REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 51 OF 2018

(CORAM: F. GIKONYO J.)

RABBI KIOGORA ANGAINE.....APPELLANT

VERSUS

JANE KARIMI DUATI.....RESPONDENT

(An appeal from the Judgement of Hon T. Madowo (RM) Meru CMCCC No. 31 of 2003 delivered on 10th May 2018)

JUDGMENT

1. The Respondent herein was the plaintiff in the trial court whereas the Appellant was the Defendant. The Respondent instituted the suit through plaint dated 9th January 2003 seeking general damages, special damages and costs and interest of the suit.

2. It was the Respondent's averment that that on 19th July 2012 he was lawfully travelling in Motor vehicle registration number KAG 887B along Meru-Isiolo Road when due to negligence of the defendant an accident occurred occasioning him serious injuries and as a result he suffered loss and damage both special and general.

3. The appellant filed his defence on 18th March 2003 denying liability of the accident. He averred that the Respondent was solely negligent and attributed blame to the respondent by boarding a motor vehicle with disregard of the express warning "No unauthorised passengers allowed." That the respondent jumped and/or attempted to jump from the moving vehicle. The appellant pleaded the doctrine of *volenti non fit injuria.*

4. The Respondent filed a reply to the defence and stated that the doctrine of *volenti non fit injuria* does not apply in the case and placing the appellant to strict proof.

5. During trial, the Respondent called four witnesses whereas the Appellant called one in support of their respective cases. The trial Magistrate apportioned liability at the ratio of 80% to 20% in favour of the Respondent, and awarded general damages for pain and suffering and loss of amenities in the sum of Kshs. 800,000/= special damages at Kshs. 3,048/= plus cost of the suit.

6. Aggrieved by the aforesaid decision the Appellant filed its memorandum of appeal on 8th June 2018 rising five grounds of appeal enumerated as follows;

a. That the learned trial Magistrate erred in fact and in law in disregarding the appellant's evidence and erroneously finding that the Respondent was a passenger in M/V no. KAG 887B.

b. That the learned trial magistrate erred in law and in fact in holding that the appellant is 80% to blame for the accident yet the Respondent knew exactly the risk she was getting into and voluntarily got into the motor vehicle where she jumped out hence the liability at most could have been 50 % against the appellant.

c. That the learned trial magistrate erred in law and in fact in awarding the respondent excessive general damages at Kshs. 800,000/= regard being to the injuries sustained by the respondent who only had one fracture which ought to have been Kshs. 250,000/= as opposed to Kshs. 800,000/= awarded by the Learned magistrate.

d. That the earlier judgement and decree is against the weight of the evidence and the law.

e. That the learned trial magistrate erred in law and in fact in awarding general damages so manifestly high as to amount to a misapplication of the principles of assessment of damages.

7. On 4/11/2019 the court directed parties to canvass the appeal through written submissions. The Respondents counsel however on 20/2/2020 indicated to the court that she did not intend to file its submissions and would wholly rely on the courts record.

8. The appellant submitted that the respondent did not prove that she was a fare paying passenger at motor vehicle registration No. KAG 887B. That the respondent assumed the risk and sat on a stool at the back of a pickup hence the injuries she sustained. He also submitted that the evidence presented did not support the Respondents claim especially with regard to the motor vehicle which caused the accident and the owner of the motor vehicle. He claimed an award of Kshs. 250,000/= on account of general damages was fair compensation and relied on the following cited authorities; **Ibrahim Kalema Lewa v Esteel Co. Ltd. [2016] eklr, TAM (Minor suing thro her father and next friend J.O.M) V Richard Kirimi Kinoti & another [2015] eklr, Simon Taveta v Mercy Mutitu Njeri [2014] eklr.**

ANALYSIS AND DETERMINATION

9. As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses; demeanour thereof is therefore best evaluated by the trial court. See**: SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In the exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable thereof. I shall so proceed.

Issues

10. This appeal challenges both liability and quantum of damages. But, whereas these two remain the broader issues for determination, there are quite succinct threads of arguments which I should determine in a specific manner. These are; (1) alleged inconsistencies in th evidence of PW1; (2) ownership of motor vehicle registration number KAG 887B; (3) application of the doctrine of volenti non fit injuria; and (4) contributory negligence.

Inconsistencies

11. I do note the submissions by the appellant that Pw1's evidence was riddled with inconsistencies especially on the registration number of the vehicle in question. They stated that in her testimony she mentioned that registration number of the motor vehicle in question was KAB 887G as opposed to KAG 887B. On the effect of inconsistencies in a person's evidence see the case of **SATE RIDE LIMITED v JAMES ANYEGA [2010] eKLR** where the Court held as follows;

> **"…Of course there are contradictions and inconsistencies here and there in the testimony of the respondent. Such contradictions are not wholly unexpected. However, for as long as those contradictions and inconsistencies do not go to the root of the respondent's case or credibility, they are tolerable. I do not think therefore that the contradictions in the evidence of the respondent made him an unreliable witness…"**

12. Whereas the appellant argued that the evidence of Pw1 negated the fact of ownership and registration of the motor vehicle, other evidence confirmed the registration number of the M/v is KAG 887B. The police abstract and record proves this fact. The appellant himself confirmed the registration number of the vehicle he was driving and in which he gave the respondent a lift. Therefore, the said inconsistencies do not rout the core of the respondent's case. In any event, this has been reconciled through other independent evidence. The ground of appeal on inconsistencies fails.

Ownership of vehicle

13. The appellant argued that the respondent only relied on the police abstract and did not produce copy of record of registration of the vehicle. He also urged that the registered owner of the vehicle was his late father. I do note that the police abstract was produced as Pexh1 and it stated that the appellant was the owner of the motor vehicle. The evidence of Pw3 corroborated her claim. He stated that according to their records the owner of the motor vehicle was the appellant. According to the appellants he was just the driver of the said motor vehicle as his late father was the registered owner. He, however, did not provide a copy of record to prove this fact. At this juncture I wish to expound the potency of proof of ownership other than through record of registration.

14. The trial Magistrate relied on the case of **Geoffrey Njogu Mwangi v Francis Mbugua Gichia & another [2015] eKLR** where the court held as follows;

> **"It is true that the Plaintiff produced no copy of records from the *Registrar of Motor Vehicles* in proof of the 1st Defendant's ownership of KAP 568P. But he did produce a police abstract of the accident that gave particulars of the motor vehicle, including the 1st Defendant's ownership thereof. In the circumstances of this case, including the fact that the Defendants pleaded that the accident was caused by the driver of the other motor vehicle involved and substantially contributed to by the Plaintiff's own negligence, and also the fact that the Defendants offered no evidence at all, I am satisfied on a balance of probabilities that KAP 568P was at the time of the accident owned by the 1st Defendant, and was being driven by the 2nd Defendant in the course of his duties as the servant or agent of the 1st Defendant. I therefore hold that the 1st Defendant**

is vicariously liable for the negligence of the 2nd Defendant."

15. This question of proof of ownership of a vehicle was dealt with by the Court of Appeal in **JOEL MUGA OPIJA Vs EAST AFRICAN SEA FOOD LIMITED [2013] eKLR** that:

> ***"In any case in our view, an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."(Underlining for Emphasis mine)***

16. Much understanding is also gained from what was stated in **NANCY AYEMBA NGAIRA vs. ABDI ALI Civil Appeal 107 of 2008[2010] eKLR, Ojwang**, **J (**as he then was) that:

> ***"There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question."***

17. The way I understand it, section 8 of the Traffic Act only provides for a rebuttable presumption of ownership. Other evidence of or forms of ownership, may rebut the ownership of the person registered as owner of the vehicle. The police abstract was produced in evidence in this case. There was no serious evidence to disapprove that the appellant was the owner of the vehicle. The appellant merely stated without prove that his late father was the registered owner of the said vehicle. He did not adduce any evidence to support his claim. He made the claim and so he bore the burden of proof thereof. The respondent also stated that she was familiar with the appellant. Significant pieces of evidence adduced prove that the appellant was the owner of the vehicle at the material time. I agree with the trial courts determination that the registration and ownership of the motor vehicle was proved by the Respondent. The ground on that aspect of the appeal fails.

Application of the doctrine of *volenti non fit injuria*

18. The appellant stated that he gave the respondent a lift on the understanding that she will travel on the vehicle at her own risk. He therefore pleaded the doctrine of *volenti non fit injuria* to absolve himself from liability. No doubt that the respondent was a passenger in the vehicle at the material time. The appellant admitted this fact except he argued that she agreed to a lift at her own risk.

19. The doctrine of *volenti non fit injuria* has been explained to be where the claimant voluntarily agrees to undertake the risk of harm at his own expense. Pw1 stated that he boarded the motor vehicle as a fare-paying passenger. The appellant stated that he cautioned the respondent that he ought not to board the motor vehicle and had therefore offered her a lift at her own risk.

20. In **United Millers Limited & another v John Mangoro Njogu [2016] eKLR** relied upon by the trial Magistrate the court held as follows;

> **"If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is app1icable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it…Volenti non fit injuria means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. It must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will. This was the holding of Scott L.J. in Bowater v Rowley Regis Corp…….I take the view that a person who asks for a lift like in the present case cannot be said have consented to the risk of an accident or consented to negligence. In my view, the driver owed him a duty of care the moment he agreed to give him the lift and the defence of voluntary assumption of risk cannot apply."**

21. In **AAA Growers Ltd v Ann Wambui (Suing as the Administratrix in the Estate of Thomas Wahome Wambui) & another [2016] eKLR** the court explained the *doctrine of volenti non fit injuria* when it held as follows;

> **"It has, however, been held that the question is not whether the injured party consented to run the risk of being hurt, but whether he consented to run that risk at his own expense so that he should bear the loss in the event of an injury; the consent that is relevant is not consent to the risk of injury but the consent to the lack of reasonable care that may produce that risk (see Kelly v Farrans Ltd [1954] NI 41 at 45 per Lord Macdermott, cited at paragraph 69 of Halsbury's Laws of England**

(supra)……. It has been held that in order to establish a defence of *volenti non-fit injuria* the claimant must be shown not only to have perceived the existence of danger but must also have appreciated it fully and voluntarily accepted the risk. (*See the cases of Thomas v Quartermaine (1887) 18 QBD 685, CA; Letang v Ottawa Electric Rly Co [1926] AC 725, PC and Williams v Birmingham Battery and Metal Co [1899] 2 QB 338, CA)* Further, the question whether the claimant's acceptance of the risk was voluntary is generally one of fact, and the answer to it may be inferred from his conduct in the circumstances. The inference of acceptance is more readily to be drawn in cases where it is proved that the claimant knew of the danger and comprehended it (See Thomas v Quartermaine (1887) 18 QBD 685 at 696, CA, per Bowen LJ), for instance where the danger was apparent or proper warning was given of it and where there is nothing to show that the claimant was obliged to incur it (See Sylvester v Chapman Ltd (1935) 79 Sol Jo 777, where it was held that the plaintiff unnecessarily put his hand near the bars of a leopard's cage)…"

22. In **Edwin Chiroto Mandera v Mureithi Charles & another [2019] eKLR** where the Respondent had succeeded in the defence of *volenti non fit injuria* was based on the facts of the case. In that case, it was submitted that by boarding the truck without the knowledge or authority of the driver, and at the rear which was not by design capable of carrying passengers, he exposed himself to risk which he knew he ought not to.

23. In the case before me, the respondent disputed that fact that she had been offered a lift and stated that she was a fare paying passenger. The evidence of the appellant did not assist in this regard since he stated that he was informed by his turn boy (*An assistant to the driver of public transport or a truck*) that the respondent had fell from the motor vehicle. It is also clear that the respondent did not presume the occurrence of the accident when she boarded the motor vehicle. I therefore agree with the trial courts determination that the doctrine of *volenti non fit injuria* was not applicable in this case.

Contributory negligence

24. The appellant blamed a cyclist who he said entered the road causing him to veer off the road and as a result of which the accident happened. He further placed blame on the Respondent whom he said jumped from the vehicle when he swerved.

25. In attributing contributory negligence, the trial court relied on the case of **Israel Mulandi Kisengi vs the standard Limited & 2 others [2012] eKLR** where the court observed that although the plaintiff was aware of the risk by boarding a vehicle that was not a public service vehicle and sat at the back where there were goods and no seat belts there was no contributory negligence. The trial court concluded that in this case the respondent was aware of some risk and therefore apportioned liability at the ratio of 80%:20%.

26. Doubtless, by boarding a private vehicle which did not have any safety measures for passengers, the respondent exposed herself to danger. Even passengers bear a duty of care to self and should not expose self to danger. There were no seats or seat bels in the rear cabin. There were also goods on the pickup. It was stated that she sat on a stool. This was taking too huge risk. She bears contributory negligence. I pose there and I shall return to this issue once I assess the extent of negligence by the appellant.

27. **PW1** told the court that she boarded the vehicle herein as a fare-paying passenger. At some point, the vehicle started to move in a zigzag manner and veered off the road whereupon she was thrown out of the vehicle. She blamed the appellant for driving the vehicle too fast and in a zigzag manner as to cause the accident.

28. **Pw3 Richard Kirema** testified that he was at Muthangane stage when a motor vehicle Toyota Hilux passed by coming from Kiirua heading to Meru town. That the vehicle was speeding and it lost control left the road and turned towards the direction from where it had come. That the vehicle did not tip over but the lady who was a passenger in the rear of the vehicle fell off the said vehicle. It was his testimony that they took the lady to Meru hospital s she was injured and they later went to Meru Police station and made a report.

29. In cross examination he testified that he was 200 meters from where the motor vehicle was. That at the time the vehicle was speeding. He could not tell whether the plaintiff jumped off the motor vehicle. That they hired another motor vehicle to take the plaintiff to the hospital. That there were other passengers at the back of the vehicle but none was thrown out.

30. **Pw4 Cpl Gladys Kamuren** from Meru Police station testified that on 19/7/2002 there was an accident along Meru Nyanyuki road involving motor vehicle registration Number KAG 887 B Mitshubishi pick up from their records registered at the time to Rabbi Kiogora Angaine. That along Muthangene area the driver was avoiding to hit a pedal cyclist, the driver opting to swerve whereby the passenger Jane Kirimi was thrown out of the vehicle and she sustained injuries to the leg and face.

31. That after inspecting the vehicle it was found to be defective and therefore Rabbi was charged in court file No. 2556 of 2002 for driving a defective motor vehicle and was fined Kshs 2,000/=. That from their records no one was to blame for the accident. She produced the occurrence book at Pexh 7.

32. In cross-examination she testified that he is not aware of the circumstances of how the pedal cyclist joined the road as there were no witness statements recorded. He also stated that it is an old matter she could not locate the file to confirm if the witnesses were eye witnesses.

33. The appellant attempted to blame a cyclist. But, he neither took out third party proceedings nor adduced cogent evidence against the alleged cyclist. There is evidence that the vehicle was also defective and he was charged with driving a defective vehicle. The claim that a cyclist caused him to veer off the road was not supported by evidence. PW4 was not helpful towards this end. The Court of Appeal in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004** stated that:

"In her plaint and the amended plaint as well, the appellant had pleaded the doctrine of res ipsa loquitor…If a "matatu" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the

vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle."

34. In sum, the evidence by the respondent and her witnesses was cogent that the appellant was negligent as he drove the vehicle at high speed, lost control of the vehicle and veered off the road as to cause the accident in issue. The appellant failed to discharge his evidential burden to rebut the evidence by the respondent. I find that the appellant was negligent in the manner he drove the vehicle.

35. It is now opportune time to place the accounts of both sides on the good judgment of the court in order to apportion contributory negligence. It should be noted that contributory negligence is not based on any definite mathematical formula or precision. It is purely dictated by the circumstances of each case.

36. The circumstances of this case are that both the appellant and the respondent should bear the blame equally. Accordingly, I set aside the apportionment of liability by the trial court and apportion liability at 50%:50% between the appellant and respondent.

Quantum of damages

37. The **3rd and 4th grounds** of appeal relate to quantum. It was the evidence of Pw2 that the respondent sustained the following injuries i.e. swollen left eye, cut over the knees, fracture of the femur. It was his evidence that at the time of examination the femur had healed with thickening end shortening of the leg by 2 inches. The doctor stated that the head injuries had healed without any neurological aspects. He produced the medical report as **Pexh1.**

38. The trial magistrate relied on the case of **Sbi International Holdings(AG) V william Ambuga Ongeri [2018] eKLR** where the plaintiff suffered chronic dislocation of the left hip and fracture of the femoral head as well as bruises of the right thigh. His leg was shortened by 5 cm. the court upheld an award of Kshs. 800,000/= on account of general damages.

39. The cases cited by the appellant only relate to fracture and bruises of the leg hence the quantum ranging from Kshs 250,000/= to 350,000/=. In **Njenga Karanja V Trans Ami Transporters (K) Ltd [1999] Eklr** the plaintiff suffered Fracture of the right leg below the knee, above the knee and in the thigh. The leg is shorter and the thigh bone bends outside. The doctor found a 3 cm shortening of the right lower limb mainly confined to the thigh region, 2 cm wasting of the right thigh and 3 cm of the right leg. In a decision delivered on 4th day of October, 1999, Nambuye J. (as she then was), assessed general damages at Kshs. 750,000/=

40. In **CHARLES MATHENGE WAHOME v MARK MBOYA LIKANGA & 2 others [2011] eKLR** the plaintiff suffered a fracture of the femur, the fracture united and healed well, but with attendant shortening of the leg by 2.5 cm. The court awarded the Plaintiff Kshs. 1,500,000/00 for pain, suffering and loss of amenities.

41. Being guided by the foregoing decisions, and the injuries sustained by the respondent, the award of Kshs. 800,000 made by the trial magistrate was fair compensation in general damages. I uphold it.

42. Special damages at Kshs. 3,048/= was not challenged. It was proved. I award it accordingly. Costs on the net award in the lower court is awarded to the Respondent.

43. The upshot is that only liability changes to 50%:50% between the parties. The awards herein shall be subjected to this liability apportionment.

44. Given the result of the appeal, each party shall bear own costs of the appeal. It is so ordered.

Dated, signed and delivered at Milimani this 7th day of May 2020.

F. GIKONYO

JUDGE

Representation: -

1. M/s Kithome L. Mutinda & Co. Advocates for the Appellant,

2. John Muthomi & Co. Advocates for the Respondent.