REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 4 OF 2019

KENNEDY MUTETI MUSYOKA.....APPELLANT

VERSUS

ABEDINEGO MBOLE.....RESPONDENT

(Being an appeal from the whole of the judgment delivered by the Honourable E.W.Wambugu Senior Resident Magistrate Kithimani on 22nd November 2018 in PMCC No. 263 of 2016)

BETWEEN

KENNEDY MUTETI MUSYOKA.....PLAINTIFF

VERSUS

ABEDINEGO MBOLE.....DEFENDANT

JUDGEMENT

1. This appeal arose from the judgement of the Learned arises from the decision of the Senior Principal Magistrates Court at Kithimani **(Wambugu, SRM**) issued on the 22nd November, 2018 in SPMCC number 263 of 2016.

2. In the said case, it was contended by the Appellants that on or about on the 31st May 2016 at around 8:00am, he was lawfully travelling as a pillion passenger on motor cycle Registration Number KMCS 915Q along Katulye-Nguka Imwe Murram road when the driver of motor vehicle registration number KBQ 429M, which was owned by and was in actual possession and control of the Respondent, drove the said motor vehicle so negligently and carelessly that he permitted the same to lose control, veer off its lane and hit Motor Cycle Registration Number KMCS 915Q and thus causing the Plaintiff to sustain serious bodily injuries. The particulars of both negligence and injuries were set out and it was pleaded that the Plaintiff suffered damages as a result thereof.

3. In his defence, the Respondent denied the alleged accident and the particulars of negligence contained in the Plaint and further stated that if the accident occurred the same was occasioned by the negligence of the rider of motor cycle registration Number KMCS 915Q and sought for the dismissal of the suit with costs**.**

4. In support of the case, the Appellant who testified as PW2 relied on his witness statement in which he stated that on 31st May, 2016 he boarded the said motor cycle heading towards his home in Katulye from Nguka Secondary School. Shortly thereafter, motor vehicle reg. no. KBQ 429M lost control, veered off the road, left its lane onto that of the said motor cycle hitting the said motor cycle causing the Appellant serious bodily injuries on the forehead, chest, left and right ankle and 2nd toe. After the accident, the Appellant was rescued by good Samaritans including his School Principal who took him to Masinga Hospital from where he was referred to Matuu Level 4 Hospital.

5. The Plaintiff later recorded his statement at Matuu Police Station where he was issued with a P3 form and a police abstract. He therefore blamed the driver of the said vehicle for causing the accident by careless and dangerous driving.

6. In his evidence in court the Appellant added that as result of the injuries sustained he was taken to Masinga Dispensary where he received first aid before being taken to Matuu Hospital. It was his evidence that he sustained injuries on his ankle joints on both legs, chest, loss of one toe, cut on the back of his head and exhibited his treatment notes, P3 Form and demand letter. He testified that from the police abstract, the vehicle registration no. KBQ 429M was owned by **Abednego Mbole**, the defendant and he exhibited copy of the records.

7. The Appellant blamed the defendant for the accident on the ground that he drove the vehicle at a high speed while not on the lookout for other road users and caused the accident at a corner. He stated that the motor cycle was on the left side of the road facing Katulye direction and that the motor cycle was not on the motor vehicle's lane when the accident occurred. He further blamed the Defendant for failing to take measures to avoid the accident. He therefore sought general damages and the costs of the suit.

8. In cross-examination, he stated that the motor vehicle was coming from the opposite direction and that it was a head on collision. He admitted that he could not see the vehicle before it reached the sharp corner and that it was after that corner that the vehicle suddenly appeared. After the accident he lost consciousness and fell down while the rider was thrown into the bush on the motor vehicle's lane. He insisted that they were on the left lane when they were hit and that he was in school uniform though he had no helmet or reflective jacket. In his evidence the rider tried to avoid the accident but could not do so due to the vehicle's speed.

9. PW3, **Dr Simeon Muli Kioko**, a general medical practitioner, testified that on 15th July, 2016 he saw the Appellant who was involved in a road accident. According to him, he relied on the clinical notes and p3 form. It was his evidence that the Appellant sustained injuries over his head, chest and lower limbs. On the head, he had a tender haematoma formation over the forehead while on the chest he had diffused tenderness of moderate degree with severe tender bruise wounds on both knees. It was his evidence that the Plaintiff was seen as a case of severe soft tissue injuries. At the time of the Appellant's examination on 15th July, 2016, the Appellant complained of headaches and chest pains. The witness prepared and signed the medical report which he exhibited.

10. PW1, CPL Stephen Kuria, testifiedbthat according to ob No. 5 dated 31st May, 2016, terewas serious road accident involving motor vehicle reg. no. KBQ 492M, Toyota Succeeed driven by Abednego Mbole Mulei and motor cycle reg, no. KMCS 915Q, Skygo ridden by Edward Mania Kivindu. On that day at 8.00 am the driver was from Katule Shopping Centre heading towards Nguka Imwe Boys High School where he was teaching and upon reaching the scene of the accident, he negotiated a bend and knocked down the said motor cycle. The rider of the said motor cycle had a pillion passenger named **Kennedy Musyoka**, a secondary school student. According to the police abstract which was issued on 9th June, 2016at column 4, it was indicated that **Abednego Mbole** was to blame for careless driving. However, in another abstract issue to the Defendant on 2nd June, 2016, it was indicated that it was indicated that **Abednego Mbole** was as yet to be charged though at column 7 it was indicated that the rider was to blame. The witness however stated that two parties cannot be blamed and that column 7 should only show the result of the case while the person to be blamed is indicated at column 3 and 4. While in the OB the rider's name is indicated as **Edward Mwania Kavindu**, his name does not appear at column 3 and 4 of the two police abstracts. He then proceeded to exhibited the police abstract dated 9th June,2016.

11. In re-examination, he stated that no one was charged and that the OB itself did not indicate who was to blame. According to the abstract dated 9th June, 2016 at column 7, the case was still pending under investigations and that the two abstracts were filled in by the investigating officer. It was his evidence that the information in the OB is entered after scene visit and that thereafter a comprehensive report is prepared after statements are recorded by the witnesses. He however, did not have the said statements and he did not visit the scene as he was not the Investigating Officer.

12. According to the OB, the rider left his lane and went to the lane of the motor vehicle at the bend. While it is the one who went to the other lane that is to be blamed, he was quick to state that based on the OB he could not tell who was to blame since the OB does not state who was to blame after the investigations. He confirmed that one abstract was filled in 2 days after the accident while the other one was 9 days thereafter. However, both abstracts at column 3 and 4 showed that **Abednego** was to blame for the accident.

13. In re-examination, he stated that the abstract dated 9th June, 2016 which indicated that **Abednego** was to blame and that charges in the nature of careless driving were to be preferred was filled in after investigations were done.

14. DW1, **Abednego Mulei Mbole**, in his witness statement, while confirming that he owned motor vehicle registration no. KBQ 429M, stated that on 31st May, 2016, he driving his said vehicle along Katulye-Ngukemwe murram road at 8.00am and upon reaching a place where the road is curved, he saw a motor cycle rider carrying a pillion passenger, from the opposite direction riding on his side. Though he slowed down, the rider still came fast and collided with his vehicle when his vehicle was almost at a standstill. As a result, his radiator, bonnet searing, airbags, windscreen, bumpers, front lighting and mouldings were damaged.

15. According to the Respondent, when the police arrived, they blamed the rider of the motor cycle who was seriously injured. It was his evidence that the said rider was to blame for riding very fast as the accident occurred on his lane. He disclosed that he was neither arrested nor charged with any traffic offence. He stated that the weather was clear and he could see ahead.

16. In cross-examination, he stated that the accident occurred at a corner and that the road was not marked. He however could not recall the speed at which he was driving when the accident occurred but he was the motor cycle when it was 50 metres away when he had negotiated part of the corner since the road is clear and the bend is not sharp. Though he blamed the rider of the motor cycle whom he knew as **Edward Mwania**, he did not sue him but filled claim forms with his insurance for the damage.

17. Referred to the exhibited abstract, he confirmed that it was indicated that he was to be charged for careless driving. In his evidence, he was on the far left side when the accident occurred and that he slowed down and went to the far left of his lane when he saw the rider on his lane.

18. In her judgement, the learned trial magistrate found that the Appellant's testimony was not corroborated by the evidence of PW1 who

testified that from the OB, the rider left his lane and went to the motor vehicle's side hence the contents of the occurrence book supported the Respondent's case. The Court found that the Respondent's testimony was given credence by the lack of action by the police. She therefore found that the Respondent was not to blame for the accident and dismissed the suit. As is the practice, the learned trial magistrate proceeded to assess the award she would have made had she found for the Appellant at Kshs 100,000/- general damages and Kshs 5,650/- special damages.

19. In this appeal it is submitted on behalf of the Appellant that the learned trial magistrate failed to analyse the evidence on record properly as regards the contents of the police abstract which showed that the Respondent was to blame.

20. It was submitted that the Appellant's evidence regarding the occurrence of the accident, was not controverted by any oral or material evidence by the Respondent herein as the Respondent herein closed his case without calling any witness to support the allegations that it was the rider of Motor Cycle Registration Number **KMCS 915Q** who was to blame for the accident. It was submitted that the Appellant *discharged the burden of proof as required under* section 107(1) of the ***Evidence Act*** and the Court was urged to set aside the judgment of the lower court and find that the Respondent 100% liable for the accident.

21. According to the Appellant, the assessment of the award that the Court would have awarded was inordinately low and not commensurate with the injuries sustained by the Appellant and in the Appellant's view, an award of Kshs. 500,000/= would be reasonable on general damage for pain and suffering.

22. On behalf of the Respondent, it was submitted that the trial magistrate did not error on both fact or law in dismissing the respondent's case as the trial court was correctly guided by the evidence on record in arriving at the decision to dismiss the respondents' suit. Though the Abstract issued to the Appellant indicated that the Respondent was to blame, it was noted that there were two police abstracts issued in regard to this matter. Each party was issued with an abstract from the police station apportioning liability to the respective driver/rider. However, according to the OB, the Appellant left his lane to the Respondent's lane. Under the circumstances, it would not have been possible for the magistrate to be guided by an abstract which contradicts the OB since the details of the abstract are gotten from the OB. It was therefore submitted that the trial magistrate was properly guided by the evidence. This Court was therefore urged to dismiss the present appeal.

23. On quantum, it was submitted that the Appellant has not shown that the trial court proceeded on a wrong principle or took to consideration matters she ought not have.

Determination

24. 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 from a trial by the High Court is by way of a retrial and the principles upon which 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."**

25. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented 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.

26. 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 a 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 courts 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, an 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 from 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 judgement 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 shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

27. It was therefore held by the Court of Appeal in **Ephantus Mwangi and 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."**

28. In this appeal, it is clear that its determination revolves around the question whether the appellant proved his case on the balance of probabilities. That the burden of proof was on the appellant to prove his case is not in doubt. 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 if no evidence at all were given as either side."**

29. 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 KLR 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 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."**

30. 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;-**
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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."**

31. Therefore, as a general rule, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the Respondent chose to remain silent. In this case, the evidence was that the Appellant was a pillion passenger on motor cycle registration Number KMCS 915Q when motor vehicle reg. no. KBQ 429M which was being driven by the Respondent left its lane, veered onto the lane of the said motor cycle and collided with it. The Respondent's case, on the other hand was that it was in fact the motor cycle that left its lane and went to the Respondent's lane and collided with the said vehicle.

32. The decision of the learned trial magistrate on liability was based on two factors. The first one was due to the fact that the OB report indicated that the accident was caused by the rider who left his lane and went to the vehicle's lane. There were two police abstract reports produced by the parties in this case. The police abstract dated 6th June, 2016 as exhibit 1 showed that it was intended to charge the Respondent with careless driving. On the other hand, the abstract dated 2nd June, 2016 indicated that it was intended to charge the same Respondent but where the result of the investigations or prosecution ought to be indicated, it was stated that the rider of the said motor cycle was to blame.

33. It is clear that in light of the patent internal inconsistencies in the contents of the abstract issued on 2nd June, 2016, that documents could not be relied upon by the Court and the Court seemed not to have attached any weight to it. As regards the OB, according to PW1, the OB is filled in by the police officers at the scene and that the decision on whom to charge is arrived at after taking down the witness statements. According to him the fact that Exhibit PEX1 was filled in 9 days after the accident indicated that it was filled in after the statements had been taken. Therefore, the learned magistrate court could not have been wholly right when she found that the Respondent's case was supported by PW1 and to that extent, I would agree that she did not sufficiently evaluate the evidence on record in order to arrive at that decision. The fact that the OB itself was not even produced made whole reliance on it doubtful since the author of the said documents was not even called to testify on it.

34. On the other hand, since the Respondent blamed the rider of the motor cycle for the accident, he ought to have applied for the said rider to be joined as a party to the suit since, from his own evidence, the rider was well known to him.

35. The second basis for finding for the Respondent was that the Respondent was not charge with a traffic offence. It would seem that the

learned trial magistrate linked the issue of liability to culpability in the traffic proceedings. As regards the relevancy of the police investigations to civil proceedings, it must always be remembered that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other or no one at all cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

36. Therefore, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the fact that the civil case comes up for hearing while the traffic matter is still pending investigations is not necessarily fatal to the former. In **Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR** it was held:

> **"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."**

37. Even where the traffic proceedings are complete and decision made thereon, save for the fact that a person may be found liable therein, it does not necessarily follow that the person found culpable is the person solely liable for the occurrence of the accident. Nor does an acquittal automatically exonerate the person charged in those proceedings. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

> **"It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim…"**

38. In this case as noted above the OB was never produced in evidence. Similarly, the police abstract dated 2nd June, 2016 was not produced. Though referred to they never formed part of the evidence upon which reliance could be placed. That was the position in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** where the court held;-

> **"16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"**
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> **17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.**
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> **18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case" Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.**
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> **19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.**
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> **20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.**
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> **21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.**

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification……."

39. The above decision shows that the court can only rely or consider what has been produced in evidence and therefore even if a document that has been marked for identification but not produced is not part of the record, then a document that is merely filed but is neither referred to nor produced in evidence cannot be considered by the court.

40. Apart from that even if the OB had been admitted, in the absence of the author of its contents being called as a witness, its admission does not necessarily mean that all its contents are to be considered as factual. In **Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998**, it was held by the Court of Appeal that:

"Admitting in evidence the record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings as it is always open to the advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of the facts deposed to therein, although the witness is not called as a witness in the civil suit, provided the agreement is clear and unambiguous…It is not for the Judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness…Equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination."

41. Platt, JA in **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74** opined that:

"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case…It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages."

42. According to **Apaloo, JA** (as he then was) in the same case:

"It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."

43. Accordingly, in **Ochieng vs. Ayieko [1985] KLR 494**, **O'kubasu, J** (as he then was) held that:

"Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored."

44. **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** was of the opinion that:

> **"Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it… Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent…The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him."**

45. In this case the only documents properly produced was Pex1 and that was the document that ought to have been considered together with the evidence adduced by the other witnesses. Taken holistically, I find that it is clear that there was an accident on the said day in which the Appellant was injured. In **Zarina Akbarali Shariff and Another vs. Noshir Pirosesha Sethna and Others [1963] EA 239**, it was held that:

> **"A driver on the main road...is bound to exercise the right of being on the main road in a reasonable way. He has to watch and conform to the movement of other traffic which is in the offing, and he must take due care to avoid collision with it. The answer as to whether the court is entitled to think that the driver, despite his *prima facie* right of way, should surrender that right in anticipation of possible failure on the part of the driver on the side road to note the safe course, must turn on the conduct of the driver on the side road and on the opportunities which the driver on the main road has of observing it. There must be something in the conduct of the driver on the side road which the driver on the main road ought to have seen and which would have certiorated him, had he been taking proper care, that the driver on the side road was not going to pass behind but was going to try to pass in front of the driver on the main road. There is no doubt that anyone driving on the main road is entitled to keep his proper place on the road, and to do so in reliance on the side traffic heaving itself as the rules of the road desires, until it may be the very last moment observation of a gross infringement by others calls for a special attempt to deal with it…If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions…A driver is never entitled to assume that people will not do what experience and common sense teach him that they are, in fact, likely to do…It is not correct that drivers are entitled to drive on the assumption that other road users whether drivers or pedestrians, would behave with reasonable care. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all forms, but he is not entitled to put out of consideration the teachings of experience as to the form those follies commonly take…He cannot be expected to cope with every form of recklessness or outrageous conduct on the part of other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper look-out, would leave him able to take reasonable avoiding action if the need became apparent. What is reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper lookout, that could be negligence contributing to an accident…This does not mean that the driver on the major road can disregard the existence of the cross-roads: it is his duty to keep a proper look-out of all the vehicles or pedestrians who are using or may come upon the road from any direction and if he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be."**

46. Similarly, in **Masembe vs. 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 than will permit his course at any time to avoid anything he sees after he has seen it…There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct…Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently."**

47. According to **Aganyanya, J** (as he then was) in **Merali & 2 Others vs. Pattani [1986] KLR 735:**

> **"That one is driving on major road does not mean that she is entitled to ignore traffic approaching the junction from the minor road and assume, which the plaintiff here did, that such traffic would always conform to the "yield" sign…The plaintiff was thus negligent in failing to slow down. The possibility of danger emerging at that junction on either side of the minor road was reasonably apparent in view of the fact that visibility was obstructed by high hedges and it was incumbent upon the plaintiff to take extra precautions. This was not a case where the plaintiff should have taken that it was a mere possibility that danger would emerge, which would never occur to the mind of a reasonable man…Anyone driving on a major road is entitled to go on that road in a proper position and is entitled to keep his proper place on that road and to do**

so in reliance on side road traffic behaving himself as the rules of the road desires until it may be at the very last moment some observations of a gross – infringement by other calls for special attempt to deal with it. The driver on a major road as the plaintiff was is not expected, say, to slow down to a pace of 15 miles an hour in broad daylight, when approaching a side road or otherwise share the blame for any collision, which may occur. But here the plaintiff omitted to take due care for the safety of the defendant and as a prudent driver, she ought to have guarded against possible negligence of drivers on the minor road, defendant included, as experience shows negligence to be common…Though therefore the defendant was mainly to blame for the accident and ought to compensate the plaintiff therefor; the plaintiff contributed in some measure to it and her contributory negligence put at 30%."

48. According to the decision in **Mwanza vs. Matheka [1982] KLR 258:**

"Speed Itself is not necessarily negligence. But it is probable that the driver of the bus took no action at all, according to the evidence, to avoid this violent meeting. He did not ease further to his near side or slow down. He was not, of course, required to steer his bus with its passengers over to his near side straight into the culvert. He must have seen the tanker approaching long enough to rule out any decision having to be made in the agony of the moment…On the evidence, the plaintiffs have proved the defendants were negligent, but it is not possible to apportion the blame and so the defendants are equally to blame."

49. What comes out from the said decisions is that there is no hard and fast rule when it comes to apportionment of liability where one driver is *prima facie* on the right. In other words, a driver on the road must always keep at the back of his mind that some road users are likely to be negligent give allowance for that and ought not to adopt an attitude that as long as he is driving properly on the road, he ought not to take action which a reasonable driver is expected to take when there appears to a possibility of danger posed by other road-users. If he fails to do so, he could be liable in negligence if not wholly to a certain extent.

50. Where a collision occurs and the claimant was a passenger in one of the vehicles and the Court is unable to determine extent of liability, one must be guided by the opinion of the Court of Appeal in **Farah vs. Lento Agencies [2006] 1 KLR 123** where it expressed itself as follows:

"In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. Everyday, proof of collision is held to be sufficient to call the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court would unhesitantly hold that both are to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them… The trial court...had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

51. In this case the Respondent stated that he saw the rider 50 metres away and that he reduced the speed. He did not say why he did not go of the road altogether. In those circumstances, the Respondent cannot wholly escape liability. However, as the Appellant neither joined the rider as a party to this suit nor called him as a witness, from the evidence on record, the Respondent cannot be found wholly liable. Doing the best I can in the circumstances, it is my view and I find that the Respondent ought to have been found 50% liable. Accordingly, I allow the appeal as regards liability, set aside the finding that the Respondent not liable and substitute therefor 50% liability.

52. As regards the quantum, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** expressed itself 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."

53. The same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** similarly held 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…"

54. In **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal also 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."

55. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

> **"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."**

56. I have considered the material placed before me and I have no reason to interfere with the learned trial magistrate's opinion on what would have been the appropriate award which she assessed in the sum of Kshs 100,000/- on general damages. I similarly have no reason to interfere with her opinion on special damages. That decision stands subject to my finding on liability.

57. As the Appellant has only partly succeeded, the Appellant will have half the costs of this appeal and it is so ordered.

Judgement read, signed and delivered in open court at Machakos this 15th day of November, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Miss Musau for the Appellant

CA Susan