REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 60 OF 2015

MUTETI PETER.....APPELLANT

VERSUS

VERONICA MUTUA MASIKA.....RESPONDENT

(Being an appeal against the judgement delivered by Hon Japheth Bii, RM on 9th April, 2015 in Kangundo SPMCC 21 of 2013)

BETWEEN

VERONICA MUTUA MASIKA.....PLAINTIFF

VERSUS

MUTETI PETER.....1ST DEFENDANT

EQUITY BANK LIMITED.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 13th March, 2013, the Respondent, as the Plaintiff herein sued the Appellant herein as the 1st Defendant and Equity Bank Limited, as the 2nd Defendant, claiming special damages, general damages, costs and interests.

2. The cause of action, according to the plaint, arose on or about 17th February, 2012 at around 4pm along Kangundo-Tala Road near the Junction of Tala Market. According to the Plaintiff, the Defendant's (sic) driver/agent/servant so negligently drove motor vehicle registration no. KBP 971Q, which was registered in the name of the Defendants, causing the same to hit Motor Cycle KMCT 322V on which the Plaintiff was riding. It was pleaded that as a result of the said accident the Plaintiff sustained serious bodily injuries and incurred treatment expenses and suffered loss and damage. Both the of negligence, injuries and special damages were pleaded. As a result, the Plaintiff claimed damages.

3. In the course of the proceedings the suit against the 2nd Defendant was withdrawing leaving only the suit against the Appellant herein.

4. The Appellant's defence was that though he was the registered owner of the said vehicle and that an accident took place on 17th February, 2012 involving the said vehicle and the said motor cycle, the allegations as to how the accident took placed was denied. As a result, he denied the allegations and particulars of negligence as pleaded by the Respondent as well as the particulars of injuries. It was further pleaded in the alternative that the accident was caused by the negligence of both the riders of the said motor cycle and the particulars of negligence were set out. The particulars of damages were similarly denied.

5. According to the Respondent who testified as PW1, on 17th February, 2012 she took a motor cycle from Tala in order to purchase to go and purchase some items for the school where she was teaching. Near the junction, they were hit by a lorry from behind and lost consciousness as a result of which she was taken to Kangundo District Hospital where she was admitted for one night before being transferred to Nairobi Hospital where she stayed for about two weeks and was discharged on 28th February, 2012. She however regained her consciousness after five days. After being discharged, she continued with physiotherapy.

6. According to her, she sustained a deep cut on her right hand as a result of which she lost grip and could no longer lift her right arm and could nolonger write on the board. It was her evidence that she spent Kshs 679, 400/- in treatment and a medical report was prepared for her by **Dr Kinyanjui**. The said accident, she testified was reported to the police who went to the scene and a police abstract was later filled in. Upon the search being conducted it revealed that the said vehicle registration no. KBP 971Q Isuzu Lorry was owned by the Appellant. Since they were hit from behind, she blamed the Appellant for the said accident.

7. In cross-examination, she stated that she was coming from the market and was she was on a motor cycle along Tala – Kangundo Road while coming towards Kangundo. It was her evidence that the said vehicle did not overtake them but simply hit them from behind as it was attempting to overtake them. Referred to her statement, she admitted that she had indicated that she did not know the vehicle that hit them but insisted that she saw the vehicle from behind and became unconscious immediately after the accident. She could not however state whether there was an eye witness.

8. PW2, **Dr Kimani Mwaura**, a medical practitioner, testified that on 6th November, 2014, she prepared a medical report for **Veronicah Mutua**, the Respondent who had a history of having been injured in a road accident on 17th February, 2012. According to him, the Respondent sustained multiple scalp fracture, cerebral contusion, multiple cut wounds and bruises on the scalp, deep cut wounds of left leg, fracture of the right middle finger on the third phalanx, deep cut wound to the middle finger, bruises to the right knee as well as traumatic injury of the knee joint and traumatic injuries to the pelvis region. According to him, the Respondent was still complaining of recurrent headache, dizziness and pain in the right shoulder as a result of which she was unable to work due to absence of right hand grip. According to him, the injuries had healed leaving the Respondent with multiple scars on her body and residual complications.

9. In cross-examination, he stated that he examined the Respondent two years after the accident and relied on the discharge summaries. While the discharge from Kangundo did not indicate injuries to the pelvic region, he testified that the Respondent had several fractures.

10. At the close of the Respondent's case, the Appellant testified that on 17th February, 2012, he was going for stones in Syanthe from Joska along Tala-Kangundo Road by lorry registration no. KBB 971Q. After Tala at the junction there was a motor bike carrying a lady and a big luggage. According to him, the lady was unsteady as she was holding the luggage. There was an oncoming Nissan vehicle and after it passed, he indicated and overtook the motor bike. However, when he checked his left mirror he saw that the bike had fallen down and heard a bang. After parking on the side of the road he went to assist them and found that the motor bike had fallen on the right side with the rider and the passenger on the edge of the road and the luggage scattered while the lady was bleeding and the rider was also injured. They were assisted to the hospital and after the police from Kangundo arrived, he recorded his statement later and as never charged.

11. It was his evidence that the accident was caused by the riders since the motor bike was off the tarmac and there was no contact and he was not to blame for the accident.

12. In cross-examination, he stated that he saw the motor bike zigzagging but did not record that in his statement. According to him, he was driving at about 30kmph. Since there was an oncoming vehicle there was no way he could overtake the motor bike. It was only after the oncoming vehicle passed that he indicated and overtook as he could not squeeze in-between. At the time of the accident he had two occupants in the vehicle who witnessed the accident. It was her testimony that he heard the bang about 300 metres and saw the motor cycle fall after he had passed it. He confirmed that the police recorded that his vehicle as involved in the accident.

13. In his judgement, the learned trial magistrate found that from the P3 it was indicated that the Plaintiff was knocked down by a lorry and that the Plaintiff was a pillion passenger. Therefore, he could not see how the Plaintiff could have contributed to the accident. It was his finding that the lorry, while overtaking the motor cycle knocked it down with its body occasioning the accident and did not believe the Appellant's version that there was no contact between the vehicle and the motor bike. According to the learned magistrate, the driver was not careful while overtaking and was not mindful of other road users and was wholly to blame. He proceeded to award the Respondent Kshs 1,300,000/- as general damages, Kshs 672,402/- as special damages, Kshs 15,000/- as witness expenses, Kshs 3,000/- for medical report and Kshs 500/- for copy of the records totalling Kshs 1,990,902/-.

14. In this appeal, the Appellant has raised the following grounds:

> **1. That the Honorable learned trial Magistrate erred in law and fact in his assessment of quantum of damages and thus arrived at an erroneous award that was manifestly excessive in the circumstances.**
>
> **2. That the Honorable learned trial Magistrate erred in law and fact in in proceeding on the wrong principles Vis-à-vis the evidence before him and laid down principles of law in awarding special damages.**
>
> **3. That the Honorable learned trial Magistrate erred in law and fact in proceeding on the wrong principles Vis-à-vis the evidence before him and laid down principles of Law in Apportioning Liability at 100% in favour of the Plaintiff as against the Appellant.**
>
> **4. That the Honorable Learned Magistrate erred in law and in fact by failing to consider the Appellant's submissions and authorities on the issue of liability and general damages and on special damages.**

15. The Appellants sought the orders that the Appeal be allowed, the said judgment and decree be set aside and the costs of the Appeal and in the lower court.

16. Before me, the Appellant set out the principles that guide the Court in interference with findings of the trial courts and submitted that general principles in apportionment of liability arise in circumstances where one party is not solely to blame for the injuries of another. He cited the case of **Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR.**

17. The Court was therefore invited, while examining the evidence on record and the Respondent's testimony, to find that, indeed, had the Respondent acted properly, she would not have sustained her injuries in their gravity and that her contribution thereto cannot be discarded as being too remote. It was noted that whilst the Respondent testified that the Motor Vehicle hit the Motor Cycle from behind, the Respondent never called any witness to corroborate her testimony despite testifying that she personally knew the rider of the motor cycle who was a witness. The Respondent further testified that the accident was reported at Kangundo police station and that she was issued with a police abstract which she produced as evidence in the Trial Court but never called the investigating officer to shed more light on the circumstances of the accident. Further the said abstract did not particularly blame the Appellant for the accident. It was submitted that if at all the said accident was caused by the Appellant as described the Respondent, then the Respondent and the motor cycle would have been thrown in the middle of the road and be run over by the Motor Vehicle or thrown off the road on the left side. It was further submitted that the Respondent did not provide any shred of proof to substantiate the particulars of negligence in the Plaint.

18. Further, it was submitted that the Respondent failed to demonstrate any safety measures of her own that she took as a pillion passenger on a Motor Cycle. Aside from the fact that she had been carrying a big luggage aboard the Motor Cycle and destabilizing it, there was neither evidence nor testimony alluding to the Respondent wearing a helmet.

19. It was therefore submitted that, on a balance of probabilities, the Respondent's contribution to the accident and the injuries sustained was at 50% and the trial court erred in apportioning liability at 100% in favor of the Appellant.

20. As regards the award of damages, it was submitted that Courts only award Special Damages that are specifically pleaded and proven. Further, special damages cannot be specifically proved during trial if they are not pleaded and the same can only be salvaged by amending the "defective Plaint" and reliance was placed on **Mathew Mutua Mutio vs. Car & General (K) Ltd [2000] eKLR.** In this case it was submitted that whereas the plaintiff particularised her special damages, at the hearing of the suit only a receipt for Kshs. 500/= being payment for motor vehicle search was produced as exhibit as well as a bundle of receipts being costs of medical expenses totalling to Kshs. 679,402/=, a receipt for Kshs. 3000/= being payment for the Respondent's medical report, and Kshs. 15000/= being court attendance fees. According to the Appellant, only Kshs. 500/= for the motor vehicle search and Kshs. 3000/= for the medical report is payable under special damages as the same was pleaded and proved and while the other costs were not specifically pleaded in the Plaint and are therefore not payable. It was therefore submitted that the Honourable Trial Court did indeed misappropriate (sic) itself in awarding Kshs. 690,902/- in Special Damages.

21. As regards general damages, it was submitted that it is trite that damages for bodily injuries must be commensurate with the injuries sustained. In the Plaint, it was pleaded that the Respondent sustained the following injuries:

i) Deep cut posterior right hand with surrounding multiple bruises and loss of the thumb nail

ii) Deep cut/ bruises on the scalp

iii) Painful right shoulder

iv) Bruises on the face, left hand and right knee

v) Chest pains

vi) Fracture of the base of proximal phalanx of the right hand

vii) Linear fracture of the right parietal bone

viii) Linear fracture right temporal bone

ix) Partial opicification of the right mastoid air cells and the middle ear.

22. However, it was submitted that the Respondent only testified that the sustained an injury to her right hand fingers and right shoulder and that she had lost consciousness for five days. Further, PW2**, Dr Mwaura** admitted that he examined the Respondent more than two years after the accident occurred and that there could be a possibility that the Respondent could have sustained some of the injuries he noted in his report after the accident. It was submitted that owing to the inconsistencies in the Respondent's evidence in lieu of her injuries, it cannot be discernible which of those injuries were sustained as a result of the accident, hence the general damages awarded by the trial court were, in the circumstances, inordinately high, manifestly excessive and not commensurate with the injuries sustained. In this regard the Appellant relied on **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** as was quoted by the High Court in **Joseph Mutua Nthia vs. Fredrick Moses M. Katuva [2019] eKLR** and submitted that the sum of Kshs. 700,000/= would suffice as a reasonable award for general damage.

23. On behalf of the Respondent it was submitted that the learned trial magistrate could not be faulted on his finding on liability since he actually stated why he found the appellant liable based on the evidence adduced. It was noted that whereas an appellate court can only interfere with findings of fact when the same is not in sync with the evidence led, contrary to it or when it perverts the evidence on record, in the instant case, the Appellant has not demonstrated any omission on the part of the trial court to warrant interference with its finding on matters of fact. In this regard reliance was placed on the case of ***Omar Athumani Mohammed T/A Paintwork & General Maintenance vs. Jumwa Kaingu (High court at Mombasa Civil appeal 210 of 2019]*** *and* ***Teresia Wanjiru Githinji vs. Lucy Kanana M'Rukaria (High court at Chuka Civil appeal 23 of 2019]*** *and the Court was urged* to find in line with the decisions quoted in the case above and find that the grounds of appeal touching on liability are unmerited.

24. Regarding general damages, it was submitted that the injuries suffered by the Appellant herein was contained in paragraph 7 of the plaint and the Respondent's witness, **Dr. Mwaura**, further produced a medical report on behalf of the Respondent from which the injuries suffered by the Respondent were serious in nature taking into consideration that among the injuries suffered by the Plaintiff were multiple fractures of the head. The Plaintiffs doctor stated that he assessed the Plaintiff's incapacity at 30%. It was noted that the Respondent had proposed an amount of Kshs. 2,500,000/= as general damages for pain and suffering while the Appellant proposed a sum of Kshs. 700,000/= as general damages for pain and suffering. According to the Respondent, the question to be answered in this appeal therefore is whether the Trial Magistrate in his award acted on the wrong principles or considered an irrelevant factor or failed to consider a relevant factor making the award so inordinately high that it must be a wholly erroneous estimate of the damages as alluded to by the Appellants. In this case it was submitted that the Appellant failed to demonstrate how the learned trial magistrate erred. To the Respondent, the trial magistrate should have considered effluxion of time since the said awards were made and should have in fact awarded the Respondent Kshs. 2,500,000/= as general damages.

25. As for special damages, it was submitted that from the judgement, it cannot be said that the Learned trial magistrate miscomprehended the law as concerns Special Damages since the Plaintiff had attached all the documents in proof of special damages (treatment) awarded in her List of documents and during hearing, the Plaintiff Produced all receipts and during cross examination the defendant had an opportunity to cross examine on the receipts in support of treatment expenses, the Defendant elected no to do so and the said evidence went unchallenged.

26. It was therefore submitted that the ground of appeal on the award of treatment expenses is without merit and ought to fail.

27. In conclusion, it was submitted that this appeal lacks merit, that the trial Court should have in fact awarded Ksh.2, 500,000/ = as an award general damages on basis of the evidence and case law that was placed by the Appellant and the Respondent before it, and the Court was urged to dismiss the appeal with costs and enhance the award for General damages to Ksh.2, 500,000/=.

Determination

28. Having considered the submissions of the parties in this appeal, this is the view I form of this matter. This being a first appellate court, as was held in **Selle –vs- Associated Motor Boat Co. [1968] EA 123**:

> **"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."**

29. 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."**

30. 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.

31. However, as was appreciated in **Peters –vs- Sunday Post Limited [1958] EA 424**:

> **"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."

32. 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."

33. In this appeal, it is clear that the determination of the appeal revolves around the question of liability 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.

34. 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.

35. 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."

36. 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.

37. 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."

38. 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."

39. 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."

40. 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….."

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

"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 lose because the requisite standard will not have been attained."

42. However, as held by the Court of Appeal in **Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR**:

"The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

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

43. In this case this court is being called upon to interfere with the trial court's apportionment of liability. In **Khambi and Another vs. Mahithi and Another [1968] EA 70**, it was held that:

"It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

44. That seems to have been the position in **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142** and **Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981**, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

45. According to **Zarina Akbarali Shariff and Another vs. Noshir Pirosesha Sethna and Others [1963] EA 239:**

"The findings of a trial Judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances."

46. Similarly, in **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that an apportionment of liability made by a trial Court will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous.

47. In this case, the evidence by the Respondent was that while she was riding on Motor Cycle KMCT 322V the Defendant negligently drove motor vehicle registration no. KBP 971Q and hit them from behind. The Defendan, on the other hand testified that he saw the motor cycle rider in front but since there was another oncoming vehicle, he waited for the same to pass after which he overtook the motor cycle. However, the said motor cycle which was loaded and was zigzagging on the road fell off the road on its own without any contact. In his evidence, he saw the said motor cycle while he was 300 metres away.

48. It is clear that there was an accident on the said day in which the Respondent was injured. While there was no reason given why the Respondent did not call the motor cycle rider to corroborate her evidence, the Appellant similarly, did not call his passengers to corroborate his evidence. The burden was, however, upon the Respondent to prove her case. As a matter of law, however, the Appellant ought to have

applied for third party notice to be served on the motor cycle rider if it was his case that the accident was caused by the rider. In those circumstances, it is my view that the evidence of the Appellant that the rider had an abnormal luggage was not sufficiently controverted. The carrying of an abnormal luggage itself, however, does not necessarily lead to accidents. In this case the accident only occurred soon after the Appellant had passed the motor cycle. Though the Appellant avers that there was no contact between his vehicle and the motor cycle, it would seem that either there was a contact between the motor cycle and the vehicle or that the Appellant drove too closely to the motor cycle and as a result, the motor cycle was forced off the road. Either way the Appellant cannot escape liability.

49. 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."**

50. 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."**

51. 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%."**

52. 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."

53. 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.

54. 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."

55. In those circumstances, I agree with the Appellant that it was erroneous for the learned trial magistrate to have found the Appellant 100% liable. Doing the best I can in the circumstances, it is my view and I find that the Appellant ought to have been found 70% liable. Accordingly, I allow the appeal as regards liability, set aside the finding that the Appellant was 100% liable and substitute therefor 70% liability.

56. 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."

57. 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."

58. 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…"

59. 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."

60. In this case, the appellant pleaded the injuries she sustained and PW2 produced his medical report in which the injuries were set out. While there were certainly some inconsistencies in the oral evidence and the medical report, I am not prepared to find that such inconsistencies are not common considering the fact that the victim of an accident cannot be expected to know in details her injuries. The evidence of an expert witness such as PW2 herein becomes more relevant when it comes to the actual injuries sustained by the Plaintiff. Having considered the evidence of PW2 vis-à-vis the plaint, I find that nothing material turns on the said inconsistencies.

61. While I agree that the learned trial magistrate ought to have evaluated the evidence placed before him more than he did, having subjected the evidence to a re-evaluation, I am not prepared to interfere with his findings are regards the injuries and the award of damages.

62. As for special damages, pleadings are meant to bring to the opposite party's attention the nature of the case that he is expected to face. In this case, the receipts were filed with the pleadings and the same were produced in evidence without any objection. It is too late for an objection to be taken for the first time in this appeal.

63. In the premises, while I set aside the finding on liability in terms hereinabove, the appeal against damages, both general and special fails and is dismissed.

64. As the Appellant has only partly succeeded, there will be no order as to costs of this appeal and it is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 10TH DAY OF NOVEMBER, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Miss Mavindu for Mr Maluki for the Appellant

Mr Webale for the Respondent

CA Susan