REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 3 OF 2020

PAUL LAWI LOKALE...APPELLANT

VERSUS

AUTO INDUSTRIES LIMITED.................................... 1ST RESPONDENT

JANATHAN CHARO KALAMA .... 2ND RESPONDENT

(Being an appeal against the judgement of Hon. D. Wasike, Serior Resident Magistrate in CMCC NO. 375 of 2018 delivered on 17th December 2019)

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo Advocates for the Appellant

C. B. Gor & Gor Advocates for the Respondent

JUDGEMENT

The appellant commenced the instant suit vide a plaint dated 19/11/2018 wherein he sought judgement against the Respondents for special and general damages. The appellant's suit is premised upon the tort of negligence arising out of a road traffic accident. The evidence adduced before the trial court demonstrate that on or about the 30.06.18 **Mr. Lokale** was travelling as a pillion passenger on Motor Cycle Registration Number KMDE 362M along Tsavo Road when on reaching Chakama area, the 2nd respondent **Mr. Charo** negligently drove motor cycle Registration Number KMJE 461H belonging to the 1st defendant Auto Industries that it lost control, veered off its lane and collided the motor cycle he was boarding. He alleged that he suffered severe injuries and damage as a direct result of the accident.

On the 20.02.19, the respondents entered appearance and filed their statement of defence. The defendants denied all the averments made by the appellant in his statement of claim and in turn alleged that it was rider of Motor Cycle KMDE 362M who was negligent.

The matter was then heard on 29/05/2019, where the parties agreed that the issue of liability be determined in CMCC No. 375 of 2018 and apply to CMCC No. 380 of 2018 and CMCC No. 401 of 2018. The issue of quantum was to be determined separately. In terms of liability, the Learned **Hon. Dr. Wasike** in her Judgement in Civil Suit No. 375 of 2018 delivered on the 17th day of December 2019 determined that both aforementioned riders were equally to blame for the accident apportioned at 50% between the appellant and the respondent. The Hon. Court went ahead to assess both general and special damages amounting to Kshs.100 000.00 and Kshs.2,550.00 respectively, jointly and severally against the respondents.

Being aggrieved by the Learned Magistrate's findings, the appellant timeously filed the instant appeal. The grounds of appeal as couched in the Memorandum of Appeal are such that:

> ***1) The Learned Magistrate erred in fact and law by applying the wrong principles in finding the appellant who was an innocent pillion passenger 50% liable when there was no evidence on record to support such finding.***
>
> ***2) The Learned Magistrate erred in fact and law in failing to appreciating the evidence of the appellant thereby leading to a miscarriage of justice.***
>
> ***3) The Learned Magistrate greatly misdirected herself in ignoring and treating the submissions of the appellant on liability very superficially thereby arriving at the wrong conclusion on liability.***
>
> ***4) The Learned Magistrate erred in law and in fact by not considering the evidence and subsequently and submissions presented***

before her on liability by the appellant consequently apportioning an erroneous assessment on liability against the appellant.

5) The Learned Trial Magistrate's judgement is against the weight of evidence and law placed before her consequently she proceeded on wrong on wrong principles when assessing liability to be apportioned to the Appellant.

The appellant therefore asked the court for the following orders:

a) This appeal be allowed with costs.

b) The judgement of the Honourable D. Wasike be set aside and the court herein be pleased to reassess the liability apportioned against the appellant.

Submission on Appeal

The appellant in his submissions reiterated that as per the evidence adduced the defendants were solely to blame for the accident. It was averred that the appellant had discharged his evidentiary burden and the same had clearly shifted to the respondents since the respondent produced no shred of evidence to rebut the Appellant's position.

The appellant noted that he was a pillion passenger on m/c reg. no. KMDE 362M and not the rider and that he was not in any control of the said motorcycle. The appellant faulted the learned trial magistrate's conclusion that the 2nd defendant is 50% to blame for the accident and the rider of motorcycle KMDE 362M was also 50% to blame for the accident. The Learned Counsel for appellant argued that there is no finding or any evidence on record that the appellant can be said to have contributed to the occurrence of the accident as a passenger. It was therefore submitted that the trial court's conclusion that the damages are subject to 50% liability is erroneous and against the principles of justice.

To support above position, the appellant relied on **Civil Appeal No. 94 Of 2011 David Kiprotich Bor -Vs Kassim Maranga & Celtel Kenya Ltd T/A Zain Kenya Ltd; Civil Appeal No. 60 Of 2016 Gilanis Super Market Richard Kiplangat Chebon -Vs- Kennedy Swanya Mwayaka; Hcca No. 5 Of 2016 Stellah Muthoni V Japhet Mutegi [2016] eKLR and Civil Appeal No. 11 Of 2017 Beatrice Barasa & Another V Thomas Kiplagat Lobeta & Another [20191 eKLR.**

The Learned Counsel for the appellant submitted that the trial court erred both in law and in fact by not considering the evidence and submissions presented before her on liability by the appellant consequently apportioning an erroneous assessment on liability against the appellant hence the appeal should be allowed with costs.

Respondents' Written Submissions

The Learned Counsel for the Respondent humbly submits that the Memorandum of Appeal dated 22nd January 2020 and filed in the High Court at Malindi on the same day has been filed out of time without any leave from this Honourable Court and should consequently be dismissed with costs. The appellant has not complied with Section 79 G of the Civil Procedure Act Cap 21 Laws of Kenya. To that end the Counsel for the respondents' relied upon the Supreme Court decision in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR**.

This court was therefore invited to struck out the instant appeal for having been filed without leave of court and that this Honourable Court cannot be moved to remedy an illegality. The respondents hold the view that the Learned Trial Magistrate did not err in any way in her judgment dated 17th December 2019 and they therefore submit that the said judgment is not at all erroneous.

On re-evaluation of evidence, the respondents' humbly submitted that the Appellant failed to prove his case on a balance of probabilities as required by law. According to the respondents', negligence cases, like the instant suit that the burden of proof entirely rests on the Plaintiff as enunciated in the celebrated case of **Blyth v The Company of Proprietors of the Birmingham Waterworks** cited by the Court in **Kenya Power & Lighting Co. Ltd V Mathew Kabage Wanyiri [2016] eKLR** where it was held (inter alia):

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do...."

The respondent also relied on the **Halsbury's Laws of England** to enunciate on the plaintiff must prove. It was written therefore that:

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a casual connection must be established."

It is argued by Learned Counsel for the respondents that Section 107 (1) of the Evidence Act envisages that the onus of proof resides with the appellant who had invoked the aid of the law that he substantially asserted in the affirmative of the issues to tender credible evidence and call all the relevant witnesses to maintain his claim as against respondents in order for liability to attach against the Respondents.

The respondents' urged this Court to be guided by the Court of Appeal in **Maria Ciobotaru M'mairanyi & Others vs Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA 280** which was cited in the case of **Patrick Omutere V Accurate Steel Mills Limited [2019] eKLR** where the Court held as follows:

"Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be case on the person who wishes the court to believe in its existence."

The respondents dismissed the appellant's evidence that his evidence was uncontroverted and went on to humbly submit that it is not enough to say that the plaintiff appellant's evidence is uncontroverted and unchallenged.

To support this position, Counsel invited the court to adopt the case of **Evans Mogire Omwansa V Benard Otieno Omolo & Another 2016] eKLR**. It is therefore argued that in the present case, there is enough rebuttal evidence to warrant the dismissal of the appellant's appeal as the appellant failed to prove his case against the respondents.

In the respondents' view, according to the evidence that was received at the trial court, the two witnesses that testified on causation of the accident sharply contrasted one another. The plaintiff testified as PW1 and stated in his examination in chief that the motorcycle registration number KMJE 461H was coming from the opposite-5 direction and was on the wrong side of the road that is on the left side. PW1 later testified on cross examination and stated that motorcycle registration number KMJE 461H was coming from the ride side and that they had just navigated a bend.

On the other hand the respondents' also referred to the evidence of the Police Officer who testified for the appellant and it was agreed by consent that the evidence he gave in CC 380 of 2018 will also be used in the instant suit. The Police Officer told the court that motorcycle registration number KMJE 461H was on the right lane and that there was no bend where the accident happened. See page 88 of the record of Appeal in **HCCA 4 of 2020**

The Learned Counsel therefore holds the view that in light of the foregoing, there were glaring inconsistencies in evidence of the Plaintiff who testified as PW1 and the evidence of the Police Officer who visited the accident scene. Further that the Plaintiff alleged that motor cycle registration number KMJE 461H veered off its lane and encroached on the lane where motorcycle registration number KMDE 362M was a collided with it from the evidence that the Appellant tendered the trial court was left in doubt whether motorcycle registration number KMJE 461H veered off to the left or right since the eye witness and the police officer who visited the scene contradicted each other on this fact. Furthermore, the court doubted whether or not there was a corner at the point where the accident happened since the two witnesses who were called by the appellant equally contradicted themselves on this fact.

The respondents took the view that it would have been easier for the appellant than to call credible eye witnesses to shed light on these inconsistencies or for the police man who visited the scene of the accident to have produced a sketch plan to assist the court to make a determination in regard to the contradictory evidence. An inference can therefore be drawn that the witnesses were not called or the sketch plan was not produced because if they were produced, they would negate the appellant's case. In support of this position, Counsel cited the case of **Timsales Limited V Harun Thuo Ndungu [2010] eKLR.** The Learned Counsel for the respondents' therefore urge this Honourable Court to uphold the trial court's finding that when a party fails to produce a crucial document, where in this case was the sketch map of the accident scene, the court infers that the document would have been averse to the Appellant.

According to the Learned Counsel for the respondents' the evidence of PW1 and that of the police officer, suggest that the appellant voluntarily boarded motorcycle registration number KMDE 362M with another pillion passenger aboard the same motorcycle in clear violation of the law. Further that, in light of Rule 7(b) the National Transport and Safety Authority (Operation of Motorcycles) Regulations, 2015, it expressly prohibits boarding of a motorcycle that already has a passenger and by offending the said provision it is evident that the Appellant was the author of his own misfortune. In light of the foregoing, Learned counsel for respondents' holds the view that the appellant came to this court of equity with unclean hands expecting them to be sanitized but we humbly urged Court not to be used as a conduit for sanitizing a party's hands who blatantly breaks the law.

Further, counsel referred to the evidence of PW1 who told the court in cross-examination that there was no other vehicle on the road but they still could not swerve to avoid the accident. In that regard, learned counsel argues that the only inference that can be drawn from these facts is that the excess weight courtesy of the extra pillion passenger made it difficult for motorcycle registration number KMDE 362M to take any evasive action in order to avoid the accident. Counsel therefore urged the court to find that the fact that the Appellant was aboard motorcycle registration number KMDE 362M gravely affected the said motorcycles ability to swerve in order to avert the accident.

On liability, the Counsel for the respondents' submitted that the appellant has failed to discharge his legal burden of proof to establish that the accident was caused as a result of the 2nd respondent's negligence.

Learned counsel urged this Honourable Court to be guided by the case of **Rosemary Kaari Murithi V Benson Njeru Muthitu & 3 Others [2020] eKLR** where the court rendered itself thus:

"I am also inclined to find that a person who voluntarily gets on a boda boda when he/she finds that there are more than one should equally be held accountable and hence culpable."

The Learned Counsel for the respondents also urged this court without prejudice to the foregoing to apportion 50% liability upon the appellant for voluntarily boarding motorcycle registration number KMDE 362M with another pillion passenger aboard the same motorcycle in clear violation of the law. Furthermore, we have also shown that these said actions prevented the said motorcycle from swerving to avert the accident despite the road being clear.

The Learned Counsel for the respondents also submitted on the failure by the appellant to apply for certified copy of the decree, the judgment and include it in the record of appeal. It is humbly submitted that this appeal ought to be struck out for failing to apply for a certified copy of the decree appealed failing to file the said decree as part of the record of appeal. It is argued that the decree is an integral part of an appeal that has been filed at the High Court against a decision from the subordinate court and without the decree or order appealed from in essence

there is no appeal. Counsel relied on Order 42 Rule 13(4) of the Rules which envisages that the record of appeal will not be complete without the decree or order appealed against. On this ground, reliance was sort in the case of **Ndegwa Kamau Tia Sideview Garage V Fredrick Isika Kalumbo (2016) KLR**. Further, it is argued that the appellant has also failed to include in the record of Appeal a certified copy of the Judgment of the trial magistrate dated 17 December 2019. Counsel therefore urged this court to find that the appeal lacks merit and dismiss and/or struck out the same with costs to the respondents.

Analysis and Determination.

First off, the respondents have raised a procedural issue in terms of Section 79G of the Civil Procedure Act. The Learned Counsel for the Respondent humbly submits that the Memorandum of Appeal dated 22nd January 2020 and filed in the High Court at Malindi on the same day has been filed out of time without any leave of the court and should consequently be dismissed with costs. Nevertheless, the evidence on record preponderates heavily against the respondents' position. As accurately pointed by the Learned Counsel for the Appellant, Order 50 Rule 4 of the Civil Procedure Code Act addresses the issue as regards when the court's time does not run. It envisaged therein that:

> ***"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the Thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:***

Provided that this rule shall not apply to any application in respect of a temporary injunction."

I note that the impugned Judgement herein was entered on the 17th of December 2019 which amounts to three days before time stopped running. The record shows that the appeal herein was filed on the 22nd of January, 2020, which counts up to eight days after the time resumed running excluding Saturdays and Sundays. In that regard, the appeal was filed within the 30 days' time frame. Consequently, the respondents' case on this limb fails.

Turning to the question of whether the appeal ought to be stuck out for the failure by the appellant to apply for a certified copy of the decree appealed against and failure to file the said decree as part of the record of appeal. The Learned Counsel for the respondents' contention is that the decree is an integral part of an appeal and without it, the appeal itself doesn't exist. Both Counsels placed reliance in order 42(13)(4)(f) which provides that:

> ***"Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party, that is to say:-***
>
> > ***(a) the memorandum of appeal;***
> >
> > ***(b) the pleadings;***
> >
> > ***(c) the notes of the trial magistrate made at the hearing;***
> >
> > ***(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***
> >
> > ***(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
> >
> > ***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***

Provided that—

> ***(i) a translation into English shall be provided of any document, not in that language;***
>
> ***(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).***

The Learned counsel for the respondents' further relied on the case of **Ndegwa Kamau T/A Sideview Garage v Fredrick Isika Kalumbo (2016) eKLR** in which the learned judge held that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal. The court further propounded that there was no evidence that the appellants had applied for the decree appealed against. The Learned judge went on to find it was a mandatory requirement, procedural provisions and the omission of the decree in the record of appeal fatal.

Conversely, appellant holds the view that the same doesn't make it mandatory to attach both the judgement and the decree hence the respondents' contention ought not to hold water. The Learned Counsel for the Appellant has sort refugee in the case of **Nyota Tissue Products -vs- Charles Wanga Wanga & 4 Others (2020)** which I am also inclined to agree with. The Learned Judge while declining an invitation to struck out a matter which bore similar circumstances as the case at hand, held that:

> ***"The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order <u>or</u> decree appealed from" and does <u>not</u> make it mandatory to attach the judgment <u>and</u> the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet***

Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."

I share similar sentiments with the Learned Judge in the foregoing authority cited by the Counsel for the appellant. To my mind, the use of the conjunction **"or"** suggest that litigants are not mandatorily obliged to attach both the judgement and the decree. Further, it is my view that a decree for purposes of an appeal being an extract of the decision appealed against, it would not be said to be an improper procedure when a litigant attaches the judgement appealed against and omits to do the same with the decree of the court. I have also looked into the definition of a **"Decree"** as provided in terms of Section 2 of the Civil Procedure Act, Cap 21, Laws of Kenya. It is defined as under:

> ***"decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91 but does not include— (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default:***
>
> ***Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;"***

Therefore, the way I understand it a decree as defined under Section 2 of the Act is a formal expression which determines the interest of both parties in a conclusive manner with regard to the disputed claim. Thus in this appeal, appellant sued the respondents before Malindi Senior Resident Magistrate Court seeking damages arising out of negligence and breach of the duty of care which, resulted the appellant sustaining personal injuries. After hearing all the evidence and submissions, the Learned trial Magistrate ruled in favour of the appellant on liability and assessment of the final decision of the trial Court regarding the reliefs sought between the appellant and the respondents is a decree in my interpretation.

Similarly, the impugned Judgment indicates the appellant commenced the suit by factoring a plaint on the claim against the respondents. In turn, the respondents filed a defence to the claim thereafter, the Learned trial Magistrate heard both parties on the issues for determination. In her Judgment substantive rights of the parties were duly determined with regard to the claim.

The disputed matter was conclusively determined with finality as far as the Court is concerned. What the statute requires to be put in writing is generally a final decree as contemplated in light of Section 2 of the Act which settles all the issues and controversies between the parties to the suit. In the instant case what seemed not to have been done was the assessment of costs and interest on the sum awarded by the Learned trial Magistrate.

As regards assessment or taxation of costs in a suit, I take judicial notice that Courts have been unable to develop clear guidelines to apply procedural requirements timeously on assessment of costs and issuance of a final decree.

Nevertheless, I do not want to be misunderstood if the appellate Courts were to strictly enforce the provision on attachment of a certified decree of the Court, before an appeal is filed and determined, there is a likelihood of it not being processed expeditiously and in a timely manner. There is always wastage of time within the Court administration directorate to extract decrees may it be a preliminary decree or final decree in the concluded suits. Therefore, in my view even when a requirement is regarded as mandatory because of its significance, the failure to attach a certified copy of the decree to an appeal should not invalidate it for reasons of non-compliance with the provisions. In any event the Court has the full advantage of the Judgment and with that there has been substantial compliance.

I consider in the circumstances similar to this appeal Courts have a right to construe the provision and be inclined to hold that requirement to be directory if non-compliance causes no substantial prejudice or injustice. Likewise, the instant appeal I do hold the requirement to be directory. The Court must examine whether the lack of a certified copy of a decree affects the fairness of the appellants' appeal and the right to be heard as postulated under Article 50 of the Constitution. It bears emphasis that the appellants base their appeal on liability and award of damages. It thus affords a stronger reason to say there is a Judgment which is a determination putting an end to the action by an award or redress to the appellant against the respondent.

It is however, evidently incorrect to assert as the respondent does in his submissions that in those circumstances the appeal should be struck out for being fatally defective.

I am therefore in agreement with the proviso in the foregoing piece of law which seems to suggest that in the event that there have been hiccups in acquiring a certified or formal decree or in the absence of the same due to its non-existence, the judgement singly suffices since it encapsulates all the contents of a decree. Thus, in my view supports the viewpoint that Order 42 rule 13(f) of the Civil Procedure Rules does not make it mandatory to attach the judgement and decree.

I take it that it would be contrary to the letter and the spirit of the Constitution of Kenya 2020, to strike out the appeal in these circumstances. Article 159(2)(d) provides for the principle of substantive justice without prioritizing procedural technicalities. I, therefore, decline to grant the respondents' the order that the appeal be struck out for having omitted to include the decree in the record of appeal and hold that the judgement appealed against alone as attached by the appellant fulfils the purpose of the decree in question.

The learned counsel for the appellant contends that the learned magistrate's finding that the appellant a pillion passenger bears 50% liability while there was no evidence to support such a finding. Counsel is adamant that his client discharged his evidentiary burden and the same had shifted to the respondent who produced no shred of evidence to rebut the appellant's testimony. The Counsel for the appellant's narrative is that the appellant was just a pillion passenger who possessed no control of the motorcycle registration no. KMDE 362M. Therefore, in the counsel's view, the apportionment of 50% liability between the Appellant and respondent was erroneous since no evidence was let to show contributory negligence.

Conversely, the Learned Counsel for the respondents argues that the appellant failed to discharge his legal burden of proof to establish that the accident was caused as a result of the 2nd respondent's negligence. Learned Counsel on a second thought urged this court to hold the appellant equally Responsible for the accident since he voluntarily boarded motorcycle reg no. KMDE 362M with another pillion passenger in blatant disregard of the law and his action precluded the said motorcycle from avoiding the accident despite the road being clear.

I must admit that the learned trial magistrate was faced by a very difficult time trying to reconcile the contradictory evidence available on record as far as liability is concerned. On one hand, the appellant asserted that he was a pillion passenger on motorcycle Reg. KMDE 362M together with **Yakub** and driven by **Baraka Kahindi** (who died on the scene) travelling towards Tsavo along Tsavo-Chakama Road around 6 pm. The rider had his lights fully on while riding on the left side of the road. He asserted that motorcycle registration No. KMJE 4M1H appeared from the opposite direction at a very high speed. He told the court that it was on the wrong side of the road which is also the left side and collided with Motorcycle 362M aforementioned.

However, upon cross-examination, the appellant contradicted himself by saying that the other motorcycle 4M1H was on the right side of the road, and they have just navigated a bend when they saw it coming. He maintains that the motorcycles collided head-on. He asserted that there was no other motorcycle in the road which begs the question as to why the rider of the motorcycle he boarded did not attempt to swerve to avoid the accident.

The evidence of **PW2 PC Taliyow Omar**, the police officer who visited the scene of the accident intimates that on the material date, a report was made to him that accident had occurred at Chakama area along Tsavo Road concerning the said motorcycles. His evidence was that the rider of Motorcycle KMJA 461H veered onto the right lane and collided head-on with motorcycle registration number KMDE 362M. Whereas the evidence of the appellant said they had just navigated a bend, PW2, the road had no bend, was under construction and had no yellow line. He further stated that the wreckage was on the left side on the point of collision and the left side towards Tsavo direction. It was further averred that there were no eyewitnesses present at the scene aside from the passengers who asserted that the motorcycle was being driven at a high speed. He placed the blamed on the rider of Motorcycle KMJA 461H for the accident but he claimed to have not charged him as was seriously injured. He claimed to have sketched the scene so he did not furnish the same to the court.

Given the above evidence, there is no dispute that an accident transpired. I agree that the sketch map would have painted a better picture of the scene of the accident and how it ensued. This makes it difficult for the court to decide on the contradictory evidence of the appellant and that of **PW2**. The question of the bend was not settled as there were two distinct positions between the appellant and PW2. I agree with the learned magistrate that certainty in that piece of evidence would have settled as to whether the Appellant indeed saw the Motorcycle registration no. KMJA 461H coming from the wrong direction. However, what is clear from the evidence of both witnesses is that Motorcycle registration no. KMJA 461H was overspeeding which is also supported by the extent of the impact that resulted in the collision.

It is noteworthy that the respondents have also a very important issue that a motorcycle is allowed to carry a single pillion passenger. The failure by the rider of the motorcycle registration no. KMDE 362M to swerve in a bid to avert collision can be attributed to the fact that he had two passengers on board and the overspeeding of Motorcycle registration no. KMJA 461H. This also supported by the evidence showing the gravity of the impact caused by the collision which saw the rider of the motorcycle registration no. KMDE 362M's helmet break and lose his life at the scene. If really motorcycle registration no. KMDE 362M was slow as asserted by the Appellant, there could have been a considerably reduced impact of the collision. This debunks the evidence by the appellant that he saw the rider of Motorcycle registration no. KMJA 461H coming at high-speed but failed to swerve to avoid the collision, questionable.

I'm inclined to agree with the Learned Counsel for the respondents that the appellant by voluntarily boarding motorcycle registration no. KMDE 362M with another passenger violated the law and the same could have precluded the motorcycle from swerving to avert the accident. I'm also unable to fault the Learned Magistrate's findings that both motorcycle registration no. KMDE 362M and Motorcycle registration no. KMJA 461H were equally to blame for the accident. The orders on the quantum of damages and liability as made by the learned trial magistrate shall stand. The result therefore is that in my view, this appeal lacks merit and deserves to be dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER , 2020

....

R. NYAKUNDI

JUDGE

In the presence of

1. Atiang holding brief for C. B. Gor advocate for the respondent