Mbiti v Maingi & another (Civil Appeal E77 of 2022)
[2023] KEHC 20833 (KLR) (10 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E77 OF 2022

DKN MAGARE, J

JULY 10, 2023

BETWEEN

SAMUEL KIOKO MBITI ..... APPELLANT

AND

VINCENT MULI MAINGI ..... 1ST RESPONDENT

AFRICA VISA TRAVEL SERVICES LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Resident Magistrate's Court Msambweni (the Hon Joy Mutimba) dated 20th May 2022 in RMC Civil Case No E100 of 2021. It is an appeal mainly on liability. The Appellant was the Plaintiff in the lower court.

2. This appellant filed a 6 paragraph memorandum of appeal against the decision of Hon Joy Mutimba given on 20th May 2022 in RCMCC E100 OF 2021. The court had dismissed the primary suit in limine. The 6 grounds are basically on the issue, that is: -

    a. whether the court erred in its finding in liability.

3. Prolixious memorandum of appeal is not useful to the parties. The court of Appeal had this to say in regard to rule 86 of the court of Appeal, which is pari mateira with order 42 Rule 1 in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the

myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

"We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

4. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross v Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

5. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

6. In the defence filed, the defendant denied negligence on their part and blamed the plaintiff for the loss that occurred.

Pleadings

7. The plaintiff averred that the defendants are owners and insured of motor vehicle registration KCP 899 F Toyota station wagon. The plaintiff was said to be on board motorcycle Registration No KMCA 857 B as a fare paying passenger along Ukunda – Likoni road.

8. The Appellant pleaded particulars of negligence. This also pleaded the following injures

    a. Bruises and abrasion right forearm/hand and right wrist area.

    b. Blunt trauma to the right shoulder

    c. The Plaintiff pleaded special damages of Ksh 4,050.

9. The defendant filed defence on 2nd September 2021. They denied negligence, causation and injuries. They averred that they carefully drove the motor vehicle but KMCA 857B drove without a reflective jacket or a risk element, they threatened to overtake when it was not safe. They set out particulars of negligence on part of the plaintiff, the rider and the owner of motor vehicle registration No KMACA 857 B.

10. I wish to point out that criminality has no place in negligence. The plaintiff is said to have been an extra passenger on an unlicensed motorcycle, failed to wear a helmet among other protective measures.

11. At the onset, none of the particulars of negligence set out on part of the plaintiff are particulars of negligence. Even if the plaintiff admitted then he could be liable for the accident. The parties filed written submissions. The plaintiff filed on 22nd March, 2012. The plaintiff relied on the authority of Embu Public Road Services Ltd. vs Riimi [1968] EA 22

12. They also submitted on quantum which is not in dispute herein. The Respondent submitted on the Highway code. The rider is said not to have a driving licence or skill on the road. They also blame the plaintiff in negligence. They rely on the Order 2 Rule 11 (1) and Section 103 B 1 & 5 of the *Traffic Act*.

13. They also rely on Daniel Muthini Maweu v Gideon Misheck [2020] eKLR. They attached the Highway code and his *Traffic Act*. The court delivered its judgement on 20th May 2021. The court relied on the Section 108 of the *Evidence Act* and Wawira Ndegwa Vs Isaiah Njuguna (2007) eKLR.

14. The court stated that the police abstract did not confirm information on the cause of the accident. The court dismissed the case. This resulted in the appeal.

15. Parties have filed submissions which I have particularly read. I have also seen a supplementary record of appeal. The respondent filed submissions on 16th December 2021. They repeated nearly the same submissions they did in the lower court. They stated that the respondent gave evidence in the lower court.

16. They rely on the decision of John Mwangi Maina v Evanson Njoroge Maina & another [2022] eKLR, where the Court stated: -

> " I have considered this appeal, submissions by counsel for the parties and the authorities relied on. I have also considered the record and the impugned judgment. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. The court should however bear in mind that it did not see the witnesses testifying and give due allowance for that.
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> In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that; [A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

Appellants submissions

17. The appellant filed submissions on 14th December 2022 and blamed the court. They also gave detailed submission on the effect of a party failing to adduce evidence.

Analysis

18. I am surprised at the lengths the parties went to show that they are not to blame. As a result, they prosecuted or defended a case not before the court. Section 47 of the *Evidence Act* provides as doth;

> " Proof that judgment was incompetent or obtained by fraud or collusion.

Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.

19. As a corollary there needed to be a judgement related to the commissions of the offence. Meanwhile it is not the duty of the trial court to check on the capability of the appellant, under the *Traffic Act*. The only issue is liability in negligence in the occurrence of the accident. I note that the respondent had particulars of negligence of the owner and the rider of the motorcycle. I do not see the rider as a party in this matter. A court of law cannot and should never condemn a party unheard. The court is supposed to find lability for the parties before it.

20. The rider is not one of the parties. Under order 1 Rule 15, a party who thinks that he is entitled to indemnity or contribution by a party who is not party to the suit, issues a notice called third party. The said provision states as doth: -

> 15. Notice to third and subsequent parties [Order 1, rule 15.]
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> (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
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> (a) that he is entitled to contribution or indemnity; or
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> (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
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> (c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

21. Consequently, the evidence related to the order is not useful. The appellant was a passenger in the motorcycle. Registration No KMACA 857B. There was another pillion passenger. This could be a good ground for the director of public prosecution to exercise their power under Article 157(6) of *the Constitution*. The said Article provides as follows:-

> The Director of Public Prosecutions shall exercise State powers of prosecution and may
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> a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
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> b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b). "

22. Therefore, issues related to the *Traffic Act* are in a different province. The said applies to the Highway Code. I shall thus disregard reliance on those as they are not relevant for determination of the matters in issue. The same questions in the court was who between the appellant and Respondent caused the accident/ who is to blame for the negligence and to what extent.

23. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

> " Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

24. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

25. The court disregarded the evidence of the police officer and stated that such evidence was needed. From the case of this nature, the standard of proof is on a balance of probabilities. The question is never what the police are doing with lability. It's not whether anyone is charged. That is another province. The police have to find sufficient cause to charge.

26. In Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

27. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%

as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

28. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the judges of Appeal held that:

> " Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say; -
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

29. In the case of Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Ltd [1984] eKLR, the court of Appeal stated as doth: -

> " The trial judge rightly applied to the facts before him the relevant law enunciated by Spry, V. P in Lakhamshi v Attorney General, [1971] E A 118, 120 for such cases which -
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> "It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.
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> 51. In the opinion of the appellant, he had proved his case against the Respondent on a balance of probabilities. Reliance was placed on the case of Abdi Kadir Mohammed & Another v John Wakaba Mwangi [2009] EKLR where the court stated that:
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> "It was similarly held in BUTT v KHAN [1981] eKLR that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission. The test, as stated in GOUGH vs. THORNE [1966] 1 WLR 1387 (referred to in the BUTT vs. KHAN decision) was whether the child was of such an age as to be expected to take precautions for his or her own safety and finding of contributory negligence can only be made if blame

could be attached to the child. In the absence of an eye witness account in the present case and having found the investigating officer's evidence quite unreliable, it cannot be said with certainty whether or not the deceased in this case did actually run into the road as claimed. Despite that being the evidence tendered by the witness called by the respondent the same cannot be the basis for finding the minor 50% to blame. For the father to have allowed him to attend the show on his own despite his tender years, there is no doubt that the deceased, whom the respondent described as clever boy did possess."

30. The Court in the above case further made the following finding:

> " Yet the same report stated that the motor vehicle was moving at a slow speed of between 30 to 40 kms due to a crowd in the town. It appears to me that the learned trial magistrate, taking the said piece of evidence as the best evidence available was right in finding negligence on the part of the driver. That the learned trial magistrate read carelessness on the part of the driver is not, in my considered view, an importation of personal opinion into the case. On a balance of probabilities the evidence tendered proved the above and the learned trial magistrate was therefore justified in finding as she did."

31. In the case of case of Felister Nduta Muthoni & Another V Attorney General [2004] eKLR where the court made the following finding:

> " From the foregoing circumstances the time was early in the morning. The traffic was scarce. The deceased in this case seemed not to have been aware of the vehicle. It is without a doubt that DW2, the driver was over speeding. He failed to take precaution and to slow down to 50KPH as is required by the traffic rules for all the vehicles that are driven within the city boundary. At the same time the deceased should have taken precaution and stopped at the road without taking due care for the presence of oncoming traffic. I would in the circumstances find that the defendants, driver and or agent is liable for this accident. I say so due to the impact of the vehicle on the deceased. This was so great that it caused him to sustain fatal injuries soon after. I would compute liability against the defendant at 80%. I hold that the deceased bears 20% liability on the grounds that he ought to have taken precaution whilst at the vicinity of the road."

32. In Joseph Muthuri v Nicholas Kinoti Kibera [2022] eKLR, Justice PJO Otieno held as doth: -

> " Lastly, there was the complaint about non-consideration of the appellant's and respondent's submissions, the court in which I consider not meriting much consideration here as its consideration appears to ignore the mandate of a first appellate court. Since the ground seems to recur in every appeal in this registry. I reiterate what the court said in Joshua Mung'athia v Evarick Muthuri Ntoiba & another (suing as the legal Representative of the Estate of Fredrick Ntoiba Baraya (Deceased) 2021) eKLR.
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> this grievance in reality ought not be taken seriously when regard is taken of the court's mandate on a first appeal. It bears no premium that the submissions were not regarded when the appellate court is to carry out a re-evaluation in order that it comes to its own conclusion. That is what I have done and I consider it immaterial that the trial court may have not demonstrated having considered the appellant's submissions. While I consider it important that parties 'industry be appreciated, and a court need to appreciate the assistance offered by submissions, I consider it a point that cannot stand on its own to upset a decision on a first appeal"

33. In Masembe v Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."

34. Similarly, in Lei Masaku v Kalpama Builders Ltd [2014] eKLR, it was observed thus:

> " It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

35. In the case of James Gikonyo Mwangi v D M (Minor Suing through his Mother and next Friend, I M O) [2016] eKLR, the court stated as follows: -

> " I further find that the respondent had no reason to enjoin a third party to the suit as the respondent was positive that it was the appellant's driver to blame for the accident and nobody else. . On cross-examination PW1 stated as follows:
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> "I blame our driver for speeding and veering off its lane. That is why I did not enjoin the other Motor Vehicle"
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> It is worthy to note that it was the appellant who has introduced the aspect of a third party in this proceeding and I find that under those circumstances it was incumbent upon the appellant, if his case was that a third party was to blame for the accident, to enjoin the said third party as he had already alluded to in his own pleadings (defence) at paragraphs 5 and 7."

36. In the instant appeal, the driver has not given any explanation as to why his motor vehicle veered off its lane and rammed into an on-coming motor vehicle. This position is further fortified by the Court of Appeal's findings in the case of Embu Public Road Services Ltd. v Riimi [1968] EA 22 where it was stated:

> " .....Where the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence...

37. In David Mwangi Kamunyu v Rachael Njambi Ruguru [2022] eKLR, the court, Justice Rtd, Mary Kasango stated as doth: -

> " Having failed to join the motor cycle rider as a third party and because no negligence can be attributed to the respondent who was a passenger and because the respondent adduced eye witness evidence the appellants ground on the finding of liability must and does fail. This

indeed is in accordance of the jurisprudence espoused in the case Stella Muthoni v Japhet Mutegi [2016] eKLR where the court held:-

"In Ntulele Estate Tranporters Ltd & another v Patrick Omutanyi Mukolwe [2014] eKLR the court faced with a similar situation held:-

'Secondly, having failed to join the estate of the motorcyclist as a party to the proceedings, I do not think any blame could be attributed to a party who had not been joined in the proceedings. In the case of Benson Charles Ochieng & Anor v Patricia Otieno HCCA 69 OF 2010 (UR) the court held:-

38. The trial court could not have apportioned liability between the appellants and a person who was not a party to this suit. This court is unable to agree with the Appellant's argument which was to the effect that the Respondent ought to be blamed for not joining the third party into the proceedings.

39. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third party into the proceedings. In the present appeal, it is the Appellants who were to face the consequences for failure to join the motorcyclist to the suit. Having failed to join that party, the argument as to contribution of negligence fails.

40. On the other hand this court and the court below should be concerned with what most probably happened. The police abstract is a good starting point, it points who were reported to be involved. In this police abstract for this case, the case was about an accident at Tiwi sport area along Ukunda road on 27th July 2021.

41. It also indicates that the owner and driver were Vincent Muli Miangi and that the appellant was injured. Further, the police officer testified on the contents of the police records. The police abstract is an abstraction of the record. Whenever someone has doubts on its authenticity they can call for the receipt.

42. There was no evidence given challenging the police evidence on the police abstract. There was nothing for the police to produce. The police abstract had all requisite details. I am therefore satisfied with the police abstract as a genuine abstraction of the police file and the Occurrence Book. The abstract was given out on 29th July 2021. The decision to charge or otherwise could not have been given.

43. I do not think, for a moment, that a police abstract indicating 'pending under investigations' is in any way an absolution from negligence.

44. Secondly, it must be recalled that the appellant was a passenger. He had no control over any of the drivers or riders involved in the accident. There appears to be an assumption that the appellant was liable for the negligence of the motorcycle he was riding in.

45. The owner of Motor vehicle registration No. KCP 899 E appears to attribute some to the owner and rider of motorcycle registration number KAMCA 857 B.

46. The attribution of negligence to a non party, like the rider was completely unhelpful in the case EN v Hussein Dairy Limited & 3 others [2020] eKLR, the Court stated as doth:

"I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows,

The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability. [Emphasis mine].

18) Having found that the trial magistrate erred on apportioning liability at 25% against the bus driver I now turn to the next issue on who was to blame for the accident. ....

47. The end result is that I cannot find the rider liable for the accident. The eye witness tendered evidence on behalf of the Appellant that the Respondent was to blame. In their pleadings the Respondent did not blame the rider. The blame is really that of the rider that the Respondent wanted to attach to the Appellant. By boarding the motorcycle, as a passenger they did not approve of the rider's negligence.

48. The parties must remember that it is not just negligence, there must be causation. A vehicle may be driven badly but not cause an accident. On the other hand, one may drive carefully and still be in an accident. It is the causal link that is the basis for liability.

49. In Elijah Ole Kool v George Ikonya Thuo [2001] eKLR, the House of Lords overruled the Court of Appeal. Lord Reid said as follows at pp 680 – 682:-

"There is no doubt that if these men had obeyed their orders the accident would not have happened. Both acted in breach of orders and in breach of safety regulations, and both ought to have known quite well that it was dangerous for Stapley to enter the stope. The present action against the respondents is chiefly based on Dale's fault having contributed to the accident and on the respondents being responsible for it, the defence of common employment being no longer available. So it is necessary to consider what would have happened if Dale had done his duty. It was his duty either to try a pinch bar or to start boring holes for the shot -firer, and on the evidence I think that it is highly probable that, if he had insisted on doing that instead of agreeing with Stapley to neglect their orders and the regulations, Stapley would not have stood out against him or tried to resume his ordinary work. Stapley had nothing to gain from his disobe dience, and if he had not found Dale in agreement with him it appears to me unlikely that he would have persisted.

But if he had persisted and thereby prevented Dale from carrying out his orders – because Dale could not have worked at the roof if Sta pley had persisted in going below it – then it was Dale's duty to go for the foreman, as he, Dale, could not give orders to Stapley. We do not know how soon the roof fell or how long it would have taken Dale to find and bring the foreman, but it is at least quite likely that the foreman would have arrived in time to prevent the accident. If Dale's failure did contribute to the accident, then I do not see on what ground the respondents can escape liability in respect of that failure. In these circumstances it is necessary to determine what caused the death of Stapley. If it was caused solely by his own fault, then the appellant cannot succeed. But if it was caused partly by his own fault and partly by the fault of Dale, then the appellant can rely on the Law Reform (Contributory Negligence) Act, 1945. 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. "A jury would not have profited by a direction "couched in the language of logicians, and expounding theories "of causation,

with or without the aid of Latin maxims": Grant v Sun shipping Co. Ld., [1948] A.C. 549, 564; [1948] 2 All E.R. 238) per Lord du Parcq.

The question must be determined by applying common sense to the fact 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. It may often be dangerous to apply to this kind of case tests which have been used in traffic accidents by land or sea, but in this case I think it useful to adopt phrases from Lord Birkenhead's speech in Admiralty Commissioners v. Volute (Owners), ([1922] 1 A.C. 129, 144, 145) and to ask was Dale's fault "so much mixed up with the state of things "brought about" by Stapley that "in the ordinary plain common "sense of the business" it must be regarded as having contributed to the accident. I can only say that I think it was and that there was no "sufficient separation of time, place or circum - "stance" between them to justify its being excluded, Dale's fault was one of omission rather than commission, and it may often be impossible to say that, if a man had done what he omitted to do, the accident would certainly have been prevented. It is enough, in my judgment, if there is a sufficiently high degree of probability that the accident would have been prevented. I have already stated my view of the probabilities in this case, and I think that it must lead to the conclusion that Dale's fault ought to be regarded as having contributed to the accident."

50. The court continued as doth: -

> " In other words, causation is a matter of fact to be determined by common sense principles. Lord Wright said as follows in Yorkshire Dale S.S. Co. Ltd v Minister of War Transport [1942] A.C. 691, H.L. at p. 706:-
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> ".....the choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as a man in the street, and not as either the scientist or the metaphysician, would understand it.

51. From the appellant's evidence the rider was not to blame. It is the respondent who shifted the blame to the rider who was not a party to the suit. A non party cannot be blamed. Once the defence is that it is not the appellant to prove the duty to prove the assertion fell on the respondent. This is in line with sections 107, 108 and 109 of the *Evidence Act*.

52. Further the passengers are not liable for the negligence of the motorcycle rider. Without having joined the rider as a third party the court cannot apportion liability to a non party consequently, I set aside finding on liability and the order dismissing the suit. The defendant was not able to prove any of the grounds of contributory negligence set out in page 25 of the record.

53. Consequently, I do not find the appellant contributory liable as excess passenger, it was not proved to have in any way contributed to the occurrence of the accident. Regarding the helmet, it is irrelevant. The injuries suffered were on the shoulders and wrist area the helmet would not have helped.

54. Regarding quantum, there is no appeal to the same. The court below awarded Ksh 110,000 as general damages and Ksh 200 as special damages. In the case of in the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

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

55. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

56. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

57. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

58. In the circumstance, I have no reason to disturb the awards. The appeal is accordingly allowed to the extent stated;

Determination

59. The court hereby decrees as follows: -

    a. The judgement and decree of the Honourable Joy Mutimba given on 20th May 2021 in Msambweni SPMCC E100 of 2021 is hereby set aside on liability. In lieu thereof the Court enters judgement for the appellant against the respondent as follows;

        i. Liability 100% against the respondent

        ii. General damages 110,000

        iii. Special damages 2,000

        iv. Subtotal 112,000

v. Special damages to attract interest at Court rates from the date of filing and general damage interest at court rates from 20th May 2021, the date of judgement in the lower court.

vi. The appellant to have costs of 55,000 payable in 30 days in default execution do issue.

vii. This judgement be served upon Hon Joy Mutimba.

viii. The appellant to get costs of the lower court.

ix. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Miss Achieng for Banene for the Respondent

Masinde for the Appellant

Court Assistant - Brian