REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 81 OF 2015

MERCY MUENI MUTUKU.....APPELLANT

-VERSUS-

SUSAN OYONDI OMBOGO.....RESPONDENT

(Being an appeal against the judgement delivered by Hon E.K. Too, SRM on 22nd April, 2015 in Mavoko PMCC 548 of 2013)

BETWEEN

SUSAN OYONDI OMBOGO.....PLAINTIFF

-VERSUS-

MERCY MUENI MUTUKU.....-DEFENDANTS

JUDGEMENT

1. By a plaint dated 18th June, 2013, the Respondent herein sued the Appellant claiming special damages, general damages, costs and interests.

2. The cause of action, according to the plaint, arose on or about 11th November, 2012 when the Plaintiff, was lawfully walking off the road along Athi River-KMC Road. According to the Respondent, the Appellant Defendant either by herself or her authorised driver, servant and/or agent drove, controlled and/or managed motor cycle reg. no. KMCN 028E that he caused the same to lose control, veer off the road and hit the Respondent, thereby causing the accident as a result of which the Respondent sustained injuries to her spinal cord and suffered loss and damage, particulars of which he pleaded. The respondent also pleaded *res ipsa loquitor* and vicarious liability.

3. In her defence, the Appellant denied ownership of the said motor cycle and that the accident occurred on the said date involving the said motor cycle and the Respondent. She further denied the allegations of negligence pleaded as well as the application of the doctrine of *res ipsa loquitor* and vicarious liability.

4. In the alternative, it was pleaded on behalf of the Appellant, that if the said accident occurred, then it was caused by or substantially contributed to by the Respondent's negligence, particulars whereof were pleaded. Further and in the alternative, it was pleaded that the accident was inevitable and occurred despite the exercise of reasonable skill and care on the part of the Appellant.

5. It was further denied that the Respondent sustained the alleged injuries and that she suffered damages and it was sought that the Plaintiff's claim be dismissed with costs.

6. In her evidence, the Respondent testified that on 11th November, 2012, she was walking by the side of the road from a church fundraising at KMC when she was hit from behind by a motor cycle and she fell into a maize plantation and lost consciousness and when she regained her consciousness she found herself at Kitengela Medical Centre where she was treated. She exhibited the appointment card and testified that she was admitted for one month at the said facility. Upon her discharge, she was given a discharge summary which she exhibited. She was informed at the hospital that she had sustained injuries to her spinal cord and the thorax. When she reported the accident to Athi River Police Station, she was given P3 form which was filled in and which she exhibited. She was also given a police abstract whose copy she identified.

7. He was also examined by a doctor who prepared a report for her which she identified. In her evidence, she carried out a search of the motor cycle that hit her being Reg. No. KMCN 028E and produce the search certificate as exhibited in court. She also produced the demand letter from her advocate to the owner of the motor cycle and sought the reliefs in the plaint.

8. In cross-examination, the Respondent stated that the accident occurred at 7pm when darkness was setting in, though it was not very dark. She reiterated that the motor cycle came from behind and she was off the road where the motor cycle followed her. She blamed the Appellant since she was not walking in the middle of the road and denied that she crossed the road. She however admitted that one could not over speed on that stretch of the road. She however stated that she neither saw the owner of the motor cycle nor was she aware that she was charged. However, she was informed by the Defendant who visited her in hospital that the motor cycle belonged to her. In her evidence, she had not fully recovered and was still having pain.

9. PW2, **Florence Wanjiku Ambasi**, stated that the Respondent was her friend and she recalled that on 11th November, 2012, they were from church at 730pm heading home on a footpath when a motor cycle appeared from behind and hit the Respondent. After the accident, the motor cycle was detained by a good Samaritan while she called another well-wisher to take the Respondent to the Hospital. It was her testimony that the Respondent's husband took the said motor cycle to the Police Station while she proceeded to the Hospital and did not go to the Police Station. She, however, did not take note of the motor cycle's number plate

10. In cross-examination, she stated that she did not see the cyclist and just heard it approach and turned to see it. The Respondent who was with her fell down. It was her testimony that the motor cycle swerved towards the Respondent though they tried to go off the foot path. She explained that she could not go to the Police Station because she had a small child and was yet to be called there.

11. In re-examination, she stated that she never saw the cyclist swerve or brake.

12. PW3, **PC Kareu Male**, attached to Athi River Traffic Base, testified on behalf of the Base Commander for the purposes of producing an abstract issued on 11th December, 2012 to **Susan Ombogo**, who was sinvolv3d in an accident that was reported on 12th November, 2012 under OB 7/12. According to the report the accident occurred on 11th November, 2012 at 7.30pm along an unnamed small footpath near Mavoko Secondary School where the Respondent was knocked down by motor cycle reg. no. KMCN 028E Skygo. As a result, the Respondent was injured on the back and was rushed to Kitengela Unit where she was treated and later discharged. In his evidence the matter was pending under investigations. He produced the police abstract as well as the OB which indicated that the matter was reported as hit and run. The accident, according to the OB was reported by the Respondent's husband known as **Mohamed**. According to him, the motor cycle was insured by **Mercy Mueni** under policy number PS/708/003/7860/2009. According to the witness he was neither the investigating officer nor did he go to the scene of the accident and could not confirm the cause of the accident.

13. PW5, **Dr Ephraim Loiposha**, testified that he prepared a medical report for the Respondent based on the discharge summary and other documents and produced his said report as exhibit. In his view, the Respondent had no further complication.

14. At the close of the Respondent's case, the Appellant did not call any evidence.

15. In his judgement, the Learned Trial Magistrate found, from the evidence on record, that the Respondent was hit by a motor cycle and injured on a foot path where the Respondent had the right of way. He accordingly, found the Appellant who was the owner of the said motor cycle vicariously liable for the injuries caused to the Respondent. Based on the authorities placed before him, he assessed the general damages in the sum of Kshs 500,000.00 and awarded the costs and interests to the Respondent.

16. This appeal is against both liability and quantum of damages and the court was urged to re-evaluate the evidence on record and arrive at its own decision.

17. According to the Appellant, from the evidence of the Respondent that she swerved off the road, it is evident that the Respondent was wobbling and/or wavering on the main road thus caused confusion to the rider of the motor cycle who even tried to move away from the Respondent but she kept wobbling. Further, as a pedestrian, the Respondent should have been walking on the opposite lane from traffic so that she could clearly see oncoming motorists on their side whereas motorists from behind are further away from her. This is the standard duty of care expected from pedestrians and the Respondent did not demonstrate applying it and reliance was placed on the case of **Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR** where **Aburili, J** quoted the Court of Appeal decision of **Patrick Mutie Kamau & Another – vs – Judy Wambui Ndurumo**, for the proposition that pedestrians too owe a duty of care to other roader users to move with due care and follow the highway code.

18. It was noted that from the police records, the matter was pending under investigations and did not blame the Appellant and in this regard, reliance was placed on the decision of **Aburili, J** in the case of **Alfred Kioko Muteti vs. Timothy Miheso & another [2015] eKLR** in which the Court of Appeal decision in **Douglas Odhiambo Appeal & Another vs. Telkom Kenya Ltd CA 115/2006.**

19. While appreciating that the Appellant did not call any witness in rebuttal, it was submitted that that should not have stopped the trial court from interrogating the Respondent's testimony and evidence thoroughly in finding whether she had proved her case on a balance of probabilities as was held in the case of **Mary Gathoni Weru vs. Mt. Kenya Bottlers Limited [2021] eKLR** and it was submitted that the Appellant has demonstrated that the Respondent did not prove her case against the Appellant; and that it was indeed the Respondent who was to blame for the occurrence of the accident and this Court was invited to find the Respondent 100% and dismiss the case against the Appellant.

20. According to the Appellant, the Respondent failed to prove the circumstances of the accident in support of the particulars of negligence pleaded against the Appellant in light of the testimony and evidence that was adduced before the trial court and she relied on the case of **Mary Gathoni Weru v Mt. Kenya Bottlers Limited [2021] eKLR.**

21. As regards the quantum, it was submitted that the trial court's award of Kshs. 500,000/- for general damages was inordinately high and excessive. In her view, the trial court gave this award with reliance on authorities in which the injuries were not comparable to the injuries sustained by the Respondent in the present suit. It was noted that the Respondent in her plaint pleaded the injuries of mild head injury and spinal injury and called **Dr. Loiposha**, PW4, who testified and produced the medical report which indicated that the Plaintiff was satisfactorily treated and was expected to recover. Further, upon cross examination, the Doctor testified that the Respondent had no further complications from the injuries sustained.

22. According to the Appellant, the trial court should have considered the totality of the treatment notes and medical report rather than just relying on the medical report which was vague on the degree of injury and classification. If the trial court would have considered the treatment notes it would have discovered that the injuries were much minor than were made to be in the plaint and the medical report; the trial court would have discovered that the injuries were not skeletal but rather soft tissue. Further, focussing on treatment medication and prescription indicated in the treatment notes and medical report which comprised of analgesics, paracentesis and antibiotics, it is clear that the injuries sustained were soft tissues as was held in **John Karanja Njuguna vs. Eastern Produce (K) Limited (Savani Tea Estate) [2014] eKLR.** Based on **Mohamed Juma vs. Kenya Glass Works Ltd, CA No. 1 of 1986** it was submitted that the trial court in its award of general damages applied the wrong principles of law and did not apply the principles which guide courts on award of damages as observed in **Johnson Evan Gicheru vs. Andrew Morton & Another, CA NO. 314 of 2000.**

23. According to the Appellant, had the Respondent proved her case against the Appellant, the proper award of general damages should have been no more than Kshs. 100,000/- which they proposed that this Court should adopt and in support of this proposal she relied on the case of **John Karanja Njuguna Case** (Supra).

24. This Court was therefore urged to allow the appeal herein by setting aside the judgment of the trial court; dismissing the Respondent's suit against the Appellant; and reassessing general damages to Kshs. 100,000/- that would have been awarded had the Respondent proved his case against the Appellant.

25. On her behalf of the Respondent, it was submitted that from the evidence adduced by the Police officer and the eye witness, it is evident that the plaintiff was knocked down by the suit motor cycle while she was way off the road. After the occurrence of the accident, the rider of the suit motorcycle did not even bother to assist the plaintiff who had lost consciousness leaving her at the mercy of good Samaritans who took her to the hospital.

26. It was urged that in making a determination on apportionment of liability, this Court should be guided by a consideration of proximate cause or primary cause as defined by the ***Black's Law Dictionary*** 7th Edition and it was contended that the proximate cause of the accident in question was the negligence of the rider of the suit motorcycle who knocked down the plaintiff who was a pedestrian walking off the road and to conclude that had the rider not acted negligently, the accident would not have occurred and the trial court was in order in considering the actions of the rider while making a determination on liability.

27. It was submitted that accident and the resultant severe injuries sustained by the respondent was the direct result of the failure by the Appellants' rider to maintain the firm and expected control of the motor cycle and hence this Court was urged to uphold the trial court determination on liability at 100% against the appellant since the motorist/rider had a higher duty of care than the pedestrian. This submission was based on **Abdalla Rubeya Hemed vs. Kajumwa Mvurya & Another [2017] eKLR** and **Mary Njeri Murigi vs. Peter Macharia & another [2016] eKLR**.

28. On quantum, it was submitted that it is evident from the plaintiffs' pleadings as well as the plaintiffs' submissions made before the lower court that the plaintiff sustained severe injuries as a result of the accident being mild head injury and spinal injury. In this case, it was submitted that the appellant has terribly failed to demonstrate how the court was in error in awarding damages of Kshs 500,000.00 under this head and this court was urged to dismiss the ground of appeal under this head and find that the plaintiff sustained severe body injuries after the occurrence of the accident and thus find the award of Kshs 500,000 sufficient in the circumstances and uphold the trial courts' determination under this head.

29. It was submitted that the appellant has terribly failed in proving the ground of appeal under this head and that this court should dismiss the same based on the decisions in **Anne Njeru vs. Headmistress Machakos Girls & 2 Others (2003) eKLR** where the **Nambuye, J** awarded **Kshs. 700,000/=** for pain, suffering and loss of amenities where the plaintiff sustained a spinal injury and **Mohammed Aden Abdi vs Abdi N. Omar (2005) eKLR** where the plaintiff had sustained spinal injuries and general damages were assessed at Kshs 550,000/=. In the Respondent's view, considering the fact that the above cited authorities are 18 and 16 years old respectively the award of Kshs 500,000/= by the trial court can thus not be said to be inordinately high as alleged by the appellant but was fair considering the injuries sustained by the plaintiff**.**

Determination

30. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle –vs- Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 allowance in this respect, in particular the 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 demeanour of a witness is inconsistent with the evidence in the case generally."**

31. 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."**

32. 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.

33. However, in **Peters –vs- Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given… Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question….it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

34. It was therefore held by the Court of Appeal in **Ephantus Mwangi & Another –vs- Duncan Mwangi, Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

35. In this appeal, it is clear that the determination of the appeal revolves around the question whether the Respondent proved her case on the balance of probabilities and what ought to have been the quantum of damages. That the burden of proof was on the appellant to prove his case is in doubt. Section 107 (1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.***

36. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.***
>
> ***112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.***

37. The two provisions were dealt with in **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

38. It follows that the general rule is that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the respondents, the appellant in this appeal depending on the circumstances of the case.

39. In **Evans Nyakwana –vs- 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 fi no evidence at all were given as either side."

40. I agree that the Court of Appeal's position in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** espouses the correct legal position that:

"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

41. The question then is what amounts to proof on a balance of probabilities**. Kimaru, J** in **William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

"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 that 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."

42. Similarly, **Lord Nicholls** of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

43. In **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

"Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

"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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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."

44. However, where there is credible evidence from the Plaintiff, the failure to adduce any evidence by the defence may well mean that the plaintiff has attained the standard prescribed in civil proceedings. It was therefore held in **Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga through Stanely Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997** that:

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."

45. In this case, the only evidence on record was from the Respondent. According to him, he was hit by the Appellant's vehicle off the road. It was his evidence that the said vehicle swerved off the road and hit him when he was waiting to cross the road. That evidence was not

rebutted.

46. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:-

> **"In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."**

47. What are the consequences of a party failing to adduce evidence? In the case of **Motex Knitwear limited vs. Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002, Lessit, J** citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998** appreciated that:

> **"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."**

48. Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that itis trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

49. In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & another Nyeri HCCC No. 95 of 1988, Makhandia, J** (as he then was) held that:

> **"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."**

50. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni J**. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

> **"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."**

51. Similarly, in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165 B of 2000, Mbaluto, J** held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted.

52. If one is still in doubt as to the legal position reference could be made to the case **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff.

53. In **Vyas Industries vs. Diocese of Meru [1976 – 1985] EA 596; [1982] KLR 114,** it was held that an appellate court will not interfere with apportionment of liability unless the Judge has come to a manifestly wrong decision or based his apportionment on wrong principles.

54. In this case there was evidence by the Respondent and her eye witness that the accident occurred on a foot path and the Respondent was hit from behind. There was no other evidence to challenge this evidence. Accordingly, what was pleaded in the defence without more could not form a basis upon which liability could be found. The learned trial magistrate cannot therefore be faulted for finding, based on the only evidence before him, that the Respondent had proved that the accident was caused by the motor cyclist for whose negligent the Appellant herein is vicariously liable and I find no justification for interfering therewith.

55. As regards quantum, in **Woodruff vs. Dupont [1964] EA 404** it was held by the East African court of appeal that:

> **"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."**

56. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

57. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

58. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

59. In this case from the medical report prepared by PW4, **Dr. Loiposha**, the Respondent sustained mild head injurie and spinal injury. In his opinion, the Respondent was satisfactorily treated and was expected to recover through physiotherapy.

60. While agree that from that evidence the Respondent sustained soft tissue injuries, the said injuries particularly the spinal injury cannot be said to have been minor soft tissue injuries in light of the fact that for the Respondent to fully recover, she needed to undergo physiotherapy.

61. I have considered the authorities and while I find the authorities relied on by the appellant not exactly similar in terms of the injuries sustained, I on the other hand find that the award was high considering the fact that the Respondent's authorities were in respect of more serious injuries. In the premises, I set aside the award made and substitute therewith an award of Kshs 350,000.00. The same will accrue interest at Court rates from the date of the judgement before the trial court till payment in full. While the costs of the trial court are awarded to the Respondent, each party will bear own costs of this appeal.

62. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Murithi for Mr Kinyanjui for the Appellant

Ms Thiongo for Ms Kamau for the Respondent

CA Susan