void as the Deputy PPO had no power to revoke documents whose issuance he did not sanction, and neither was he the author thereof. I have carefully perused the Police Abstract and P3 form issued to the Appellant. They are dated 7/01/2010 and 31/12/2009 respectively issued by the Officer in charge of Kabete Police Station and not the Deputy PPO. Further, the P3 form shows that the same was filled by the Doctor on 7/1/2010 when the Abstract was issued to him. It appears to me that when the Appellant reported to the police, he was issued with the P3 form first and when he returned it after completion by the doctor is when he was issued with the Police Abstract No. 0208209 on 7/1/2010. However, iam aware that, officers in charge of police stations act under delegated powers of their superiors and in this case, were under the command of the then Commissioner of Police. In my view, the Officer in charge of Kabete Police Station was operating within the delegated powers of the Commissioner of Police and officers under his command. Iam fortified by the

provisions of Section 4 of the repealed Police Act, Cap 84 Laws of Kenya which provided *inter alia that:-*

1) The Commissioner may delegate any of the powers conferred upon or vested in him by this Act or, unless a contrary intention appears, by any other written law, to any gazetted officer of or above the rank of senior superintendent.

2) Without prejudice to any power vested in the Commissioner (whether or not delegated under subsection (1)), the control of the Force in any province, district, area, place or unit shall be vested in such police officer as may be appointed by, or under the directions of, the Commissioner for that purpose.

In addition, Section 14 A of the said Act provided that-

The force shall perform its functions under the overall direction, supervision and control of the Commissioner of Police.

From the above provisions, I find that the Police Abstract and P3 form were issued by the Officer in charge of Kabete Police Station on the authority of his superiors under the command of the Commissioner of Police and officers under him. I also find that although the Deputy PPO did not issue or directly authorize the issuance of the Police Abstract and P3 form to the Appellant, he had the power, for good reason, to revoke the said police Abstract either personally or by instructing officers who issued the same to cancel.

However, in my view, the revocation of the Abstract and P3 issued to the Appellant had a draconian effect of denying the Appellant his right to claim for damages following the accident and injuries sustained. It therefore required that the Appellant should have been accorded an opportunity to be heard before such power was exercised. This accords with the rules of natural justice that no person should be condemned unheard. There is no evidence that the Deputy PPO served the Appellant with any notice to show cause why the P3 and Police Abstract issued to him could not be revoked. The Deputy PPO acted unilaterally without giving the Appellant an opportunity to be heard before revoking them. Neither did he inform the Appellant of such a decision or reasons for revoking the two documents prior to the hearing date. The revocation was contained in a letter dated 8th May, 2011 addressed to the Managing Director, Directline Assurance Co. Ltd and no copy was made to the Appellant or his advocates. In as much as our legal system is adversarial in nature, the circumstances of this case required absence of bias on the part of the police in making decisions that would affect the rights of parties to the suit before the court. These are matters which the trial magistrate failed to consider. I find that he was in error and so I make my own finding that he failed to take into account those factors which were relevant to the case.

Further, it is common ground that when people make reports to the police station, the report is recorded by the duty officer at the report office desk at the material time. The reportee is not the person making entries but providing information to be entered in the OB. In this case, if the police, for whatever reason, chose to enter particulars as narrated to them by the Appellant concerning the material accident after his discharge from hospital in the margin, and not at the usual column of nature of occurrence, in the absence of any evidence of fraud or misrepresentation, or collusion to commit a fraud, the Appellant reportee should not be made to suffer for the irregularity he did not perpetuate. In any event, it was not shown to the satisfaction of the court that such mistake rendered the particular entry void, as far as the Appellant's involvement in the material accident was concerned. It was, in my view, an honest mistake that was not material to vitiate the Appellant's claim of involvement in the accident subject matter of this appeal.

On whether the Appellant should have known the good Samaritan who took him to Avenue hospital or been part of the injured taken to MP Shah hospital and not Avenue Hospital as he was, my view is that it is not a realistic and legitimate expectation to anticipate a passenger or traveler to predict an accident so he could have his kin or acquaintances around him to come to his rescue and usher him to a hospital of his choice or choice of the owners of the accident motor vehicle. It was, therefore, unrealistic for the Respondent to expect that the Appellant should have known the Good Samaritan who took him to Avenue

Hospital and to keep his contacts so as to call him as his witness in the event that he lodges suit for damages to prove how he was rescued from the scene of accident. It was further unrealistic to expect the Appellant to have known that he should have been taken to MP Shah Hospital together with all other victims of the material accident in the circumstances for him to prove his involvement in the accident in question. In my view, assuming the Appellant was conscious after the accident, he had a right to go to any hospital of his choice for urgent medical attention. A contrary expectation, in my view would not be legitimate in the circumstances.

I find that the evidence of the Appellant with regard to the accident and his involvement as a passenger is unrebutted, unchallenged and uncontroverted. He proved on a balance of probability that he was involved therein. The hospital discharge summary dated 9/12/2009 is clear that on admission he gave a history of being involved in a road traffic accident as a passenger in a Matatu on 4/12/2009. He also reported to the police after being discharged from hospital. He described the scene of accident and how it happened. The Respondents' counsel submissions that there was no valid source of information in the police abstract to confirm that the Appellant was one of those involved in the accident on the material day, however persuasive, had no basis and regrettably, a conclusion that did not take into account all the circumstances of this case. I therefore hold that on available evidence, the Appellant proved, on a balance of probability that he was a legitimate claimant who was lawfully travelling in the Respondents' motor vehicle at the material time of the accident and the purported revocation of the documents issued to him by the Deputy PPO was non consequential, null and void.

3. Who was to blame for the accident?

It is trite law that the burden of proof lies with the person who alleges (section 107 and 108 of the Evidence Act). I am not oblivious of the fact that this being a claim based on negligence, there is no liability without fault, and that the Appellant was duty bound to adduce evidence showing how negligent the 2nd Respondent drove the said motor vehicle. In the case of ***MUTHUKU .V. KENYA CARGO SERVICES LTD (1991) KLR 464,*** the court observed 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….." The appellant clearly failed to prove any sort of negligence against the respondent and in my respectful view his claim was rightly dismissed….."***

The Appellant in this case pleaded particulars of negligence against the Respondents as outline in this Judgment. I reiterate some of them here:

a) driving at an excessive speed in the circumstances;

b) driving without due care and attention;

c) losing control of a motor vehicle and hitting a tree;

d) failing to brake, swerve, stop, slow down and or avoid hitting an electric post and or rolling;

e) allowing an accident to occur

f) Res ipsa Loquitur

The Appellant testified that the driver lost control when he was trying to change lanes to the left only to realize that there was an oncoming vehicle from behind and as he tried to avoid a coalition, he veered off the road and hit a pavement. He was driving fast before the accident, and that the Appellant and other passengers had tried to persuade him to slow down but in vain. The 2nd Respondent never rebutted this evidence. Save for the aspect of speed, the Appellant's testimony was similar to what was recorded in the OB report concerning how the accident occurred. It reads in part_

"….the said vehicle was trying to avoid hitting unknown m/vehicle and lost control and veered off the

road and hit an electric pole……"

The Respondents in denying particulars of negligence had this to say at paragraph 5 of the defence:-

"Further and / or in the alternative and without prejudice to the foregoing, the defendants aver that any such occurrence as the Plaintiff may prove occurred without any negligence on his part and the same was due to an inevitable accident as a saloon car which was on the left lane overtook Motor Vehicle KAQ 210 S and he had to move to the left in the process hit the pavement and lost control."

The 2nd Respondent driver chose not to testify against the allegations that he was negligent in the manner in which he drove, managed or controlled motor vehicle Registration No. KAQ 210 S. In the absence of any evidence on how being overtaken by another vehicle could have caused the 2nd Respondent to lose control and veer off the road, or how avoiding to hit another vehicle could have led to losing control and veering off the road and hitting an electric pole, the above averment remains an allegation forever. Iam fortified by the decision of the Court of Appeal in the case *of* ***EMBU PUBLIC ROAD SERVICES LTD .V. RIIMI (1968) EA 22*** where it was stated that:

"……..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……"

The Respondent chose not to advance his theory that the accident was inevitable. There is no evidence to show that there was a probable cause of the accident which did not connote negligence or even an explanation for the accident consistent only with an absence of negligence on the part of the 2nd Respondent. In the case of **NANDWA .V. 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 that the accident was caused by the negligence of the defendant. However, if in the cause 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 defendants evidence provides some answer adequate to displace that inference…"

To prove an inevitable accident, it was necessary for the Respondent to show, as was observed in the case of **DEVSHI VERSUS KULDIPS TOURING CO(1969) EA189** at page 192 that:-

"A person relying on inevitable accident must show that something happened over which he had no control and the effect of which could not have been avoided by the greatest care and skill… 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…" In order to avoid liability must prove to the satisfaction of the court that they took all reasonable steps to ascertain that…….. they had taken all reasonable steps to avoid this accident…."

In the Court of Appeal decision of **KENYA BUS SERVICES LTD VS DINA KAWIRA HUMPHREY, CA 295/2000 TUNOI, OMOLO&GITHINJI JJA** , 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."***

The above principle was further authoritatively upheld in the **NYERI COURT OF APPEAL CIVIL APPEAL NO. 305 OF 2005.**

In the instant case, the Respondent offered no evidence to support the allegations of inevitable accident. Neither did they tender any evidence to support the allegations that the Appellant was responsible for or that he substantially contributed to the said accident as pleaded in the defence.

The Appellant also pleaded reliance on the doctrine of *Res ipsa Loquitur* albeit it was not mandatory to do so. In the present case, and from the evidence on record, it is clear that had the driver of the Matatu carefully driven the said vehicle, the vehicle could not have lost control and veered off the road. As I have stated repeatedly, the 2nd Respondent did not offer any evidence to counter what the Appellant pleaded and testified in court concerning how the material accident occurred. In the absence of any evidence that tended to exonerate the Respondent fully from blame for causing the said accident, or to prove any of the averments in the defence, I hold that on a balance of probability, the Appellant has discharged the burden that the 2nd Respondent who was the driver of the accident motor vehicle was wholly to blame. And from the averments in the plaint and the evidence adduced by the Appellant, on a balance of probability, the doctrine of *Res Ipsa Loquitur* applied. Iam fortified by the Court of Appeal decision in the case of **EMBU PUBLIC ROAD SERVICES LTD VS RIIMI [1968] EA 22** where it was held that

"***where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa Loquitur and hold the defendant liable in negligence."***

The Court further held at p. 26 that:

*"**While the driver had to meet a sudden emergency and what was required of him was not perfect action, nevertheless on the evidence it had not been shown that the emergency was so sudden that he could not have taken that amount of corrective action which should be expected of a competent driver of a public service vehicle."***

According to the Respondents, the Police did not prefer any charges against the 2nd Respondent. The Police Abstract produced showed that the case was pending investigations. In other words, as at the time of trial in the subordinate court, the police had not completed their investigations into the accident to determine who was to blame for its occurrence. The question is whether failure to charge the driver of the accident motor vehicle with any offence meant that he could not be blamed for the accident? The standard of proof in civil cases is based on a balance of probabilities whereas that which is expected in a criminal/ traffic case is one beyond reasonable doubt.

Therefore, as described by the Appellant in his testimony, it has to be inferred that the accident was caused by the negligence of the 2nd Respondents driver, who was in the course of his employment. In my view, if the 1st Respondent was driving with due care and attention, he could have avoided the accident. He attempted to change lanes without ensuring that it was safe to do so and lost control of his motor vehicle. He was therefore negligent in the manner he drove, managed and controlled motor vehicle registration No. KAQ 210S Toyota Matatu.

In the circumstances therefore, having carefully evaluated the evidence on record, I hold that the Appellant did establish, on a balance of probabilities, that the Respondents were negligent. The 2nd Respondent was solely to blame for causing the said accident. The 1st Respondent is vicariously liable for the acts of the 2nd Respondent. I therefore hold that the Respondents shall be jointly and severally liable in negligence to the extent of 100%.

I have gone to great lengths to examine the issue of liability because the trial magistrate, having found that the Appellant was not involved in the material accident, dismissed his suit. He did not even mention that it was not necessary to delve into the issue of liability at that stage. This, I hold, was an error on his part.

4. Whether the Appellant was injured as a result of the said accident?

According to the Discharge summary from Avenue Hospital, P3 form, medical report and the Appellants' testimony in court, as confirmed by Dr. Lalji and Dr. Moses Kinuthia both who testified on his behalf, the Appellant sustained a comminuted fracture of the left arm. He underwent surgery and screws and plates

implanted. He required further surgery to remove the metals. I find that on the uncontroverted evidence adduced by the Appellant, he was injured as a result of the accident.

> ***5. What would be reasonable compensation in damages for the Appellant for the injuries sustained?***

The trial magistrate dismissed the Appellant's suit on the ground that he did not prove his involvement in the material accident. He nevertheless awarded the Appellant Kshs**. 250, 000** had the Appellant proved his involvement in the accident. The Appellant's counsel prayed for Kshs.500, 000 which he still maintains on appeal, asserting that the award by the trial magistrate was inordinately low as to constitute an erroneous assessment of damages payable to the Appellant on account of injuries suffered.

The test as to whether an Appellate Court may interfere with an award of damages was stated in the case **MBOGO & ANOTHER –Vs- SHAH (1968) E.A. 93** as follows:-

> ***"I think it is well settled that this Court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

The test was also considered by Law, J.A **IN BUTT V. KHAN [1977]1 KAR** as follows-

> ***"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high low."***

See also the case of JOSEPH HENRY RUHUI –Vs- ATTORNEY GENERAL HCCA CASE No. 701 OF 2001.

Counsel for the Appellant urged that although an appellate court is slow to interfere with an award of damages by the trial court, this appeal was an appropriate case for interference.

The Court in ***GEORGE KIRIANKI LAICHENA -VS. - MICHAEL MUTWIRI- CIVIL APPEAL NO. 162 0F 2011*** expressed itself as follows:-

> ***"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case.***

I am further guided by the case of H**. WEST & SONS LTD –Vs- HEPHARD (1964) AC. 326** where Lord Morris stated-

> ***"The difficult task of awarding money compensated in a case of this kind is essentially a matter of opinion of judgment and experience. In a sphere in which no one can predict with complete assurance that the award made by another is wrong, the best that can be done is pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellant tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitable differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."***

The Respondents' counsel submits in this appeal that it was in order for the trial magistrate not to award the Appellant any damages as there was no proof of negligence against the Respondents. He does not

offer any amount as reasonable compensation should this court find the Respondents liable. The Appellant's counsel cited and attached the authority of-**JOEL JUMA MULATYA VS KENYA RAILWAYS CORPORATION MBSA HC CC NO. 113 OF 199RD** decided in 2004, where the plaintiff who suffered injuries involving comminuted fracture of the humerus and head injury concussion, he was awarded Kshs. 400,000 general damages.

The trial magistrate never appreciated the injuries sustained by the Appellant and neither did he refer to the authority cited by the Appellant's advocate in support of the prayer for general damages to compare similar injuries and awards in similar cases. This failure to appreciate what kind of injuries were sustained by the Appellant before making an award invites this court to interfere with the finding on general damages as the award of Kshs. 250,000 was not grounded on any established principle of law. In other words, the trial magistrate did not state the basis upon which he exercised his discretion in as much as award of damages is a matter of judicial discretion.

Cognizant of the above position, and being aware that an award of damages is not intended to enrich a party, but to put them in the same position they were before the injury, I find that the trial magistrate made an award that was too low in the circumstances, and I therefore interfere with the award.

In this case, taking into account the injuries sustained by the Appellant, decided cases and also inflation, doing the best that I can, I assess the general damages to be paid to the Appellant for pain suffering and loss of amenities at **Kshs 450,000**. I r**ely on the authority cited by the Appellant's counsel and MBSA HCCA No. 53** of **2008 MATANO MBITI NGATI & ANOTHER -Vs- ALI RAJAB BINDO** where the injuries involved:-

> ***"Fracture in the Plaintiff's tibia and fibula, a compound fracture occasioning fragments which took a long time to be held together."***

The Judge in the above case noted however that the Plaintiff had fully recovered, unlike the present appeal where the Appellant at the time of trial still required an operation to remove the implants.

6. Whether the Appellant was entitled to a claim for future medical expenses

The trial magistrate did not make any pronouncement on this claim which was pleaded by the Apellant in the sum of Kshs. 140,000. Dr. Moses Kinuthia testified that the Appellant would require surgical removal of the plates and screws after confirmation of a union through radiology at a cost of Kshs. 100,000, analgesics and several physiotherapy sessions at an estimated cost of Kshs. 40,000. This evidence was uncontroverted by the Respondents.

As to whether I should award the Appellant this claim, iam guided by the principle that future medical costs are anticipated costs. At best, therefore, evidence can only be adduced regarding the estimated costs. This evidence as led by Dr. Kinuthia who examined the Appellant on 5/3/2010 proved that he will inevitably require the expense to enable him recover. There being no contrary medical evidence and as there is no justification for ignoring the Doctor's recommendation and estimation, I hold that the trial magistrate erred in totally ignoring this prayer and that it was wrong not to make and pronounce himself on an aspect of a claim that had been specifically pleaded and proved by evidence. Failure to pronounce himself invites interference and intervention by this court to rectify the error which can only be done by an appellate court. The failure to make a pronouncement by the subordinate court is therefore quashed and set aside. It is substituted with a pronouncement that there be an award of Kshs. 140,000 for future medical expenses in favour of the Appellant.

7. Whether the Appellant is entitled to special damages and how much

The Appellant claimed for Kshs. 3,000 consisting of medical expenses - 300, medical report -2,000, police abstract-200 and records from Register of motor vehicle-500. There was no pronouncement on this claim for special damages by the trial magistrate. I set aside the failure by the trial magistrate to make a pronouncement on the claim for special damages and substitute thereof with an order awarding the

Appellant Kshs. 2500 special damages as specifically pleaded and proved for the medical report and for obtaining records from the Registrar of Motor Vehicles. The claim for Kshs. 200 for Police Abstract and 300 for medical expenses was not proved. I decline to award the same.

8. Whether the Appellant is entitled to the fees charged by the witnesses(doctors being court attendance fees)

The two Doctors who testified for the Appellant also produced receipts for Kshs. 10,000 and 12,000 being their respective charges for attending court. I disallow the prayers for the Doctor's attendance charges claim of Kshs. 10,000 by Doctor Halal Lalji and 12,000 by Doctor Moses Kinuthia. These are special damages which were not specifically pleaded. That notwithstanding, they fall in the category of witness expenses and can only be claimed as part of the costs of the suit at an appropriate time.

The upshot of the above is that, the appeal herein is allowed. The whole judgment and decree of the subordinate court vide Limuru SPM CC NO 179/2010 delivered on 11th October, 2011 by Hon. M.W Murage, SPM dismissing the Appellant's suit with costs is hereby set aside and substituted with judgment being entered for the Appellant against the Respondents jointly and severally as summarized hereunder:

(i) On Liability

The Respondents are found 100% liable. The 1st Respondent is vicariously liable for acts of negligence attributed to the 2nd Respondent.

(ii) On Quantum

(a) The Appellant is awarded Kshs 450,000 general damages for pain suffering and loss of amenities.

(b) The Appellant is awarded Kshs 140,000 as cost of future medical expenses.

(c) The Appellant is awarded special damages as pleaded and proved amounting to Kshs. 2500.

(c) The Appellant shall have the costs of this Appeal and of the subordinate court.

(d) The Appellant shall also have interest on special damages to be assessed from the date of filing suit and interest on general damages payable from the date of judgment in the subordinate court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2014.

ABURILI ROSELYNE EKIRAPA

JUDGE

Pronounced in open court in the presence of

……for the Appellant

……..for the Respondents

Virginia Kavata, Court Clerk