**Njoroge v Wambua (Civil Appeal E203 of 2021)
[2024] KEHC 1436 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E203 OF 2021

FROO OLEL, J

FEBRUARY 14, 2024

BETWEEN

JOHN NJOROGE .... APPELLANT

AND

MICHAEL KYALO WAMBUA .... RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT AND DECREE OF THE HON B. BARTOO, SENIOR RESIDENT MAGITRATE DATED 16TH SEPTEMBER 2020 IN MACHAKOS CMCC NO 763 OF 201)

JUDGMENT

A. Introduction

1. This appeal arises from the judgement/decree of Hon. B. Bartoo (SRM) dated 16th September 2020 delivered in Machakos CMCC No. 763 of 2015, where She found that the Appellant was 100% liable for the accident that occurred on 20th August 2014 at Konza Area of Mombasa – Nairobi Road and proceeded to award the respondent General Damages of Kshs.500,000/= and special Damages of Kshs. 3,500/= plus cost and Interest.

B. Pleadings

2. The respondent herein was the plaintiff in the primary suit and vide his plaint dated 4th September 2015, he sought compensation for Injuries suffered arising from a Road Traffic Accident which occurred on 20th August 2014. It was alleged that on the said date he was a passenger in motor vehicle registration number KBZ 860P Toyota Sienta (hereinafter referred to as the suit Motor vehicle), when the said motor vehicle was so carelessly and negligently driven at Konza area by either of the defendants sued, their servants, employee and/or agent, that they permitted the suit motor vehicle to violently

crush thereby occasioning the respondent herein to suffer severe bodily Injuries for which he claimed damages.

3. The Injuries sustained by the respondent were particularized in the plaint and were; deep cut wounds on the forehead, head contusion with font epidural hematoma, front parietal; -temporal fracture, deep wounds on the left shoulder, deep wounds on the right forearm, deep wounds on the left buttock and fracture of right femur, deformed with loss of function, for which the respondent claimed damages.

4. The Appellant herein, who was the 2nd Defendant in the primary suit, filed his statement of defence dated 31.08.2016 denying all the allegations pleaded in the plaint and further in the alternative averred that if indeed an accident did occur, which was denied, the same was caused and/or substantially contributed too by the respondents Negligence for which he was wholly to blame. The Appellant prayed that the suit be dismissed.

B. Evidence at Trial.

5. PW1 P.C Robert Tummo attached to Machakos Traffic base testified that on 20.08.2014, they received a report of the occurrence of a fatal road traffic Accident which occurred at about 9.00p.m at Konza Area along Nairobi – Mombasa Road. The accident involved the suit motor vehicle, which was being driven towards Nairobi direction, with four (4) passengers on board. The driver lost control of the said motor vehicle, veered off the road towards the left and rolled several times. As a result, one passenger lost his life and the other passengers including the respondent herein sustained serious injuries.

6. The seen was visited by P.C Kimanthi, and he recovered the appellant's driving license and it was believed that he was the one who was driving the suit motor vehicle, when the accident occurred but had escaped from the scene. The accident was booked under O.B No. 14 of 20/8/2014 and later the respondent was issued with police Abstract which was produced as Exhibit 1.

7. The other passengers apart from the respondent, who were injured/died as a result of the said accident were; Albanus Kaleli John died on his way to hospital, Musyoka John and Rose Nzau Musyoki were injured and taken to hospital. Upon cross examination PW1 further stated that he did not know who was driving the motor vehicle at the time of the accident, though the investigating officer found a copy of the driving license of the Appellant at the scene of the accident, he did not have the said copy in court though.

8. PW1 also had a copy of the cash bail bond issued to one Collins Muli Mativo in respect of the suit motor vehicle and it was indicated therein that they intended to charge him with the offence of causing death by dangerous driving. In reexamination the witness stated that Collins Muli Mativo was the driver of the accident vehicle and that the abstract showed the owner of the suit motor vehicle.

9. PW2 Dr. Judith Kimuyu testified that she attached to Machakos Level 5 hospital and held a degree in Medicine and Surgery from UON. she had worked with her colleague Dr.Jack Nthanga from 2013 and was familiar with his handwriting and signature. Dr Nthanga was her boss and currently was serving as the chief officer of health Machakos County thus was unavailable to testify before court due to his heavy work schedule. He had therefore requested her to testify on his behalf. She confirmed that she had the medical report dated 18.6.2015 in respect of Michael Kyalo Wambua (the respondent) that had been prepared and signed by Dr Jack Nthanga. She produced the Medical report, discharge summary, payment receipts and payment waiver forms issued from Machakos level 5 Hospital.

10. In cross examination, PW2 confirmed that the respondent underwent surgery to fix a fracture on his thigh bone and was discharged from hospital after a month and two days. He had not completely healed and was to undergo physiotherapy, process he was still undergoing/undertaking in 2015. She could

not tell whether the plaintiff could walk normally, but confirmed that the respondent had sustained injury to the brain, there was bleeding into the brain which was life threatening at time of admission into hospital.

11. PW3 Micheal Kyalo Wambua adopted his witness statement as his evidence. In the said witness statement, the respondent confirmed that on 20.08.2014, he was a passenger in the suit motor vehicle, when it was involved in a self-involving accident owing to the driver's recklessness as he was over speeding, lost control of the said motor vehicle and it rolled several times.

12. As a result of the said accident he sustained severe Injuries namely; deep cut wounds on the forehead, head contusion with font epidural hematoma, front parietal; -temporal fracture, deep wounds on the left shoulder, deep wounds on the right forearm, deep wounds on the left buttock and fracture of right femur, deformed with loss of function. He was treated at Machakos Level five hospital, where he was hospitalized for over one month and incurred medical bills totaling Kshs 50,561/=He blamed for defendants for the accident and prayed to be compensated for injuries suffered, plus cost and interest of the suit.

13. Upon cross examination, PW3 testified that they were travelling from Makindu to Kajiado when the accident occurred along Mombasa road. The Motor vehicle search revealed that the owner of the suit motor vehicle was the Appellant, though he had not looked at the document very well. The appellant was a person he knew very well as he used to always pay them their salary. During the journey, he was with one Musyoka and Muli Kaleli in the car and it was Muli who was driving during the accident. Muli (deceased) was the appellant's driver. In reexamination, PW3 reiterated that the appellant was known to him and for this trip they had paid him. They also resided together.

14. PW4 Daniel Musyoka John also confirmed that he was in the suit motor vehicle as at the time it was involved in the accident, which occurred on 20.08.2014 and as a result he got injured. He had recorded his witness statement with his advocate, and adopted the same as his evidence. Upon cross examination, PW4 testified that the appellant gave them the vehicle and he paid him Kshs 5,000/= via Mpesa and Kshs 3,000/= in cash. Th appellant gave the money to the driver, whose name he was not sure, but believed that he was called "Muli". They were five people when going for the journey and four people when coming back. He believed that the registered owner of the suit motor vehicle was the Appellant who they had paid Kshs 8,000/= and that they were not drunk during the drive back to Kajiado.

15. The Appellant in the primary suit closed his case without calling any witness.

16. After hearing the suit, the learned magistrate in her judgment delivered on 16th September 2020 apportioned Liability at 100% as against the Appellant and proceeded to award the respondent general damages at Kshs.500,000/=, special damages at Ksh 3,500/= plus costs and interest of the suit.

17. The Appellant being dissatisfied by the quantum awarded did file their memorandum of Appeal dated 20th December 2021 (Pursuant to leave granted in Machakos High court Misc. Application No E187 of 2021) and raised grounds of appeal namely: -

    a. That the Learned Trial Magistrate erred in law and fact in finding the appellant herein 100% liable.

    b. The Learned Trial Magistrate erred in law by entering judgment in favour of the Respondent against the Appellant should pay the Respondent a gross sum of Kshs 500,000 in general damages and Kshs 3,500 in special damages which award is arbitrary and unwarranted in the circumstances.

c. The Learned Trial Magistrate erred in law and in fact in not finding that the Respondent had not established that Appellant herein is not the owner of the driver of the motor vehicle as at the time of the accident.

d. That the Learned trial magistrate erred in law and in fact in failing to take cognizance of the nature of the suit before her and the circumstances of the case.

e. That the Learned Trial Magistrate erred in law and in fact by failing to consider the defence of record and further failing to analyze the Appellant's evidence and facts on record.

f. That the Learned Trial Magistrate erred in law and in fact in failing to dismiss the suit when the Respondent failed to establish a case against the Appellant.

g. That the Learned Trial Magistrate erred in law and in fact in failing to consider and apply the law appropriately.

B. Submissions

Appellants Submissions

18. The Appellant filed his submissions on 27.06. 23 and supplementary submissions on 25.07.2023. He submitted that the trial court erred to hold that he was 100% liable for the accident, when the respondent had not proved who was driving the suit motor vehicle as at the time of the accident and any link the said person had with him. PW1 the police officer stated that the driver of the suit motor vehicle was unknown, but one Collins Muli Mativo, who was believed to be the driver of the suit motor vehicle was bonded and was to be charged with causing death by dangerous driving.

19. PW3, the respondent herein did produced a motor vehicle search Exhibit 7 (a) which did prove that one Karugu Monica was the registered owner of the suit motor vehicle and there was no nexus placed and/or duty of care shown as between him and the said Karugu Monica for which he could be held responsible. The respondent had therefore failed to discharge the burden of proof regarding ownership and by extension who was liable for the said accident. Reliance was placed on Nickson Muthoka Mutavi Vs Kneya Agricultural Reasearch Institute (2016) eKLR.

20. The appellant while relying on the case of Shaneebal Limited Vs County Government of Machakos (2018) eklr where Odunga J, While relying on the case of Trust Bank Limited Vs Paramount Universal Bank Ltd & 2 others Nairobi (Millimani) HCCA No 1243 of 2001, & Donoghue Vs Stevenson held that where a party failed to call evidence in support of his case and/or to substantiate his pleadings, such a party would have fail to prove his case. The respondent had failed to link the him to the suit motor vehicle and therefore he could not be blamed for the said Accident.

The Respondent's Submissions.

21. The Respondent filed submissions on 06.07.2023 in which it was contented that the respondent PW3, PW4 and the Appellant knew each other for many years and he had been paid the money to hire the said suit motor vehicle. They also knew for a fact that the suit motor vehicle was owned by the Appellant. When the accident occurred, the appellant was informed by PW4 and he went to see them at Machakos level five hospital and later went to view the suit motor vehicle at the police station. The police Abstract also clearly showed that the suit motor vehicle belonged to the Appellant and therefore the said fact was sufficiently proved.

22. The appellant was also faulted for not calling any witness to testify on his behalf, and having not tendered any evidence to support his case, the respondent's evidence and that of his witnesses remained

uncontroverted. His appeal on this limb was therefore made without any basis and the court was urged to reject the same. As regards the quantum awarded, the respondent urged this court to find that the respondent did suffer severe injuries, which lead him to suffer a disability assessed at 25% by Dr Jack Nthanga. There was no error pointed out which the trial Magistrate made in awarding the respondent Kshs.500,000/= and the said award could not be termed as excessive viz a viz the injuries sustained.

23. The respondent thus urged this court to find that the appeal as filed was not merited and prayed that the same be dismissed with costs.

B. Analysis and Determination

24. I have considered the entire proceedings of the trial court, the entire record of Appeal and the submissions of the parties herein. I note that this is a first appeal and the court did not have the opportunity to see the witnesses and see their demeanor, however the court will analyze the evidence before it and arrive at its own independent conclusion. I am therefore guided by the case of Selle & Another Vs Associated Motor Boat Company Limited & others (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270.

25. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

26. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

27. It is not in contention that an accident occurred on 20.08.2014 along Nairobi- Mombasa road at Konza area where motor vehicle registration number KBZ 860P TOYOTA SENTA crashed and as a consequence therefore the Respondent sustained serious Injuries. Based on the pleading filed and submission's made, i find that the issued for determination is whether liability of the Appellant was sufficiently proved and whether the quantum awarded as adequate or excessive.

I. Whether the trial court erred in finding the Appellant 100% liable

28. On the question of proof of liability, the Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR did succinctly proffered that ;

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
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> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...",.

29. In the case of Haybourhill –V- Young (1942) 2 ALL ER 396 quoted in the case of Benson Dulo v Joseph Waire Njoroge [2022] eKLR in which Lord Porter distilled the neighborhood maxing thus;

> " The duty is not to the world at large it must be tested by asking with reference to each several complainants was a duty hold to him or her. If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or other relations or flames, normally I think no duty would be owed. In the same court Lord Macmillan expressed himself as follows "on the duty in terms of proper care it connotes avoidance of excessive speed, keeping a good lookout, observing traffic rules and signals and so on. Then to whom is the duty owed? To persons to placed that they may reasonably expected to be injured by the omission to take such care. The duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as it is reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

I also mindful of the provisions under Section 40, 46, 47, 49 of our *Traffic Act* Cap 403 of the Laws of Kenya which emphasizes that the driver of a motor vehicle shall observe the following rules "to drive the motor vehicle with due care and attention, not to drive on the road recklessly or at a speed or in a manner which is dangerous to the public, in a manner so as to overtake traffic unless the driver has a clear and unobstructed view of the road ahead."

In the instance appeal the duty to proof negligence rested with the respondent. In Kiema – V- Kenya Cargo Handling Services (1999) eKLR "the court held that the onus of proof is on

who alleges and where negligence is alleged. The position is as yet no liability without fault and a plaintiff must prove some acts of negligence against the claim if based on negligence."

As Dennis in his BOOK law of evidence 2nd edition reprinted 2004 observes "when a party has discharged an evidential burden and raised an issue for the court to consider, there arises a tactical onus on the other party to respond with some rebutting evidence. There is no legal obligation to adduce(further) evidence on the issue, but the party against whom the evidence has been adduced increases the risk of losing on the issue if nothing is done to challenge the evidence when a judge is deciding whether an evidential burden has been discharged, he looks only at the evidence favouring the party who bears the evidential burden. The question for decision is whether the favourable evidence is sufficient by itself to raise for the court to consider; the fact that there may be substantial other evidence contradicting the favourable evidence is immaterial at this stage. When a fact-finder (judge, jury or bench of magistrates) is deciding whether a legal burden has been discharged, the fact-finder looks at all the evidence adduced in the case. Thus the fact-finder evidential burden plus any other evidence which tends to confirm or rebut it. The discharge of an evidential burden does not involve a decision that any fact has been proved. All it signifies is that a question has been validly raised about the possible existence of a material fact; the decision is only that enough evidence has been adduced to justify a possible finding in favour of the party bearing the burden. The discharge of the legal burden occurs at a later stage in the trial, when the fact-finder is required to decide on the existence or non-existence of facts whose possible existence is in issue(Emphasis added)."

The conceptualization of the above principles lies at the heart of the contestation on liability between the appellant and the defendant. This implies that the appellant is aggrieved of the failure by the respondent to discharge the burden of proof on a balance of probabilities on the accident he caused as alleged in his evidence. The reason for the division between the appellant and the respondent is on the proposition that the fact of the accident was wholly to blame by the appellant whilst he maintains that not to be the case. For purpose of this appeal one of the main characteristics that differentiate the burden of proof on liability with the complaint raised by the appellant is the evidential variety found in the testimony of PW 1 and PW 2. The trial court having reflected on the strength of both the appellant and respondent case in his judgment it is clear that the degree of confidence was qualitatively on the part of the respondent. In any judicial proceedings in which there is a dispute about the facts of some earlier event the trial court can never acquire unassailably knowledge of what happened. All he/she can acquire is a belief about what probably happened. The strength of this believe can vary with knowledge, experience and appreciation of the facts to the Law. First in the impugned judgment besides the appellant denying occurrence and breach of duty of care of the said accident there is no corresponding probative evidence to rebut the testimony of PW 1 and PW 2. The rule prescribing the standard of proof as a matter of law before the judge also in certain circumstances goes hand in hand with the principle on corroboration. My combined review of the evidence shows no anomaly on the testimony of the respondent which was further corroborated by an independent witness particularly cycling around the scene of the accident. The general obligation of the appellant was to controvert that evidence to alter the balance of probability which was an essential safeguard of the respondent case. Unfortunately, the trial magistrate who had the feel of the case exercised his discretion to rule on liability tilting in favour of the respondent. Within this basic duty, the trial magistrate has a wide discretion in deciding how to sum up the facts in issue and their application to arrive at a judgment which is the subject matter of this appeal. The appellant apparently seems to invite the court to draw an influence of a finding made by

the trial court without any iota of evidence. The object was to request this court to dismiss the suit in its entirety. However what is submitted is not dependent upon the facts of this case for the interest of justice to call upon this court to interfere with the judgment of the lower court by setting it aside and granting the relief of allowing the appeal as intimated by the appellant.

The primacy of this court to me does not even relate to the issue on contributory negligence. In Defrais –V- Rooney 2002 BDA LR 21 the court held as follows "contributory negligence required the foreseeability of harm to oneself. A person is guilty of contributory negligence if she ought necessarily to have foreseen and if she did not act as a reasonable prudent person, she/he might be hurt and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiffs should have failed to take reasonable care for her own safety. I do not that the plaintiff conduct was in any way contributory negligent. In the agony of the moment she made unsuccessful attempt to avoid the collision." I consider therefore on assessment and scrutiny of the evidence it is crystal clear and beyond peradventure that the accident occurred in the manner described by the respondent and his independent witness (PW 2). It involved the maneuvers made by the appellant motor vehicle and as a result the respondent was injured. The duty of care in this case was owed to the respondent by the appellant driver. It is on record that the appellant driver maintained that he never committed any such breach of duty.

30. In this case, no evidence was tabled by the Appellant to show any negligence on the part of the Respondent. The accident was self-involving and the respondent as a passenger did not contribute to the causation of the said accident in any manner. It remains basic law that the only forum where the respondent's evidence could have been challenged was at trial. Since the Appellant failed to call any witness the respondent's evidence remained uncontroverted and thus proved.

31. In Motrex Knitwear Vs Gopitex Knit wear Mills Ltd Nairobi (Millimani)HCCC NO 834 OF 2002 Lessit J citing the case of Autar Singh Bahra & Another Vs Raju Govindji, HCCC NO 548 OF 1998 where it was appreciated that;

> " Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff case stands unchallenged but also that the claims made by the defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail."

32. In the case of shaneebal limited Vs County Government of Machakos (2018) eKlr , Odunga J relied on the case of Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 others Nairobi (Millimani) HCCS No 1243 OF 2001 where it was held that;

> " it is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing do the party fails to substantiate its pleadings and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

II. Whether Quantum Awarded was Excessive.

33. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case Khambi & Another v Mahitu &Another (supra). Further the Court of Appeal in the case

Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992 Stated:

> " Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88]I KAR 1 at pg 5 as follows-
>
> 'An Appellate Court will not disturb an award of damages unless it is so 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 or low ..."

34. According to the medical report by Dr. Jacks N. Nthanga date 18th June 2015; the injuries sustained by the respondent were; Deep bruises left- parietal region of the head and forehead, Generalized head tenderness, Deep bruises on the left shoulder joint and right forearm, Deep bruises of the right buttocks, Tenderness- deformed right leg with loss of function. The respondent injuries were quite severe and he had to be admitted to hospital and taken to theatre. The shell fracture/ head injury was quite life threatening since the respondent was exposed to high risk of brain internal bleeding. Fracture of the right femur as an adult, means staying for a long time before resuming meaningful livelihood. The Respondent underwent a lot of pain, inconvenience and loss of income and the doctor placed his disability at 25% partial/ financial incapacity."

35. Nothing has been placed before this court to warrant interference with the award that was given by the Trial court. It has not bene proved by the appellant that the award of damages is inordinately high as to represent an entirely erroneous estimate, or that the trial magistrate made her discussion based on wrong principles or that she misapprehended the evidence in some material respect.

B. Disposition

36. The upshot is that this appeal, is wholly unmerited and the same is dismissed with costs to the Respondent.

37. The costs are hereby assessed at Kshs.170,000/= all inclusive.

38. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 14TH DAY OF FEBRUARY, 2024.

In the presence of;

No appearance for Appellant

Mr Mutunga for Respondent

Sam - Court Assistant