REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 522 of 2004

CHARLES JUMA WAKO

THE POWER LIGHTING COMP. LTD……APPELLANT

VERSUS

ZAKAYO SAITOTI NAINGOLA……DEFENDANT

GEORGE KAYUNGA SILA

JUDGEMENT

The back ground information to this appeal, is that the respondent Zakayo Saitoti Naingola and George Katunga Sila came to the lower court vide a plaint dated 8th September 1992 and filed on 11th September 1992. the suit was filed against the Kenya Power and Lighting Co. Ltd , Charles Juma Wako, Peter Ndambuki and Onesmus Mwema Kiruthu as the 1st, 2nd, 3rd and 4th defendants respectively.

The cause of action is set out in paragraph 7 of the plaint. It is to the effect that on or about 29th day of November 1990, the plaintiffs were lawfully travelling as passengers in the 3rd defendants motor vehicle registration number RXK 346 when the 4th defendants so negligently recklessly drove, managed or controlled the same while he was in the normal cause of his employment as the 3rd defendants driver, servant and agent that it violently collided with first defendants' motor vehicle number KXL 029 which was being negligently and recklessly driven by the 2nd defendant acting as the driver servant and agent of the 1st defendant. The said collision is attributed to the negligence of the 2nd and 4th defendants particularized in the same paragraph 7. The 1st and 2nd respondents who were the plaintiffs, sustained injuries pleased in the same paragraph 7 of the plaint. By reason of matters, afore said, both plaintiffs suffered injuries for which they claimed both special and general damages, in the manner shown in the plaint. In addition they sought costs of the suit, interest on (a), (b) and (c) above at court rates plus any other further relief as this honourable court may deem fit to grant.

The first and 2nd defendants filed a defence dated 15th October 1992 and filed the same October 1992 whose date stamp is not very legible. Vide paragraph 3 thereof, it is averred that "*save that on accident occurred on or about the 29th day of October 1990 between motor vehicle registration number KXL 029 owned by the first defendant and driven by the 2nd defendant and vehicle registration number KXK 346 owned by the 3rd defendant and driven by the 4th defendant, the 1st and 2nd defendants deny that the said accident was caused by the negligence of the 2nd defendant as alleged in the plaint and all particulars of negligence alleged against the 2nd defendant are denied as if the same were set out and traversed seriatim. The first and second defendant shall contend that the said accident occurred due to the*

negligence of the 4th defendant in controlling and managing motor vehicle registration number KXK 346 or in the alternative, the negligence of the 4th defendant very substantially contributed to the occurrence of the said accident"

The particulars of negligence attributed to the 4th defendant are given in the same paragraph 3 of the 1st and 2nd defendants defence. On that account the 1st and 2nd defendant prayed that plaintiffs' suit against them should be dismissed with costs.

The 3rd and 4th defendants also filed a defence dated 21st July 1993 and filed the same date. Vide paragraph 2 thereof it is averred that

"*the above mentioned defendants further admit the accident as shown in paragraph 7, but deny any negligence or recklessness attributed to the 4th defendant as set out in the particulars of negligence thereof.(vide paragraph 3 thereof) the 3rd and 4th defendants deny the injuries suffered by the plaintiff and put the plaintiff to strict proof thereof.(vide paragraph 4 thereof) averred that they further deny the particulars of special damage, set out in paragraph 7of the plaint and put the plaintiff to strict proof thereof. By reason of afore mentioned averments, the 3rd and 4th defendants prayed for the plaintiffs' suit to be dismissed with costs to them.*

Five issues were agreed between all the parties along the following lines:-

(1) Was the accident caused by the negligence of the 2nd defendant in the manner in which he drove, managed and or controlled motor vehicle registration number KXL 029 owned by the 1st defendant, or in the alternative did the negligence of the 2nd defendant contribute to the occurrence of the accident as alleged in the plaint and if so to what extent?

(2) Was the accident caused by the negligence of the 4th defendant in the manner in which he drove the motor vehicle registration number KXK 346 owned by the 3rd defendants or in the alternative did the negligence of the 4th defendant contribute to the occurrence to the accident as alleged in the plaint and if so to what extend.

(3) Did the plaintiffs suffer any damages, losses, injuries?

(4) If the answer to number 3 above is yes, are the plaintiffs entitled to damages, both special and general and if so how much.

(5) What orders are to be made on costs

The record of the proceedings reveals that one Zakayo Saitoti Naingola and George Kitunga Sila the plaintiffs, gave evidence and they were cross examined. The second defendant also gave evidence. The record mentions that the 3rd and 4th defendants were deceased as at the time of trial. Leave to substitute had been granted but no substitution had been undertaken.

Judgments in the matter was given by H.A. Omondi Mrs. Chief Magistrate as she then was (now Judge) The salient features of the same are as follows:-

(1) That the 1st and 2nd defendants admit occurrence of the said accident, but deny that it was due to their negligence and contend that the same occurred due to the negligence of the 4th defendant in controlling, driving and managing motor vehicle registration number KXK 346.

(2) In the alternative that it is further pleaded that negligence of the 4th defendant very substantially contributed to the occurrence of the said accident and the particulars of 4th defendants negligence are pleaded.

(3) The 3rd and 4th defendants admit the occurrence of the accident but deny that it was due to the negligence of the 4th defendant and pray that the suit be dismissed with costs.

(4) That as per the evidence of PW1 they were travelling from Katumani to Machakos town. They reached a bridge known as Mwania bridge which is very narrow to an extend that it cannot allow two motor vehicles to by pass freely on it. They got on to the bridge first, then a minibus KXL 029 came speeding. It did not stop to allow cross first, them to and as a result of that both vehicles collided on the bridge just as KXK 346 was about to complete crossing the said bridge. PW1 blamed the driver of KXL 029 for failing to slow down so as to let them pass over the bridge completely.

(5) That the 3rd and 4th defendants died in 1997/98. There was no substitution and so the suit against them abated

(6) That though police formed the opinion that Onesmus (4th defendant) was to blame and charged him and only called witnesses allied to DW1, the court, still acquitted Onesmus without even putting him to his defence, it found that he had no case to answer.

(7) That PW1 has PW2 to corroborate his evidence.

(8) That it is DW1 who had not called any witness to corroborate his claim that he complained loudly to his passengers about the speed of KXK 346.

(9) That indeed it became clear even from DW1s evidence, that even as he saw KXK approaching from the bridge, and he did not stop to let it pass, he continued approaching the bridge and he is the one to blame for the accident. Consequently the learned trial magistrate as she then was (now Judge) found in favour of the plaintiffs against the 1st and 2nd defendants jointly and severally.

(10) That if the 3rd and 4th defendants are deceased, then the suit against them abated. In any event no liability attached against them. By reasons of the afore set out assessment the court, awarded the first plaintiff

(a) Ksh 350,000?- as general damages

(b)Ks 20,000.00 as cost of future medical cost

(c) Ksh, 1,350 as special damages.

2nd Plaintiff

(a) Ksh 300,000.00 as general damages

(b)Kshs 1,000.00 as special damages

(c) Costs of the suit

The appellant became aggrieved with that order and appealed to his court, vide this appeal no 522 of 2004. The appellants are named as the Kenya Power & Lighting Co. Ltd and Charles Juma Wako as the 1st and 2nd appellant. These were the 1st and 2nd defendants in the lower court. The respondents are Zakayo Saitoti Naingola and George Katunga Sila who were the 1st and 2nd plaintiffs in the Lower court.

A total of 6 grounds of appeal have been put forward namely:-

(1) That the Hon. Magistrate erred in law and in fact in apportioning liability at 100% against the 1st and 2nd appellant in total disregard to the fact that this accident was wholly caused by the 4th defendant in

(2) That the Hon. Magistrate erred in law and infact in orally being convinced that the 3rd and 4th defendants are deceased in the absence of any written documents, hence failed to apportion liability even after they failed to appear at the hearing to exonerate themselves from blame.

(3) That the Hon. Magistrate erred in law and infact in failing to consider the 2nd Appellants evidence when he was the only defendant who appeared and explained the circumstance leading to the accident.

(4) That the Hon. Magistrate erred in law by failing to take into consideration the respondents negligence for failing to substitute the 3rd and 4th defendants with their administrators even after the court, had granted leave on 3rd March 1998. So the non appearance at the hearing, of the 3rd and 4th defendants and or their representatives ought to be inferred as having owned up the blame.

(5) That this being a road traffic accident collision involving two motor vehicles coming from the opposite directions, and the traffic police having visited the scene of accident and blamed the 4th defendant who was subsequently charged, the Hon. Magistrate erred in law and infact by failing to consider the expert opinion of the traffic police.

(6) That the Hon. Magistrate erred in law and infact in awarding excessive awards on general damages and failed to consider the current judicial trend in a warding compensation for similar injustices. As such it is harsh and unjustified.

On that account the appellant urged the court, to set aside the lower courts' judgement and or have the same reviewed.

In his oral submissions, counsel for the appellants reiterated the grounds of the appeal and then stressed the following points.

(i) That this being an appeal this court, has the power to reevaluate the evidence adduced before the lower court and then interfere with the concluding remarks of the learned trial magistrate as she then was

(ii) The learned trial magistrate was wrong to find the appellant wholly liable on liability despite there being evidence to the contrary on the record dictating otherwise.

(iii) It was un procedural for the court, to reopen the case for the 2nd plaintiff to given evidence after, the defence had given evidence, been cross- examined and closed its case. They contend, that approach was highly irregular. A proper approaching should have been by way of an application made to the court, giving reasons as to why the matter should be reopened for the 2nd plaintiff to be heard

(iv) It is their stand that the appellant blamed the 4th defendant for the causation of the said accident which evidence was not controverted by the said 4th defendant and as such, the court, was wrong to place the entire blame for the causation of the accident onto the appellant.

(v) If anything the court should have apportioned liability between the 1st and 2nd appellant on the one hand and the 3rd and 4th defendant on the other hand.

(vi) It is their stand that since the plaintiff joined the 1st, 2nd, 3rd and 4th defendants to the suit so, as not to gamble on liability, he cannot be heard to absolve the 4th defendant of any blame, more so when in his own testimony, he stated that the accident was after the bridge. It was wrong for PW1 to attempt to assert that the 2nd defendant applicant was solely to blame for the accident. When in their own pleadings they gave particulars of negligence attributed to the 4th defendant. They contend by failing to consider that evidence, the lower court, committed an error of principle which this court, has power to deal with.

The circumstances demonstrated here were such that the court, should have found the 3rd and 4th defendants wholly liable or apportion liability

(vii) It is on record that the 3rd and 4th defendants died before the trial and leave to substitute was granted but no substitution was ever done. It means that by that conduct the plaintiffs had abandoned their claim against the 3rd and 4th defendants or they chose that which was convenient to them.

(viii) On quantum they submit that the injuries of the first plaintiff were not severe and so an award of 350,000 is excessive and it should be interfered with and reduced to a figure of Ksh 180,000/- 200,000/-.

Like wise the injuries of the 2nd respondent which were soft tissue injuries, should not have been awarded the award given. In their opinion an award of Ksh 80,000.000 – 100, 000.00 would have been appropriate

In response the respondents counsel opposed the appeal on the following grounds

(a) The appellant cannot be allowed to argue the ground raised that it was irregular to allow the 2nd plaintiff to testify after the defence had testified, and closed its case as that would be contrary to the requirement of order 41 rule 2 CPR which requires that a party should be allowed to argue only grounds raised in the memorandum of appeal. As such the same should be disallowed and expunged from the record. Alternatively the same to be disallowed as no provision of law was cited as having been breached. This being the case, the respondent cannot be faulted for making an oral application to have the matter re opened for the plaintiff to be heard. Order 17 Civil Procedure rules is silent on the mode of procedure to be followed, when reopening a matter for a party to be heard. Section 3 A of the Civil Procedure Act is called in to play to cure that defect. The court is also urged to look at the circumstances which led to that scenario, namely the matter being adjourned to the next day and case closed at 8.25 a.m. and as the witness takes the stand at 8.25 a.m, the second plaintiff walks in at 8.30 a.m. The court had to wait for the defence witness to conclude his evidence before the 2nd, plaintiff being called to take the stand. They maintain that in the circumstances, the magistrate was justified in reopening the matter, as it would have been grossly unjust for the learned magistrate as she then was, to shut out a witness who was readily available to offer his/her evidence.

(b) On liability it is their stand that the findings of the lower court, should not be disturbed as on the same was based on the evidence of the first and second respondent, which evidence, was crystal clear on how the accident occurred. The court, heard their testimonies, observed their demeanor, and then believed them. It is their stand that the court, did not believe the 2nd appellant as he had blatantly lied in his testimony that he never testified in the traffic proceedings and yet the record showed that he had infact testified in the said proceedings

(ii) They maintain that the issue of liability cannot be interfered with unless if there are special circumstances which are absent herein

(iii) No apportioning can be done by this court, because as the evidence on the record showed, that it is the 1st and 2nd appellants who are to be blamed for the accident

(iv) It is their stand, that the court, weighed the evidence of DW1 which was before it, to the effect that the 2nd appellant approached a narrow bridge without giving way to the other vehicle to pass, despite the fact that the 2nd appellant admitted that the other vehicle got on to the bridge first before them, and yet he did not stop to let that other vehicle to pass. The 2nd appellants' explanation was weighed and rejected by the court.

(c)Agreed that indeed 3rd and 4th defendants passed on, and the case against them withdrawn because the evidence solely pointed to the 2nd appellant as the one responsible for causing the accident. If the applicant felt that the said 3rd and 4th defendants were necessary parties, they should have applied to have them joined to the proceedings as 3rd parties

(ii) They maintain that even if the 3rd and 4th defendants would have participated in the proceedings, that in itself would not have changed the evidence of the scene of the accident. It would have been the same as testified by the two plaintiffs.

(d) Neither party called the police to testify, but that not withstanding the learned trial magistrate considered the evidence tendered in the traffic proceedings and arrived at the conclusion on blame worthiness.

They further maintain that on the basis of their assertion, there is no other conclusion that the lower court could have arrived to

(e) On quantum, they maintain that the respondents cannot complain about quantum when they never provided any guidelines for the court, to consider when assessing quantum. It is only the respondents who provided guide lines. As such they cannot now turn round and challenge the assessment on appeal. They contend that the award made by the lower court, is reasonable and it shouldn't be disturbed.

(ii)Further that there is no error of principle displayed by the lower court. All that the lower court, did was to exercise its discretion within the acceptable principles. On that account counsel urged the court, to dismiss the appeal with costs to them.

In response to the, respondents counsels' submissions, counsel for the appellant reiterated the earlier submissions, and then added the following points:-

- That the existence of order 41 rule 2 Civil Procedure Rules not withstanding the appellate court, has a discretion to deal with that issue

- They contend that where order 17 Civil Procedure Rule is silent, on the mode of procedure, then a party has no alternative but to turn to the order 50 rule 1 procedure of presenting any formal application.

- Still maintain that it was irregular for the court, to reopen the plaintiffs case after the defence had closed its case.

- The removal of the 3rd and 4th defendants after the issue had been raised by the appellants.

- On authorities cited they contend that this case is distinguishable from the facts herein

- Still maintain that liability should have been apportioned.

- That this is a proper case where the lower courts' discretion can be interfered with

- The authorities relied upon by the respondents are distinguishable. Further they are not binding as they are decision of courts of co-ordinate jurisdiction

- Maintain section 78 (1) (9) empowers this court, to reevaluate the evidence before the lower court, and then determine the matter finally.

- It is their stand that they have demonstrated sufficient material to warrant this court, to grant them the relief they are seeking

On the courts', assessment of the matter, herein it is clear that it is common ground that this court, is seized of the matter in its appellate jurisdiction. Being so seized, then the simple task of this court, is to bring itself into the ambit of what is expected of it as provided by law on the subject namely section 78 of the Civil Procedure Act and order 41 rules. Section 78 Civil Procedure Act reads:-

" 78 (1) subject to such conditions and limitation as may be prescribed an appellate court, shall have power-

(a) To determine a case finally

(b)To remand a case

(c) To frame issues and refer them for trial.

(d)To take additional evidence or to require the evidence to be taken.

(e) To order a new trial.

(2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be, the same duties as are conference and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein".

Order 41 rule 2 on the other hand provides:

"*The appellant shall not except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the High court, in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal, or taken by leave of the court, under this rule.*

Provided that the High court, shall not rest its decision on any other grounds, unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground"

Applying the afore set out provisions, to the facts herein, it is clear that the appellants complaint can be grouped under three grounds;

(1) The learned trial magistrate in the lower court, should not have reopened the matter for the second plaintiff to be heard after the defence had testified and closed its case. More so when there was no formal application for such reopening

(2) The lower courts' findings on liability is wrong and the same should be interfered with. The said liability should have been placed wholly on to the 3rd and 4th defendants failing which the same should have been apportioned.

(3) The quantum of damages arrived at by the court, was excessive. In that, the same was not commensurate to the injuries sustained by the victims and as such warrant to be interfered with

(4) The court, has jurisdiction and the power to so interfere with the lower courts', findings and for the reasons given the lower courts' decision should be interfered with along the lines suggested so that their appeal is allowed with costs.

Section 78 (2) Civil Procedure Act, enjoins the court, in the exercise of its Appellate jurisdiction to assume the role performed by the lower court, in dealing with the matter. The said role is none other than a reevaluation of the entire evidence, adduced before the Lower, court and then determine whether the conclusions reached by the lower court, are to stand or not to stand. This court, has done so and it proceeds to make findings on the same as here under:

On the first complaint of irregularity committed by the lower court, when the said court, allowed the plaintiff to adduce evidence after a defence witness had testified and the defence closed its case, it is common ground that this is what happened. A perusal of the record of appeal at page 18, and page 5 of the lower court proceedings it is clear form the entry of court proceedings of 13/5/2004 that Mr. Mege for the plaintiffs made the following representation to the court:-

"*I have not received any word as to what may have happened to the witness, and I pray that court, takes evidence of defence witness debeenese and then get the plaintiff to testify later as defence witness lives in*

Kisumu and has to travel back now, having spent two nights in Nairobi"

The said representation were recorded at 8.25 a.m. Mr Wanjohi is recorded as having no objection. Then the court, made the following remarks:-

"*Court lets proceed with evidence of defence. The 2nd plaintiff had confidently assured the court, he would be here in fact by 7.30 a.m. Despite his advocate having reservations. He has not communicated and otherwise its overstretching the courts, indulge to give him another date. I will treat 2nd plaintiffs' case as closed, proceed with defence hearing"*

Following those remarks, the defence witness was put in the stand and gave his evidence and then he was cross examined and re-examined. After Re-examination the defence counsel marked the defence case closed.

At page 19 of the record, and page 6 of the proceedings as soon as the defence closed its case, counsel for the plaintiffs made the following remarks.

"*Mr. Mege – AS we were hearing the defendant, I saw my witness come in and I ask the court, to allow him testify," then Mr. Wanjohi responded thus:- Mr Wanjohi. No objection, the court, has ruled on that.* Then the following sequence of events took place

Wanjohi -court has ruled on that object.

Mege,- court, has power to reopen a case and I ask the court to reopen for purposes of hearing the witness.

Court - but why wasn't he here on time?

Mege - I ask for time to consult.

Court: Given 10 minutes

½ hour later

Mr. Mege: 2nd plaintiff was held in a traffic jam caused by a road traffic accident and that is why he was late. We apologize and request the court to reopen

Wanjohi: I still oppose.

court: I think those circumstance were beyond the control of the witness, and allow the application and set a side orders which had closed 2nd plaintiffs case and allow the 2nd plaintiff to testify"

This courts', construction of those sequence of events is that, when the application was made in the first instance, the defence was noted as having no objection to the plaintiffs Counsel, request of having the evidence of the defence heard debeenese and then have the matter reopened for the remaining plaintiff. But the Court exercising its discretion, overruled that and then treated the 2nd plaintiff's case as closed.

However when it transpired to the plaintiffs Counsel, that the witness had walked in before even the defence witness completed his evidence, the Counsel chose to bring this to the attention of the Court. Indeed the defence objected, but after giving reasons, for the delay the court, once again exercised its discretion and reopened the matter for the Plaintiff to be heard on the same. When the 2nd plaintiff took his stand, in the witness box, he apologized to the court, and that apology was accepted by the Court. The 2nd Plaintiff then gave his testimony in chief, was cross-examined, re-examined and then the 2nd Plaintiffs case was closed.

In this Courts' view, the right moment for the appellant to have raised that issue was when the court, ruled against him. He should have sought a right of appeal or reserved the right to appeal against that decision even after the second plaintiff had testified. No such action was taken. Having failed to exercise his right of appeal at the right time, the appellant cannot be heard to raise that complaint as a ground of appeal after the conclusion of the case, without reserving the right to do so at an opportune time.

Secondly it is evident that the court, was simply invoking its discretion in the first instance to close the door on the 2nd plaintiff, and in the second instance, to reopen the door for him. It is now trite law, that these powers are enshrined in Section 3A of the Civil Procedure Act which enjoin courts, to do all that is necessary to prevent abuse of the process of the court, and also for ends of justice to be met. That exercise of the courts' discretion in reopening the matter for a litigant to be heard, can only be attacked if it can be shown that the defence was greatly prejudiced. No prejudice is shown to have been suffered by the defence as they were given an opportunity to cross examine the witness.

Further its should be noted that even if the court, had refused to reopen the matter for the 2nd plaintiff to be heard, the said second plaintiff had a right to appeal, against that refusal, order, or apply for review and this would have prolonged the proceedings. In this courts' opinion by the learned trial magistrate as she then was (now judge) acting in the manner she did, she was simply upholding a cardinal principle of judicial practice which in now trite, namely that, the exercise of the courts discretion is unlimited with the only fetter, to it being that it be exercised judiciously and with a reason. Secondly that courts, should at all times strife to dispose off disputes on their merits as opposed to disposing them off on technicalities. In her courts' opinion, the learned trial magistrate as she then was exercised her discretion rightly and with reasons.

Issue was raised about the mode of presentation of application to have the matter re-opened for the second plaintiff. This is gone into solely for purposes of the record. Order 17 has featured in the argument. A perusal of the record reveals that the order deals with hearing suits and examination of witnesses. Scrutinizing through it reveals that no provision is made for reopening the matter for any witness. The only matter required to be accessed formerly is instances where a witness is about to leave the jurisdiction of the court and there in need to take his evidence. Rule 14 as read with rule 11(1) Civil Procedure rules the same order, requires such a request to be made formally by way of a chamber summons. In the courts' opinion, by exclusion it means that all other application talling outside order 17 rule 11(1) Civil Procedure Rule can be accessed through oral application. It therefore follows that the plaintiff counsels' oral request to have the matter reopened for the 2nd plaintiff is proper and cannot be faulted.

Issue was also raised about the request contravening the provisions of Order 41 rule 2 already set out hereunder. Indeed the central command in the said provision is that "only grounds presented are to be argued. But the provision goes further to state that where raised it is not to be brushed aside, the same is to be considered after the other side has been given an opportunity to be heard on the issue. Herein the respondent has been given an opportunity to be heard on the same and the court has made findings as indicated above.

Lastly, on the same issue, the court, wishes to note that the mode of invocation of the courts' inherent powers enshrined in section 3A of the Civil Procedure Act is not in built. This leaves room for the invocation of those powers to be both formally and informally. The Plaintiffs Counsel therefore rightly invoked those powers informally and likewise the court also rightly exercise them upon the said informal request. It was necessary to act so as to prevent injustice to one party and for the ends of justice to both parties. For it would have been unjust to shut out the testimony of the 2nd plaintiff when he had been present on the previous day, and he had a reason for coming to court late which explanation was not remote. It was just for both parties to be heard so that the court has a balanced view of the dispute in order to enable it rule justly on the matter.

The second complaint was on liability which the appellant alleged should either have been wholly blamed on the 3rd and 4th defendants and or apportioned between the two colliding vehicles. Indeed the Plaintiffs sued the owners and the drivers of the colluding vehicles and attributed negligence to each as specified in

the plaint. It is on record that each of the said drivers put in a defence. It is now trite law that a pleading is not evidence. A party putting forward a pleading had a corresponding duty to adduce evidence to prove the allegations unless the Court, orders otherwise, in instances where the provisions of order VI rule 9(1) Civil Procedure Rules are called into play. It therefore follows that whether the particulars of negligence attributed to the 3rd and 4th defendants are to stand or not, or should have been taken into account when assessing evidence on liability will depend on the content of evidence adduced by the witnesses, that was presented to the learned trial magistrate as she then was, and which she was called upon to assess.

The witnesses were three namely the two plaintiffs, and the 2nd defendant who is the second appellant herein. In addition there is also a record of proceedings in the traffic case which had been faced by the then 4th defendant.

P.W.1s' account of the accident is found at page 17 of the record. At line 5 from the top it runs thus:- " *There is abridge at the corner known as Mwania Bridge and its narrow – two motors vehicle cannot pass each other on it. Just as we were on the bridge almost to complete crossing it, we saw a mini bus KXL 029 approaching from the opposite direction at a high speed. It did not stop as it got to the bridge to let us complete going over the bridge. I was in the drivers' cabin. The motor vehicles collided. I blame KXL 029 driver for failing to slow down and letting us complete going over the bridge"*

When cross examined the witness had this to say:- *" Road traffic accident was immediately after the bridge. The motor vehicles collided. KLX had not joined the bridge, but when our driver saw it approach at a fast speed our driver tried to get off the bridge quickly. The collision was head on. The portion of the road has no left or right because it is narrow. Immediately after the bridge and the vehicle occupies the entire road. The KP&L vehicle hit ours as it came downhill. I have sued KP&L and Ndambuki was the driver. I joined all drivers so as not to gamble on liability.*

PW2 the 2nd plaintiff on the other hand had this to say at page 20 of the record page 7 of the proceedings line 2 from the bottom: -*" As we got to the bridge over Mwania river (it is narrow and at a corner) so two motor vehicles cannot by pass each other. The first one to get on to the bridge to be given way to pass. While on the bridge another motor vehicle emerged from Machakos direction descending at a very fast speed. It did not stop to let us pass and there was a collision. It is Reg no. KXL 029 owned by KP&LC……. I blame the KPL and C driver for road traffic accident for not giving us way yet we were already on the bridge. At the scene the driver of KXL complained that he had no brakes."*

When cross examined he had this to say on the same page 20 lines 18 from the bottom: "the accident just occurred at the tip of the bridge just as we had completed the bridge and just touching the tarmac. It is the KPL and C vehicle which hit us"

The version of DW1 is found at page 18 of the record and page 5 of the proceedings and it runs thus from line 3 from the bottom:- " *as we approached a bridge, I was descending, while there was another motor vehicle coming from the opposite direction. I was on the left hand side of the road. The other motor vehicle went over the bridge at a fast speed and then I applied emergency brakes. I had wondered loudly why the motor vehicle was moving so fast, and the motor vehicle made a turn and hit my motor vehicle"*. When cross examined at page 19 of the record page 6 of the proceedings at line 14 from the top he stated: "*the other motor vehicle got on to the bridge first. I did not testify in court. If the Machakos court record shows that I testified that is untrue. Yes I said the motor vehicle applied emergency brakes, yes the bridge was narrow and two motor vehicles can't pass each other. I don't tell why upon completing crossing the bridge, the other driver applied emergency breaks. Yes I continued approaching the bridge even as the other motor vehicle was approaching"*. The traffic proceedings are contained in the supplementary record of appeal. At page 17 of the record and page 3 of the proceedings, there is traced the testimony of PW1 by the name of Charles Juma Wako, similar names to the 2nd appellant. The relevant portion of that testimony is found at line 16 from the bottom and it runs thus:- " *at or near the bridge I saw a pick up driving from the opposite direction at a high speed. I was going downhill. The pick up applied emergency brakes. And apparently skidded towards my motor vehicle. This was a corner. The pick up swerved and hit our motor vehicle. After the collision I become unconscious."*

The responses to the cross examination on the same page are a follows: *"the accident occurred near the bridge. I was driving along Konza road. I was on the tarmac road. I do not know Katumani Institute. I was driving slowly."*

PW2s' (PW2) in the traffic proceedings) testimony is at page 18 of the supplementary record and 4 of the proceedings and had this to say at line 7 from the top. "*We were about to arrive at Mwania River when a motor vehicle came from the opposite direction. I sat at the back. The road was downhill. Our driver was slow the pick up hit the side of the driver. It was KXX 346 plink up Isuzu white in colour. This pick up collided with our motor vehicle. 3 meters from bridge, the road was tarmac. There was a corner. The accident was on the left side where PW1 was driving. The other motor vehicle was supposed to be on the right"*

In cross examination he responded thus:- *" I saw the other motor vehicle before the accident . I saw clearly the view. I cannot estimate the speed. I was not so keen in damages on the motor vehicle. The accident occurred on the road on our side. There was no yellow line."*

PW 3 is a technical witness as he gave evidence in his capacity as the motor vehicle inspector for both vehicles. The ruling in the traffic proceedings is found at page 28 of the supplementary record and it runs thus: - *"I have considered the evidence adduced before me by the various prosecution witnesses in support of the charge. No evidence has been tendered by the prosecution to show that the accused person was careless. Accordingly I acquit the accused person under section 210 of the CPR and I order that he be set to his liberty forth with unless otherwise law fully held"*

The afore set out testimony is what the learned trial magistrate as she then was, had before her when she made findings on the matter. These findings on liability have already been set out herein, but there is no harm in repeating the same for purposes of re evaluating it to determine whether her findings on the same stand or do not stand. The testimony of PW1 is reviewed at page 42 the record or page 1 of the judgement. The learned trial magistrate as she then was observed thus:- " *there is a bridge known as Mwania bridge which he described as narrow to the extent that two motor vehicles cannot pass each other on it. Just as they were on the bridge about to complete crossing, it they saw a mini bus registration number KXL029 approaching from the opposite direction at high speed. It did not stop as it got to the bridge so as to let KXK complete going over the bridge and they collided. PW1 blames the driver of KXL for failing to slow down so as to let them pass over the bridge completely"*

At page 43 of the record and page 2 of the judgment the learned trial magistrate as she then was, went on at line 3 from the top:

"*although police formed the opinion that Onesmus was to blame and charged him and only called witnesses allied DW1, the court, still acquitted Onesmus without even putting him to his defence, it found that he had no case to answer". The case cited of* ***MARIAM ATHIMON HCC*** *845 OF 06 in fact against the defendant because PW1 has PW2 to corroborate his evidence and it is DW1 who has not called any witness to corroborate any claim that he complained loudly to his passengers about the speed of KXR. Indeed it became clear even from DW1s' evidence that even as he saw KXK approaching from the bridge and he did not stop to let it pass, he continued approaching the bridge and he is the one to blame for the accident. Consequently I enter judgment in favour of the plaintiff against the first and second defendant jointly and severely".*

This court, has given due consideration to this finding in the light of the evidence adduced already set out, and the court, finds that certain issues have arisen for determination by this court, namely:

(1) Against whom did the plaintiff attribute negligence and what is the legal position of that attribution of negligence?

(2) Did police blame one or both of the colliding accident drivers and if so what is the outcome of the said police blame worthiness?

(3) What is the outcome of the said police blame worthiness of the said driver or drivers

(4) What is the effect and or bearing of the said blame worthiness on the Civil proceedings before the lower court, and the current court of appeal?

(5) What is the courts' own impression of the nature of the scene of the accident and its contribution to the causation of the accident?

(6) What are the final orders of this court, as regards liability in view of its finding on issue no. 1, 2, 3, 4 and 5 above?

As regard issue no. 1, the plaint is very clear. The plaintiff attributed blame for the causation of the accident against both drivers and by way vicarious liability their employers. The particulars are given in the plaint. The legal position as stated earlier on is that a pleading is not piece of evidence. It needs to be proved, unless the court for reasons to be recorded allows such a pleading to be un controverted in terms of the provision of order 6 rule 9 (1) CPR. Herein the order 6 rules 9 (1) CPR provision cannot be allowed aid the plaintiff because both sets of defendants responded to the said particulars. Having so responded it means that the plaintiffs were required to prove the same by adduction of evidence, which evidence the plaintiffs tendered and on the basis of which liability was placed onto the defendant No. 2 and then No. 1 vicariously.

(2) As regards issue No. 2 the police did blame the 4th defendant and he was infact prosecuted vide Machakos PMS criminal case no. 1370 of 1991, but was acquitted of the offence of offences charged under section 210 CPC

(3) The outcome of the said police blame worthiness is that, the prosecution resulted in an acquittal under section 210 CPC

(4) The legal effect and or bearing of the acquittal of the 4th defendant in the traffic proceedings, to this proceedings, is that the acquittal did not give the 4th defendant ociean bill of un blame worthiness. This is so because the traffic court, was exercising criminal jurisdiction whose standard of proof was different from the one applicable to civil proceeding. The one in the traffic proceedings was one beyond reasonable doubt. Where as the one in civil proceedings is one of a balance of probability. Further this court has judicial notice of the fact that since the two courts were exercising different jurisdictions the court seized of the civil proceedings was not to be bound by the decision of the court exercising criminal jurisdiction. It was duty bound as it did, to reevaluate the evidence on the record and arrive at its own conclusion. Likewise, this court, as an appellate court, is not bound by the findings of the lower court. It has a duty to reevaluate the evidence on the record and then arrive at its own conclusion on the matter.

As regard this courts' own impression of the scene of the accident its findings are as follows:

(i) Indeed two vehicles collided.

(ii) There is a narrow bridge.

(iii) It is agreed no two vehicles can by pass each other on this bridge

(iv) The vehicle driven by the 4th defendant and in which the plaintiffs were travelling got on to the bridge first.

(v) The vehicle of the second appellant was descending,

(vi) As per DW1s' evidence:

- He agrees the bridge was narrow and no two vehicles could by pass each other

- The vehicle driver by the 4th defendant got onto the bridge first.

- He says the accident was three meters from the bridge onto the tarmac.

- His vehicle was descending.

- The other vehicle applied emergency breaks.

- DW1 never mentioned that he himself applied emergency brakes.

- According to him he had not reached the bridge. If at all the accident was 3 meters after the bridge, he DW1 has not stated what prevented him from also applying emergency brakes, reverse or swerve to his side to allow this other vehicle pass safely.

(6) In this courts' opinion in view of the findings set out above, had DW1 slowed down, when he saw the 4th defendant vehicle enter a narrow bridge, stood on the side, the vehicle of 4th defendant would have crossed safely and then allowed he 4th defendant to pass after which DW1 would proceed. Has this been done no accident could have occurred. This appellate court therefore arrives at the same conclusion, that the second defendant/appellant is solely to blame for the accident. There is no need to disturb the finding of the learned trial magistrate as he then was.

On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages

(1) Damages should not be inordinately too high or too low.

(2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.

(3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.

(4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.

Both sides have cited authorities to this court. The appellant put forward the case of **MARGARET MUTHONI VERSUS DAVID NAMU MUTHONI AND HENRY KIRIMI NYAGAH NAIROBI HCC 148 OF 2000.** From the summary of facts the accident was a collision between two vehicles, where upon liability was apportioned 50/50 against each. On the injuries, the plaintiff had suffered fracture in the middle ½ of both the right and left femurs.

(b) Loss of two teeth and loosening of a further three teeth.

(c) Lacerated wound over face.

The court assessed Ksh 150,000 for pain suffering and loss of amenities Ksh 150,000.00 as future medical care. Decided on 15 /11/2005

The case of **RICHARD MUNGAI GICHUHI VERSUS PETER NGILU KAHIA AND K.K PROMOTE LIMITED NAIROBI HCC NO. 2654 OF 1997**. The summary of the fact reveals that the case related to a running down matter. It was a collision between two vehicles but liability was given at 100%. The injuries sustained by the plaintiff were:

- comminuted fracture of the left lower end of the tibia

- Fracture of the left patella with mild displacement.

- Fracture of the left tibia plateau

- Comminuted fracture of proximal third of the left femur

- Compound comminuted fracture of the lower end of the right patella

- Comminuted fracture of proximal third of the right tibia of the right leg.

- Closed head injury

- Multiple soft tissue injuries. General damages for pain suffering and loss of amenities assessed at Ksh. 180,000.00. Decided on the 6th day of February 2002.

The case of **ZACHARY KIRAITU KARANJA AND KEVIN** KARANJA KIRAITU a minor using by his next friend and father **ZACHARY KIRAITU VERSUS SAMUEL G. NJERI NAIROBI HCCC 5890 OF 1993. AT PAGE 2** of the said judgement the first plaintiff is indicated to have suffered the following injuries:-

- Fracture of the left clavicle

- head injury

- loss of upper left molars

- Sprain of left ankle joint

- deep cut on the superior aspect of the left eye brow and anterior occipital region

- painful left inner ear.

The 2nd plaintiff is indicated at page 3 of the judgement, to have sustained soft tissue injuries on the left forehead and bruises. The quantity of damages is found at page 4 of the judgement. The first plaintiff **ZACHARY KIRAITU KARANJA** was awarded Ksh. 200,000.00 as general damages for pain suffering and loss of amenities and Ksh. 1,166.00 as specials. Where as the second plaintiff was awarded Ksh. 50,000,000 as general damages for pain suffering and loss of amenities and Ksh. 1,207.00 as specials. The decision was made on 9th day of March 2001.

The respondent on the other hand relied on the following authorities. The case of **OWNERS OF STEAMSHIP OR VERSEL (BRITISH FAME) VERSUS OWNERS OF STEAMSHIP OVERSEA MACC GREGOR (1943)** IAER33 whose decisions central principle is that " *the finding of the trial judge as to the degree of blame to be attributed to two or more tort feasors involves an individual choice or discretion and will not be interfered with on appeal save in very exceptional circumstances".*

The case of **KHAMBI AND ANOTHER VERSUS MAHITHU AND ANOTHER (1969) EA 70** where the CA held inter alia that "an apportionment of liability made by a trial judge will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous. **HENRY HILAYA ILANGA VERSUS MANYEMA MANYOKA (1961) EA 705** which dealt with principles of assessing of damages. That "*the appellate court is entitled to re evaluate the evidence and then determine the evidence upon which the trial judge relied upon to arrive at those conclusions. Further that the trial judge did not apply any wrong principle of law in assessing the damages at Ksh. 5,000/= as that amount was neither low nor so inordinately high as to be a wholly erroneous estimate of the damages and the dis allowance of the respondents' claims for Ksh. 12,000/= did not sufficiently affect the gravity of the trespass to justify*

the reduction on the damages".

The case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI VERSUS A.M. LUBIA AND OLIVE LUBIA** , decided by the court of appeal on 27th day of February 1985. The court of appeal held inter alia that " *the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this , he amount is so inordinately high that it must be a wholly erroneous estimate of the damages"*

The case of **MARIAM ATHUMANI AND SALAMA RASHID A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND MARIAM ATHUMANI VERSUS OBUYA EXPRESSAND PHILIP KIPKEMOI CHECULE. THE NAKURU HCCC NO. 477 OF 1998.** The adult plaintiff sustained the following injuries.

- Head injury – had brain concussion and lost consciousness for several hours, bruises and lacerations on the lips.

- Extensive lacerations on the upper back with foreign body pieces of glass embedded in the skin.

- Bruises and lacerations on the upper limbs. Deep cut wound on the posterior aspect of the left arm above the elbow joint.

- Extensive bruises on the left leg and foot with foreign bodies (broken pieces of glass)

- Bruises on the right leg.

- Bruises on the left gluteal region and lacerations and foreign body on the right gluteal region

The minor suffered the following injuries.

- deep cut wounds on the forehead and right temporal region

- Fracture on the right femur on the lower one third

- Soft tissue injuries of the right knee joint.

- Bruises on the right elbow

The court, awarded to the first plaintiff Ksh 600,000 as general damages for pain suffering and loss of amenities, and Ksh 187,600 as specials total Ksh 787,600. For the minor Ksh 350,000.00 as general damages and ksh 82,500 as specials, total Ksh 432,500 decided on 14th day of June 2000.

The case of **SIMON GITHIOMI VERSUS PETER WACHIRA NAKURU HCC NO 91 OF 1993.** The plaintiff sustained

- fracture of the neck of the right femur

- Dislocation of the hip joint.

- Cut wound 6X2 CM on the forehead.

- Cut wound on the anteria aspect of the nose. The court awarded Ksh 357,100, being Khs 350,000 as general damages for pain suffering and loss of amenities and Ksh 1,100 being specials. Decided on 20/9/2000.

The case of **Abdi RISAK IBRAHIM VERSUS ATTORNEY GENERAL NAIROBI HCC 2052 OF 1996.** Decided on 20th May 1997. The injuries sustained are:

- Fracture of the left femur.

- Fracture of the right collar.

- Head injury. The court awarded Ksh 350,000 as general damages for pain suffering and loss of amenities and Ksh 1500 as specials.

The case of **MARY MUTHONI NDICHU VERSUS HESHIMA DISTRIBUTORS NAIROBI HCC NUMBER 4983 OF 1989** decided on 22/3/94. The injuries sustained are as follows

- Fracture of the jaw right mandible.

- Dislocation of the jaw left temporally mandible joint

- Broken and chipped off left premolar tooth and loss of upper canine tooth.

- Injury to the left ear.

- Laceration of the lower limb.

- Soft tissue injury to the left and right legs.

- Laceration on the chin right side.

Disabilities noted were

- Inability to chew hard foods.

- Loss of one tooth and another broken and chipped off.

- Partial loss of hearing in the left ear.

The court awarded Ksh 350,000 as general damages and Ksh 600.00 as speciasl. The case of **JEMIMA NJIRA NDEREVA VERSUS RICH FOOD PRODUCTS LIMITED AND JOSEPH KAMAU NJENGA NAIROBI HCC NO. 2553 OF 1990** decided on 3rd day of December 1992. The Injuries are listed as follows.

- Lacerations over both upper eye lids, bridge cornea deformation of the right eye and left lower leg.

- Injury to the lower jaw.

- Fracture of the medial edge of the first molar tooth of the right upper jaw, with loss of the fractured fragments.

- Soft tissue injury to the chest.

The court, awarded50,000.00 as general damages for pain and loss of amenities, Ksh 170,000.00 as, cost of operation, Ksh 27,000 loss and diminished earning capacity, and 950/= as special total ksh 825, 950.000

These have to be related to the injuries suffered herein. As per the record of evidence, the first plaintiff enumerated the following injuries PW1 stated:

- I got hit on the left leg and nose.

- Injuries on the shoulder.

- Cut on the face. The record shows that he was not cross examined on the enumeration of these injuries.

The second plaintiff enumerated the following injuries.

- I injured my lower jaw, above the eye, and lower back. He was rushed to hospital, treated and discharged. Once again PW2 was not cross examined on those injuries.

The medical documents relied upon by both plaintiffs are contained in the supplementary record of appeal. Exhibit 4 is a P3 form for the 1st plaintiff the injuries noted are:

- Broken nasal bridge

- Closed fracture left femur midi shaft.

- He was put on traction.

The report by Dr. Wokabi is dated 9th may 1991. The injuries enumerated from the history are

- head injury

- fracture of the left femur

- Soft tissue trauma to the left shoulder girdle.

Complaints as at the time of examination were.

- He experiences pain on the nasal bridge on and off.

- He experiences a lot of pain around the left thigh when he walks or when he stands even for a short time.

- Pain on the left shoulder girdle.

- He cannot be able to lift any heavy object

The finding on examination were as follows:

- a scar on the bridge of the nose 3 cm long. The nasal bridge is depressed.

- X-ray taken after the accident showed that there is a depression over the nasal bridge.

- Right leg has a long surgical scar on the outer aspect of the left thigh. He walks with pronounced limp. The movement of the hip and knee joint are within normal limit

- X-ray taken revealed presence of a healing fracture of the upper third of the left femur. Callus (new bone formation) was not adequate on the fracture site

- Swelling around the left shoulder girdle was detected. Movements of the left shoulder joint are within reasonable limit. But complaint of pain when the arms was raised upward and backward.

In the Doctors opinion, the depressed fracture of the nasal bridge if left alone is going to cause some deformity. The patient therefore needed elevation to the depressed nasal bone at a cost of Ksh 15,000 – Ksh 20,000.00. If not corrected the patient would suffer from recurrent nasal obstruction.

(b)As for the fracture of the left femur it had been treated conservatively but later underwent a major operation which fixed the K- nail. However it had not been properly rehabilitated as he walked with a pronounced limp. He has to undergo another major operation to remove the metallic K- nail which would cost approximately ksh 8,000.00

(c) As for the major soft tissue trauma on the left shoulder girdle the swelling had subsided, but pain still persists and it is likely to persist over along time and likely to be exaggerated by any undue exertion. There is also medical report from professor Nim Rod J.M Mwang'ombe dated 8th August 2002. Historical findings are similar to those set out in the report of Dr. Wokabi already set out herein. The findings on examination are as follows:

- Surgical on the left thigh 25 cm long.

- Another surgical scar on the left hip 6 cm long.

- Movement in the left hip joint and left knee joint are satisfactory.

- Fracture of the left femur has clinically healed.

- Mild deformed of the left nose.

In conclusion, the Doctor stated that the patient had a fracture of the left femur bone, underwent surgery, upon reduction of the fracture and internal fixation with the K- nail was done. The K-nail was removed after one year when the fracture had healed. He also had a fracture of the nasal bridge which was managed conservatively which gives him a nasal deformity of the nose. The pain in the left leg will bother him now and then. The fracture of the nasal bridge can still be elevated should he so desire at an approximate cost of ksh 15,000.00.

As for the 2nd plaintiff there is on record a treatment sheet with the following findings

- blood stained, face and clothing

- large wound above the right eye, lower lip, ecchymis round Re

- Loss lower tooth 42.

- Swollen upper lip.

- fracture of the P3 from on the other hand listed the following injuries:

Echymosis right eye loose tooth (42 which was extracted)

- Swollen lower lip, fracture alveolus.

The medical report by Dr. Wokabi is dated 29th may 1991. Historically it listed injuries to the mouth and back. The injuries were on the teeth and lower jaw. The teeth were dislocated. He was X-rayed and a fracture of the lower jaw was detected. The jaws were fixed with wires for a period of 6 weeks. He also had a cut wound, on the right brow which was stitched.

Severe backache but X-ray revealed no fracture or dislocation. The finding on examination were:-

- Pain over the teeth and he could not gnaw with them.

- the teeth are quite loose

- He cannot bend for long time and cannot lift heavy objects.

Upon examination the Doctor observed gross mis alignment of the lower incisors. These teeth are quite loose. A scar in the right brow 5 cm long. No obvious abnormality detected on the back.

In the Doctors opinion the patients had sustained multiple dislocation of teeth and fracture of the lower jaw, over the mid line. He had also suffered a great deal of the pain. The lower incisor teeth are very loose and the patient cannot be able to gnaw because of the loose incisors which were going to be lost in the near future, rather prematurely. He could wear dentures as a replacement. Regular changing of dentives would obviously cost him money. The cut would on the right brow had healed. The scar on the right brow wound persist permanently, but it would not be unsightly from a cosmetic point of view. As for the severe lower back aches, which are muscular in nature, which was likely to persist for a period of 2-3 years and after this it would become less and less severe or disappear completely.

The report by professor Nim Rod Mwang'ombe is dated 3rd September 2002. The historical findings are same as those set out above. The findings on examination revealed a small scar on the right eye lid, a missing frontal lower tooth's. In the Doctors' opinion, the patient had suffered soft tissue injuries to his mouth and teeth leading to removal of one of his teeth. Pain in the frontal teeth, and lower back pain now and then. The pain in the frontal teeth would bother him now and then.

This court, has made due consideration the authorities cited by each side IX both on liability and quantum. It has also considered the injuries in the authorities cited on the quantum and those sustained by the plaintiffs herein, and the effect of those injuries on the future well being on the plaintiffs. This has also been considered in the light of submission of both sides on quantum. The court also makes due consideration of the age of those decision, takes judicial notice of the fact that the purchasing power of the Kenyan shilling when the awards in the cited authorities were made, the purchasing power when the awards herein were made, and the purchasing power of the Kenyan shillings as at the time the appellate decision is made, more so when it's a matter of public notoriety that this court has judicial notice of, that inflation is high due to global economic recession leading to loss of legal tender purchasing power. The court therefore moves to make the following findings:-

(1) After revisiting the evidence on the record the court finds that for the reasons given the learned trial magistrate as she then was (now judge) carefully assessed the evidence before her and arrived at the conclusion that the 2nd appellant was solely to blame for the accident rightly as so would the 4th defendant from blame. It therefore follows that the participation and non participation of the 3rd and 4th defendant in there proceedings would not have altered the nature of the findings on liability. The learned trial magistrate rightly failed to apportion liability between the 1st and 2nd appellants on the one hand and the 3rd and 4th defendant as they were then on the other hand.

(ii)Further on this it is on record that as at the time the assessment was made the 3rd and 4th defendants had long since died leave to substitute had been granted but substitution had not been effected. In effect the 3rd and 4th defendant were no longer participating in the proceedings. If they were not in the proceedings how liability could liable be apportioned to them. As submitted by the respondents' counsel if the applicants counsel felt that the none participation of the two ion the proceedings would be injurious to the interest of his clients, then he should have moved the court for appropriate orders either to substitute or introduce them as 3rd parties before commencement of the trial.

(iii)Indeed the plaintiff blamed them also. However that blame was subject to proof. If proof tendered by the plaintiff led to the court absolving them on the basis of the evidence before it, they plaintiff cannot be penalized for that absolution as theirs was only to lay the evidence before the court, for the court to determine which of the two is to be pinned down for the blame worthiness of the accident.

2. QUONTUM

This court has taken note of the court of appeal decisions to the effect that an award of damages is a matter of the courts discretion and can only be interfered with if among others

- The award is inordinately too high or too low.

- It is based on cursory principles. The principles applied by the lower court in the assessment was that of taking a narrative of the injuries by the witnesses

- Calling for proof of the same by visual observation if pointed out and medical records

- By seeking guidance from other decisions and this is what the learned trial magistrate did and this is evident on the record. The court, therefore makes a finding that no wrong principles was applied in the assessment on quantum. As noted earlier on herein, these must be commensurate to the injuries. The medical reports show that the 1st plaintiff sustained fractures, underwent operation, and he was to undergo future operation. This court finds nothing wrong in the award made in fact it was on the lower side.

As for the second plaintiff, he also had a fracture of the jaw, and lost one tooth. The injuries had healed save for the pain. The award may have appeared excessive than to the other compensable. However in view of the other factors to be taken into consideration, interfering with that award will render nonsense the very act of the assessment at the time it was made. It will not serve the purpose it was meant to serve. For the reasons given the court is of the opinion that there is no justification to disturb the award arrived by the lower court.

For the reasons given on the assessment above, the appeal dismissed in its entirely. The lower court decision is confirmed. The respondent will have costs of the appeal over the proceedings in the lower court.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2008

R.N. NAMBUYE

JUDGE