**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 65 OF 2018**

**MWINZI MULI.....APPELLANT**

**-VERSUS-**

**JAMES KENNETH KIARIE.....1ST RESPONDENT**

**FAITH MUNGUTI KANINI.....2ND RESPONDENT**

**(Being an Appeal from the Judgment of the Judgment of the Learned Honorable E. Agade delivered on the 11th day of May 2018 in Kangundo Senior Principal Magistrate's Court Civil Case No. 72 of 2015)**

**JAMES KENNETH KIARIE.....PLAINTIFF**

**- VERSUS –**

**MWINZI MULI.....1ST DEFENDANT**

**FAITH MUNGUTI KANINI.....2ND DEFENDANT**

**JUDGEMENT**

1. This judgement relates to an appeal arising from the decision made in Kangundo PMCC No. 72 of 2015. That suit was commenced by way of a plaint filed by **James Kenneth Kiarie**, the 1st Respondent herein in which he sought damages, both general and special and the costs of the suit.

2. According to the said plaint, the 2nd Respondent herein, **Faith Munguti Kanini**, was at al material times the owner of motor vehicle registration No. KBN 541Z Toyota Allion while the Appellant was the registered owner of motor vehicle registration No. KBN 854K Toyota NZE. Both Defendants were sued in their capacities as the registered owners of the sais respective vehicles. The 1st Respondent (also referred to as the plaintiff) was however a lawful passenger in motor vehicle registration No. KBN 541Z Toyota Allion which was owned by the Appellant herein.

3. It was pleaded that on or about the 5th day of July, 2014 at around 8.30pm, the drivers of the said vehicles so negligently drove the same along Nairobi-Kangundo Road leading to collision of the same at Kwa Uku Area. Their respective particulars of negligence were set out in the plaint. The plaintiff also relied on *res ipsa loquitor*.

4. As a result of the foregoing, the plaintiff sustained serious bodily injuries, whose particulars were set out in the plaint. The Plaintiff disclosed that as a result of the said accident, he continued to suffer recurrent pain in the pelvic area and right wrist as well as stiffness of the wrist joint. Though the injuries healed, they left permanent scars and stiffness of the wrist joint.

5. The 1st Defendant (the 2nd Respondent herein) filed a defence in which she admitted that the Plaintiff was a passenger in the said vehicle and that the said accident occurred. She however denied that it was caused by or substantially contributed to by the negligence of her driver. Instead she pleaded that the same was caused or substantially contributed by the driver of the 2nd Defendant (read the Appellant's) motor vehicle and she set out the particulars of the said negligence. It was disclosed that as a result of the said accident, the 2nd Defendant's driver was, one **Abel Ndeti Kituku**, was charged before the Court in Traffic Case No. 103 of 2016 with the offence of causing death by dangerous driving.

6. As for the 2nd Defendant, the Appellant, his defence was a denial of all the facts pleaded in the plaint save for the descriptive parts. He however averred in the alternative that if the same occurred then it was caused by or substantially contributed to by the negligence of the 1st Defendant's driver and the particulars thereof were set out.

7. There was also a notice of indemnity by co-defendant issued by the 1st Defendant against the 2nd Defendant, the appellant herein.

8. In his evidence the Plaintiff testified that he knew the 1st Defendant who was driving the vehicle in which he was in on the material day. According to him, on 5th July, 2014, at around 1800 hours, they had attended a burial of his wife's grandfather and were on their way back from the burial. He was seated on the left side of the back seat of the 1st Defendant's car together with his brothers in law, Mutangei and Mark while the 1st Defendant and her husband were seated in the front seat heading towards Nairobi. He then heard a loud bang from behind and lost consciousness immediately only later to regain the same at Kangundo Hospital. He was then informed that he had been involved in an accident. According to him, his shoulder was swollen and his arm was twisted. X-ray was taken and he was transferred to Aga Khan and later taken to Kijabe Hospital where he was admitted and a surgery performed on him around 1200 hours. He was then informed that he had a punctured lung, broken ribs and was put on a chest tube. His arm and collar bone were broken and he had injuries on his pelvis and a cut on his forehead. He stayed in the Hospital for two weeks during which time implants were put on his arm before he was discharged. According to him, at Kangundo only first aid was done while at Aga Khan, a request was made for CT scan for the spine and x-ray. He however parted with Kshs 43, 815.00. for the neck dress and medication and produced the receipt for the same. He was also given morphine and first aid at the cost of Kshs 3,560/-. At Kijabe, he was also issued with medical report by **Dr P Watson** which detailed all his injuries dated 12th September, 2014 which he exhibited. After being discharged he continued with the treatment and would pay for medication and exhibited receipts for the same. According to his evidence the receipts totaled Kshs 125,084/-

9. After leaving the Hospital he went was issued with a P3 form which he exhibited. He also saw **Dr. Mwaura** who prepared a medical report which he exhibited dated 15th December, 2014 and he paid Kshs 3,000/- towards the same. At the request of the defence he was also examined by **Dr Maina** who made a report dated 21st February, 2017 which was exhibited as well.

10. The Plaintiff testified that the search at the registrar of motor vehicles revealed the ownership of motor vehicle reg. no. KBN 854K and he produced the same. He therefore sought compensation for the injuries he sustained

11. In cross-examination by counsel for the 1st Defendant, the Plaintiff averred that he believed that the loud bang was as a result of the impact though he was not a driver. He testified that he was called to testify in the traffic case in which the driver of the third party car was charged but by the time of his evidence in court, he was yet to testify.

12. Cross-examined by the counsel for the 2nd Defendant he stated that they were moving at moderate speed and that the driver slowed down to avoid a pot hole before he heard the impact. According to him, he was not looking at the back during the time. According to the plaintiff the driver, the 1st Defendant, was careful in her driving. He was later inform3d that Roy, his wife's brother and Mark, the brother in law to the 1st Defendant, passed away. According to him, he did not conduct a search for motor vehicle reg. no. KBN 541Z because he knew the owner.

13. In re-examination, he explained that the impact was on the l3eft side where he was seated at the back and that those affected were the passengers on that seat.

14. PW2, **PC Paul Samoei**, testified that the report of the accident was that the accident occurred on 5th July, 2014 at around 1830 hours at Kwakuku Area along Kangundo Nairobi Road involving motor vehicle reg nos. KBN 541Z Toyota Allion and KBN 854K Toyota NZE. According to the report the said vehicles were moving in the opposite directions. The driver of the Allion was trying to avoid a pot hole and moved in a zigzag manner from the left to the right and left her lane onto the lane of the other vehicle and that is when the accident occurred. According to him, he never conducted the investigations but relied on the report of the Investigations Officer. He disclosed that charges had been preferred against the driver of KBN 854K for causing death by dangerous driving and that the point of impact on the Allion was on the left side. According to the police file. It was recommended that Abel the driver of NZE be charged with causing death by dangerous driving.

15. Cross-examined by the advocate for the 1st Defendant, the witness stated that the 1st Defendant was driving the Allion from Tala towards Nairobi at 50 kph when she noted the pot hole on the left lane and tried to maneuver on the right side when she heard the bang from the rear of the car. According to him NZE had extensive damage at the front but none at the rear while the Allion had damage on the left in the middle of the door. Though the area behind the left door was extensively, the front was not. He disputed the contention that the vehicles were headed in the same direction as incorrect and insisted that the Allion left its lane and came to the lane of NZE and it was then that it was hit.

16. In answer to the question by counsel for the 2nd Defendant, PW2 reiterated that the Allion left its lane and came to the lane of NZE and it was then that it was hit.

17. DW1, **Faith Kanini**, the 1st Defendant and the 2nd Respondent herein testified that on 5th July, 2014, they were coming from her grandfather's funeral heading towards Nairobi in motor vehicle reg. no. KBN 541Z which was being driven by her. As she was driving, she saw a pot hole on her lane an swerved to avoid the pot hole to her right and ten returned to her lane. While returning to her lane, she heard a loud bang at the rear of the car and she lost consciousness and when she regained her consciousness the vehicle was on the extreme side facing Kangundo. According to her, she did not see anything. Upon coming out she saw a white vehicle facing Nairobi while her vehicle was facing Kangundo. It was her evidence that she was driving at 50 kph at 1830 when darkness was setting in. According to her the back rear left side of her vehicle was damaged while the front part of the other vehicle was completely damaged. According to her she was not charged but one **Abel Mwinzi** was the one charged and she was a witness in the said case. It was her opinion that the accident was caused by the other vehicle because she was on her right lane by the time she veered off and that the driver of the other vehicle had no proper look out and did not keep the distance.

18. In cross-examination by counsel for the Plaintiff, she confirmed that the Plaintiff was a passenger in her vehicle and was seated on the left back side of the vehicle. According to her, she never saw the other vehicle before the accident though she was checking her rear mirrors. According to her there were no on-coming vehicles as one faces Nairobi and that there was nothing on her rear left mirror. According to him the impact was sudden.

19. Cross-examined by the counsel for the 2nd Defendant, the 1st Defendant stated that they were in conversations but all her passengers had seat belts. She admitted that she swerved lightly and slowed down from 50kph to about 20 kph or 30kph and went to the right side. According to her, the pot hole was on the left. She however denied entering the right lane though she indicated that she was serving. She admitted that there was reason to indicate because she was entering the right lane. In her evidence the incident occurred in a matter of seconds but insisted that there were no oncoming vehicles from Nairobi direction. Similarly, there was no vehicle at the rear. She stated that there were other oncoming vehicles from behind. She stated that at that time there were cars from Nairobi and they were going back to Nairobi. In her evidence, she saw the pothole 50 meters away. She however denied that she caused the accident since she was careful and had there been no pot hole the accident would not have occurred.

20. In re-examination, she insisted that her car was not damaged in the front which would have been the case had the accident been head on collision. She stated that she was driving towards Nairobi and that there were on coming vehicles about 150 meters away. However, when she checked her side mirrors, she did not see any vehicle. She denied losing control of the vehicle before the accident.

21. DW2, **Wilson Mwangi**, who investigated the accident on behalf of Heritage Insurance Company supported the testimony of the 1st Defendant as regards the damage caused to her vehicle.

22. **Abel Nderitu Kituko**, the driver of the 2nd Defendant testified that on 5th July, 2014, he was driving the 2nd Defendant's said vehicle from Nairobi towards Kangundo at about 60/70 kph. According to him, there was no traffic on the road but there was a vehicle in front of and behind him. However, the weather was clear. Suddenly the vehicle in front lost control and the driver tried to control it but failed. As result a collision occurred between his vehicle and that other vehicle though his vehicle remained on the road. According to him, the other vehicle hit the pot hole and lost control and veered towards him. After the collision his vehicle turned towards Nairobi while the other vehicle went off the road and overturned. According to him, he was conscious after the accident and saw what happened.

23. It was his evidence that the other vehicle was in high speed and there was no warning as the accident occurred in a fraction of seconds. He agreed with the investigation report that the impact was on the right side of the other vehicle. According to him, his vehicle was hit on the front left and he blamed the driver of Toyota Allion for the accident for failing to control the said vehicle. He denied that he hit the other vehicle from behind. Though he admitted that he was charged in the traffic case, by the time of his testimony the matter was still pending.

24. In cross-examination on behalf of the Plaintiff, he insisted that the other vehicle hit the pot hole before zigzagging towards him. According to him, the left side and the driver's side of the other vehicle and his front left were damaged.

25. The 2nd Defendant called an insurance and forensic investigator who after testifying on his investigations concluded that the accident was caused by the condition of the road and the carelessness of the 1st Defendant. According to him, it was not tenable for the driver of the 2nd Defendant to have been behind the 1st Defendant.

26. In his judgement, the Learned Trial Magistrate found that the version by the 1st Defendant was more believable because of the point of impact where the rear of the Allion was damaged and the front of the NZE which means the contact was between the rear of the Allion and the front of the NZE. However, the court discounted the evidence of the 1st Defendant that she looked into the mirror and so no vehicle behind as the NZE could not have come from nowhere. Based on the evidence of the 1st Defendant, the Court found that it was her action of diverting to the opposite lane that made her come into collision with the NZE and that had she stayed on her lane, she would never have come into contact with the NZE. Based on the decision in R vs. Evans (1963) 1 GB 412 at 418, the Learned Trial Magistrate found that the 1st Defendant was to blame for the act of diverting to the opposite lane. On the other hand, the failure by the 2nd Defendant's driver to stop when he was driving at 60/70 kph was found by the Court to have been an indication of negligence on his part. The Court therefore found that both the 1st Defendant and the driver of the 2nd Defendant were negligent.

27. On damages the Court assessed the same in the sum of Kshs 1,000,000.00 for general damages and Kshs 125,084/- special damages.

28. Aggrieved by this decision the Appellant has lodged the present appeal raising the following grounds:

> **1. That the learned trial Magistrate erred in law and fact in finding the Appellant negligent and liable for the accident contrary to the facts and evidence of the case.**
>
> **2. That the learned trial Magistrate erred in law and fact in failing to consider the Appellant's Submissions on the issue of Liability /negligence and authorities cited and thereby making a wrong decision.**
>
> **3. That the learned trial Magistrate erred in law in failing to apportion liability as between the Appellant and 2nd Respondent.**
>
> **4. That the learned Magistrate erred in law in failing to pronounce the extent of Liability between the Appellant and 2nd Respondent.**

29. The Appellant therefore sought the following orders:

**a) The Honorable court be pleased to set aside the Judgment on liability of the Lower court.**

**b) The Honorable court be pleased to find on liability in line with the Appellant's Submissions on liability in Senior Principal Magistrates court at Kangundo Civil case No. 72 of 2015, James Kenneth Kiarie Versus Faith Munguti Kanini and Mwinzi Muli.**

**c) The Costs of this Appeal be awarded to the Appellant.**

30. On behalf of the Appellant it was submitted that the summary of the evidence of **Abel Ndeti** the driver of motor vehicle registration number KBN 854K and **Jared Migina** an insurance and forensic investigator, was that the accident was caused by the manner of driving of the 2nd Respondent driving motor vehicle registration number KBN 541Z and that **Abel Ndeti** demonstrated that he was driving from Nairobi and not to Nairobi as he had attended to the medical needs of his child who was a passenger among others in his motor vehicle. This was corroborated by **Jared Migina**, an expert in his field with over twenty (22) years' experience whose opinion was that the subject accident was caused by the condition of the road as well as the carelessness of the 2nd Respondent's manner of driving. It was noted that the fact that the 2nd Respondent hit a pot hole while driving and thereby initiated the occurrence of an accident was not disputed by any party.

31. It was submitted that the 2nd Respondent called a police officer from Kangundo Police station to testify and his evidence was that an accident occurred on the 5 July 2014 involving motor vehicle registration number KBN 854K Toyota NZE and KBN 541Z Toyota Allion. "the vehicles were moving in opposite directions, the KBN was headed to Nairobi and the KBK was headed to Kangundo". He further stated that the driver of the Allion was avoiding a pot hole and she moved in a zig zag manner from the left to the right and left her lane to the lane of the other vehicle and that is when she was hit. The Officer stated that the point of impact on the Allion was on the left which was consistent with the evidence of the Appellant.

32. It was submitted that the Learned Trial Magistrate failed to give cognizance to the submissions of the 2nd Defendant/Appellant filed in the lower court which are extensive on the evidence on liability and instead relied on speculation. It was therefore submitted that the trial court's finding on liability was contrary to the evidence, facts of the case and authorities cited by the Appellant and as such the same be set aside and liability be wholly placed on the 2nd respondent.

33. It was further submitted that the learned Magistrate did not pronounce upon whom liability fell and to what extent which in the humble opinion of the Appellant is a failure in law. The Appellant urged the Court to find that the 2nd Respondent was wholly to blame for the accident and enter judgement on liability wholly upon **Faith Munguti Kanini** as the driver and owner of motor vehicle registration number KBN 854K.

34. In support of the submissions the Appellant, inter alia, relied on **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212) CA for the holding that** the responsibility of the appellate court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. He also cited **Simon Waweru Mugo vs. Alice Mwongeli Munyao [2020] eKLR** for the holding that:

**"Where negligence has been established and where there is a head on collision the court is required to make a call on apportionment of liability."**

35. The Appellant also cited **Lakhamshi vs. Attorney General, (1971) E A 118, 120**.

36. Based on the same submissions, the Appellant urged the Court to dismiss the Cross Appeal for want of merit and to award the costs both of the appeal and the cross-appeal to the Appellant.

37. The 2nd Respondent in this Appeal, the 1st Defendant before the trial court, also filed a cross-appeal citing the following grounds:

**1. That the learned trial Magistrate erred in law and fact in failing to find the appellant herein 100% liable.**

**2. That the learned trial Magistrate erred in law and fact in failing to find that the second Respondent was not to blame for the accident.**

**3. That the learned trial Magistrate erred in law and fact in failing to apportion liability between the appellant and the 2nd Respondent.**

**4. That the learned trial Magistrate erred in law and fact in failing to find and hold that the Appellant was wholly or substantially to blame for the Accident.**

38. The 2nd Respondent therefore prayed that:

**a) The cross appeal be allowed.**

**b) The learned Trial Magistrate's finding on liability be set aside and be substituted with a finding that the appellant was 100% liable.**

**c) In the alternative, the Learned Trial Magistrate's finding on liability be set aside and be substituted with a finding that the**

**Appellant was Substantially to blame for the accident.**

**d) The appellant's appeal be dismissed with costs.**

**e) The costs of this Cross Appeal be awarded to the 2nd Respondent.**

39. According to the 2nd Respondent, from the evidence adduced, the Second Respondent herein was not in any way to blame for the accident. During trial, the Second Respondent testified that she was driving motor vehicle KBN 541 Z towards Nairobi from Tala when she noticed a pot hole on the left side of the road. She testified that she slowed down and moved towards the right side to avoid the pot hole and while returning to the left side she heard a loud impact on the rear of the car, lost control thereof and overturned. The Second Respondent also called a private investigator who produced a comprehensive investigation Report complete with photographs of the scene of the accident and of both motor vehicles. In it, DW2 testified that the damages in the motor vehicle KBN 541 Z were at the left rear side as depicted by the photographs and opined that the said vehicle was hit from the left rear at an angle while returning to the left lane. The damages as shown by the photographs within the report were consistent with the Second Respondent's testimony that she was hit from the rear.

40. It was recalled that the Appellant called two witnesses the Appellant's driver and the investigator. The said driver testified that he drove the said motor vehicle KBN 854 K from Nairobi to Kangundo (opposite direction) when he encountered motor vehicle KBN 541 Z that was driven in a Zig Zag manner and that upon collision, the said vehicle spun and faced the opposite direction without leaving the road. The investigator called produced an Investigation Report with only the Appellant's motor vehicle and excluding not only the photographs of the Second Respondent's motor vehicle KBN 541 Z but also the scene of the accident. The circumstances of the accident as Depicted by the Appellant were inconsistent with the damages as provided in the investigation report. If at all the version of the Appellant is to be plausible, the damages on the Second Respondents would have been on the front left door diminishing towards the rear, which is not the case. The damages on the Second Respondent's motor vehicle are inconsistent with the sketch on the Appellant's Investigation Report.

41. It was submitted that from the foregoing overwhelming evidence tendered, the trial magistrate ought to have found the Appellant herein entirely to blame for the accident since it is evident that the damages as inflicted on the Second Respondent's vehicle were consistent with the circumstances as described by the Second Respondent. According to the 2nd Respondent, the Investigation Report produced by the Appellant is partisan and incomprehensive and on that ground ought not to have been considered then and now. The sketches in the Appellants Investigation Report are inconsistent with the damages as inflicted on the Appellant's motor vehicle.

42. It was submitted that the Appellant herein was wholly to blame for the accident because the Second Respondent's investigation report which was comprehensive complete with photographs of the scene of the accident and of both motor vehicles revealed that the damages in the motor vehicle KBN 541 Z were at the rea side as depicted by the photographs. The damages were all consistent with the circumstances of the accident as described. To the 2nd Respondent, the Appellant's investigation report was however evidently flawed. Notably, damages on motor vehicle KBN 541 Z were inconsistent with the sketch on the Appellant's investigation report. Further, the investigator confirmed that in compiling the Report he did not contact the passengers in KBN 854 K to ascertain their version on how the accident occurred. However, of more significance to the Second Respondent's case, the sketch map depicts that motor vehicle registration number KBN 854 K would not have been damaged on the right side. The inconsistencies were noted by the Learned trial magistrate who in her judgment appreciated that the Appellant's investigation report was out rightly not plausible. The Court was therefore urged to find that the Appellant's version cannot be plausible from the foregoing.

43. It was submitted on behalf of the 2nd Respondent that the Appellant was headed the same direction as the second Respondent herein. The eye witnesses to the accident were the Appellant and the First and Second Respondents and both the First Respondent and the Second Respondent were unanimous in their testimonies that the Appellant's motor vehicle registration number KBN 541Z was heading to Nairobi. The Appellant, although admitting that the said vehicle had passengers failed to call any of them to confirm the version. The witness called did not also produce any treatment notes to confirm that he had taken his child to hospital on the material day. Additionally, the investigation Report produced by the Second Respondent's investigator revealed that the initial report at the police station was that both motor vehicles registration number KBN 854 K and KBN 541 Z were headed in the same direction. A subsequent O.B entry however reflected that the motor vehicles were travelling to opposite directions. The initial entry was interestingly not challenged during trial further putting to question the Appellant's allegations.

44. It was contended that there is no indication whatsoever from both the testimony tendered and the investigation reports produced depicting the damages inflicted on the vehicles that the Appellant's motor vehicle was headed the in opposite direction.

45. It was noted that the Appellant's driver, upon months of investigations was charged with causing death by dangerous driving in **Kangundo Traffic Case No. 103 of 2016**. This position was confirmed by the PW2 during trial. The Second Respondent was not charged for the occurrence of the occurrence of the accident and the decision cannot be assumed to be uninformed. The trial court although aware of the position and the weight of the evidence supplied proceeded to erroneously find the Second Applicant herein liable.

46. It was further submitted that it is apparent from the learned magistrate's decision that the Appellant's testimony regarding the accident was not plausible and that she was more inclined to believe the Second Respondent's version. Significantly, the trial magistrate in her judgment confirms that the Second Respondent's version as presented in her testimony is plausible. The Honorable Magistrate admitted that the evidence by the Appellant's driver was farfetched and that she was inclined to believe the Second Respondent's version. Despite the foregoing position, the learned Magistrate proceeded to erroneously find the Second Respondent liable for the accident. The 2nd Respondent maintained that from the weight of the evidence adduced, liability should have been 100% against the respondent.

47. From the foregoing, the 2nd Respondent prayed that the cross appeal be allowed and the Learned Trial Magistrate's finding on liability be set aside and be substituted with a finding that the Appellant was 100% liable.

48. The 1st Respondent opposed both the appeal and the cross-appeal. According to him, the trial Court in fact was right on liability of the

Appellant and the 2nd Respondent for the said accident the subject of the case herein and that the trial Court not only paid due regard to the Appellant's submissions but went ahead and relied on them and that the instant appeal is otherwise an abuse of the court process and only meant to delay the Plaintiff herein from enjoying the fruits of her Judgment. It was submitted that 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 case herein, the Appellant and Second Respondent have not demonstrated any omission on the part of the trial court to warrant interference with its finding on matters of fact. 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 this Court was urged to find* the first and second Grounds of Appeal in the Memorandum of appeal and the first, second and fourth grounds in the Cross appeal unmerited and dismiss them and uphold the finding of the trial court on liability.

49. While conceding that the trial court did to apportion liability as between the appellant and the 2nd Respondent herein, it was noted that the court in its conclusion stated that it found both drivers negligent. It was submitted that the failure to apportion liability between the appellant and the 2nd respondent is an issue that comes from the determination of facts before the trial court and one that called for the Appellant and the 2nd Respondent to present an Application for review of the trial court's judgment for clarity if any was needed and not file an Appeal to have the Apportionment of Liability done at the appellate stage. The trial court was best suited to handle apportionment of liability if indeed the Appellant and the 2nd Respondent felt that it was an issue that needed addressing.

*50.* According to the 1st Respondent he attributed negligence to both the Appellant's driver and the 2nd Respondent and sought judgement against them both jointly and severally. The trial court in its judgement found the appellant and the 2nd respondent were both negligent. By seeking that this Court apportions liability, it was submitted that the Appellant and the 2nd Respondent have denied the trial court an opportunity to exercise its discretion in the matter. In this regard the 1st Respondent relied on the case of ***Teresia Wanjiru Githinji vs. Lucy Kanana M'Rukaria (High court at Chuka Civil appeal 23 of 2019.***

51. *The 1st Respondent urged this Court* to find that the Appellant's Appeal and the 2nd Respondent's cross appeal are both without merit and proceed to dismiss them with costs to the 1st Respondent.

**Determination**

52. I have considered the issues raised in these consolidated appeals and the cross-appeal.

53. 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."**

54. 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.

55. 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."**

56. 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."**

57. It is clear that what is in contention is liability and particularly the apportionment of liability. From the submissions made, it is impliedly clear that both the Appellant and the 2nd Respondent appreciate that one of them or their drivers must have been negligent. The only point of divergence is who between them was negligent.

58. The 2nd Respondent's version was that as he was driving along the aforesaid road, she came across a pot hole on the left side of the road and she served to avoid the same. As she was returning back to her lane, her vehicle was hit by the Appellant's vehicle from behind. It was her evidence that despite the fact that she checked on her mirror before swerving, there was no vehicle behind her. As the learned trial magistrate rightly pointed out, it is inconceivable that the Appellant's vehicle appeared out of the blue and hit her vehicle. There was no evidence of a feeder road near the area where the accident occurred and the evidence on record was that the road was clear and fairly straight. Assuming that the 2nd Respondent's evidence was true that she was hit from behind while returning to her lane, the failure to notice the approach of the Appellant's vehicle which collided with her vehicle can only be explained on her not exercising proper lookout. That connotes some level of negligence.

59. As for the Appellant, his evidence was that his driver was approaching from the opposite side when the 2nd Respondent's vehicle lost control and collided with his. Though it was his evidence that the accident occurred in a matter of seconds, there is no evidence that he took any action to avoid the said accident by either swerving or stopping. Failure to do this in my view similarly connotes some level of negligence.

60. In her judgement, the learned trial magistrate attributed the negligence on both the 2nd Respondent and the Appellant's driver. It is true that she did not apportion that liability which she ought to have done. That a Court faced with two sets of circumstances is duty bound to make a determination thereon however difficult the circumstances are, was appreciated by **Madan, J** (as he then was) in **Welch vs. Standard Bank Limited [1970] EA 115** expressed himself as hereunder:

> **"When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Everyday, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame…Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, in its judgement, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion…There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does hold so in this case."**

61. Similarly, in **Lakhamshi vs. Attorney-General [1971 EA 118** it was held that:

> **"A judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them."**

62. Though strictly speaking this appeal does not therefore revolve around the 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.**

63. 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.

64. In this case, a holistic reading of the judgement of the trial court reveals that she attributed negligence to both the 2nd Respondent and the Appellant's driver. She seemed to have been in a difficulty in apportioning the liability. This Court did not have the benefit of seeing the witnesses testify and hence cannot determine the matter based on the credibility of the witnesses. 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."**

65. I have considered the evidence on record and I am of the view that based thereon, which was characterized with inconsistencies and internal contradictions and implausibility, it is not possible to apportion liability as between the 2nd Respondent and the Appellant's driver. In the premises the order that commends itself to me and which I hereby make is that both the Appellant and the 2nd Respondent are equally to blame. Accordingly, the judgement is entered against them at 50:50 on liability.

66. In the event, both the appeal and the cross-appeal fails with costs to the 1st Respondent to be shared equally between the Appellant and the 2nd Respondent.

67. Judgement accordingly.

**JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2021**

**G V ODUNGA**

**JUDGE**

**Delivered the presence of:**

**Miss B. N Kamau for the Appellant**

**Mr Webale for the 1st Respondent**

**CA Susan**