REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 19 OF 2017

EDWIN CHIROTO MANDERA.....APPELLANT

VERSUS

MUREITHI CHARLES .....1ST RESPONDENT

DANIEL KIMUTAI CHERUIYOT.....2ND RESPONDENT

(Being an appeal against the judgment delivered by Hon. L. Kassan (Senior Principal Magistrate), at Mavoko law courts, in Civil Suit No. 468 of 2014 on 23RD January 2017)

BETWEEN

EDWIN CHIROTO MANDERA.....APPELLANT

VERSUS

MUREITHI CHARLES.....1ST RESPONDENT

DANIEL KIMUTAI CHERUIYOT.....2ND RESPONDENT

JUDGEMENT

1. This appeal arises from the decision of the learned trial magistrate in Mavoko PMCC No. 468 of 2014 which was instituted by the Appellant herein as the Plaintiff against the Respondents herein as the defendants.

2. In those proceedings the appellant pleaded that the 1st Respondent was the registered owner of motor vehicle reg. no. KAX 661Z, while the 2nd Respondent was the actual but the unregistered owner and/or the driver of the said vehicle or had an insurable interest therein.

3. It was pleaded by the appellant that on or about 13th December, 2013, he was a passenger in the said vehicle along Ngurunga road when the said vehicle was so negligently and/or carelessly driven that it lost control and overturned as a result of which the plaintiff sustained severe bodily injuries and suffered loss and damage. He proceeded to plead the particulars of negligence, injuries and special damages.

4. In support of his case, appellant called **P.C. Kiboi**, who testified as PW1 and produced a police abstract as P. Exhibit 1. He stated that the Appellant (PW2) was a passenger in a lorry registration number KAX 661Z (‘***the lorry***’) and was on 13th December, 2013 involved in a traffic road accident along Murunga Road. According to him, the Appellant was also issued with a P3 form which he produced as exhibit. According to his evidence, his charges for attending court was Kshs 5,000.00 and he produced a receipt in support of the same. It was his evidence that though a passenger may be blamed for an accident, depending on the circumstances, in this case he could not tell who was to blame as the case was under investigation.

5. On cross examination, PW1 acknowledged that he was not an investigating officer in the accident though he had a sketch plan of the scene. He testified that Murunga road is a rough road and that at that time roads were slippery since it was raining. He confirmed that it was a truck that was involved in the accident though he could not tell if it was loaded but later changed his statement and indicated that the lorry was loaded though he had not checked. In his opinion, it would have been impossible for it to have been over-speeding. According to his

evidence, the passenger was behind the truck and not in the cabin.

6. The Appellant (PW2) produced the report made by **Dr Wokabi** as exhibit by consent. According to him, on 13th December, 2013 he boarded lorry reg. no. KAX 661Z as he was coming from work. According to him, it had rained and the driver drove the said vehicle carelessly and the vehicle lost control, veered of the road and overturned. In his statement which he adopted as his evidence in chief, he stated that he sustained serious injuries as a result of which he was taken to Kenyatta National Hospital where he was admitted for approximately 2 months. He therefore blamed the driver of the said vehicle for the accident having allowed him to board the said vehicle and driving the same negligently. It was his evidence that he boarded the said vehicle with the driver's permission. According to him, since you have to step onto the tyre for you to board the trailer, one could not board when the vehicle was moving.

7. In cross examination he stated that the vehicle was a tipper truck and they were a number of people behind it. It was his evidence that they were working in different places and though he knew some people he did not know all of them and that it was the driver who told him to board at the back of the truck. He however admitted that the work of a tipper is to carry goods and that there were no safety belts. He stated that he did not know the driver of the lorry but he came to know of one Charles Mureithi after the accident though he denied that he was the one who hired him.

8. In re-examination he stated that they were many in the vehicle and that he knew 5 of the people who were with him. He however did not know the 1st Defendant though they used such lorries while going to work in the quarry.

9. At the close of the plaintiff's case, the defence called **Daniel Cheruiyot** (DW1) who in his statement stated that he was employed by **Mureithi Charles** as a driver of one of his trucks. According to him, on 13th December, 2013, he was with his turnboy, Titus Kipkorir going to a quarry to collect pozzolana for Athi Stores Limited. According to him, the road was under construction and on their way back, the vehicle was laden with raw material and metal bars and it was raining.

10. Without their knowledge, some people climbed on top of the truck which was being driven at approximately 10 km/hr. Due to the rain, the open spaces left by the contractor were filed with water as a result of which the vehicle's from wheels entered one of the open culverts thereby causing the truck to lie on its side. It was his evidence that they then heard screams coming from the back of the vehicle and they got out to check whereby he found that some people were thrown on the ground together with the pozzolana. He later learnt that the said people were quarry workers one of whom was badly injured and died on the spot while some others sustained injuries and were rushed to the hospital by good Samaritans. After the accident he contacted traffic police officers from Athi River Police Station and the vehicle was towed to the police station. It was however his evidence that he was never charged with any offence and he blamed the people who climbed on the back of the truck as it was not meant to carry passengers. He also blamed the road contractors for not marking the road.

11. In his oral evidence, he stated that it had rained a lot and repairs were being done on the road and that culverts had been put halfway. On reaching a corner which he had earlier passed the lorry got into a hole and overturned. According to him, he was not aware that side had been dug. He and his turn boy struggled to get out and upon so doing, he heard screams and saw someone bleeding and he helped him. In his testimony, many people had boarded the lorry but he knew none of them as he did not carry people especially when the lorry was full and further that there was in fact no place for passengers when the lorry is full. He stated further that he could not see who had boarded since the side mirror had mist due to the rain. In his evidence, he did not know how the appellant got into the vehicle as he did not allow him to board the lorry. It was however possible for the appellant to board from the back door since he was driving at a low speed.

12. On cross-examination, he stated he had used the road for three (3) years and on that day, that was his third trip. Although the road was slippery, it was passable. According to him, the lorry had stairs to the driver's seat. He disclosed that though there are no *matatus* on the said road but people did not use tippers as a mode of transport. He maintained that there were no markings to show that the area was dug.

13. In her judgement, the Learned Trial Magistrate found that the vehicle in question was a lorry/tipper and was not a PSV hence the Appellant did not pay any fare. In other words, the lorry was used to carry goods and not passengers. According to the court since there was neither sitting space nor seat belts, at the back of the lorry, by standing on the goods aboard a lorry the Appellant exposed himself to a lot of risk. According to the court, the Appellant did not know the driver of the lorry as they did not work in the same company. Further the Appellant did not bring those who were in charge of the road construction to testify in the mater.

14. Accordingly, the Appellant failed to prove negligence on a balance of probability and his case failed as the Respondents did not owe him a duty of care and his presence on the vehicle was unknown. Accordingly, the suit was dismissed

15. In the submissions filed on behalf of the appellant it is contended the Magistrate misdirected himself on the law and on the principles of contributory negligence for the reason that the fact that there were no seats, and that the appellant was standing/sitting on goods on board a lorry, had nothing to do with the 2nd Respondent losing control of the vehicle, getting into the hole and overturning. He further contended that the Magistrate misdirected himself on the law and on the principles of contributory negligence by stating in second paragraph of his judgment that "*the plaintiff did not bring those in charge of road repairs in order to challenge the defendant's testimony as to the state of the road and whether there were sign post or not."* It was argued that the Appellant neither mentioned nor blamed those in charge of the road repairs in his testimony. That it is in fact the 2nd Respondent who mentioned the road repairs and blamed the person in charge for the poor condition of the road and that as such, the learned magistrate cannot blame the Appellant for not calling the person in charge of the road repairs to testify before court.

16. It was contended that the Magistrate misdirected himself where he stated that the subject motor vehicle was used to carry goods and not passengers. That no evidence was adduced in that respect. It was further argued that t*here was no notice or warning displayed on any part of the lorry that the driver was expressly forbidden to carry any passengers. That the* fact that the vehicle was a Lorry that had no seats at the back could not be translated to mean that the driver had no authority to carry passengers. It is the Appellant's argument that as long as the driver of the Lorry was ready and willing to give the passengers a lift; and there being no warning that the driver could not carry passengers; and the driver having the authority to use the vehicle in the performance of a task or duty delegated by the owner of the vehicle, then by virtue of being on board the lorry at the time of the accident cannot connote any contribution of negligence to the Appellant and as such the

Respondent should have been found wholly to blame for the accident and injuries sustained by the Appellant. That the fact that the subject motor vehicle was not a passenger service vehicle and that the Appellant did not pay any fare were irrelevant for all purposes of apportioning liability in the case. it was argued that the 2nd Respondent also confirmed that he was aware that the road that he was driving on was under construction and that the culverts were halfway put and further that he confirmed and admitted that it was raining a lot and the road was a rough road but he decided to drive on the said road anyway.

17. It was contended that the Magistrate misdirected himself when he stated that *"it is a fact that there is poor visibility on a rainy day. This makes it difficult for a driver to see a man boarding his lorry form behind".* Pointing out at the 2nd Respondent's testimony thus "*you could not see who had boarded…I do not know how he got into the motor vehicle",* it was submitted that it was clear the 2nd Respondent was aware of the passenger on board his lorry only that he could not identify who they were.

18. The Appellant contended that the magistrate failed to consider his evidence that the driver permitted him to board the lorry. That to confirm that he was so permitted, he continued to testify that, it is difficult to get on board the said motor vehicle while it is moving, the reason being that one has to step on the rear tyre in order to get on board the said motor vehicle. It was in that regard submitted that the said testimony was corroborated by the 2nd Respondent where he testified that the lorry has stairs and only climbs to the driver's seat. That it is untrue for the 2nd Respondent to state that he was not aware of the Appellant and other passengers who were on board his said motor vehicle. That it is clear from the Appellant's testimony that they were several people on board the lorry. That his testimony in that regard was corroborated by the 2nd Respondent. It was submitted that it is not possible to fail to notice a number of passengers on board a motor vehicle especially when it is an open lorry as the one in this case.

19. It was submitted that it is not in dispute that there was an accident involving the lorry and that the Appellant suffered injuries as a result of the said accident. That it is further not in contention that the Appellant did not contribute in any way to the occurrence of the suit accident and as such no liability could be apportioned to him. It was expressed that it is unclear how the 2nd Respondent could not notice the passengers yet it was stated that the accident occurred at 3:30 PM as per the police abstract produce before court, that the lorry was driven at 10 KPH that there were many passengers on board and that the lorry had an open rear part that was easy to see anyone on board.

20. In the alternative and on a without prejudice basis, it was contended that the Magistrate having found that the Appellant **contributed to the injuries he sustained,** he did not go on to assess the level of such contribution. In support of his submissions, the appellant relied on holding in **Gitobu Imanyara & 2 others v Attorney General [2016] Civil Appeal 98 of 2014**.

21. In conclusion, the Appellant urged that the trial court's judgment and orders issued on 23rd January, 2017 be set aside and/or varied as the court may deem fit; that the Respondents to bear the entire percentage of liability at 100% and in the alternative, the trial court's finding on liability be substituted with an order directing that the Respondents to bear a larger percentage of liability.

22. The Respondents on their part contended that the magistrate correctly evaluated the evidence and as a result, arrived at a just determination. In support of their case the Respondents relied on the case of **Phyllis Wairimu Macharia vs. Kiru Tea Factory [2016] eKLR**

23. It was submitted that the magistrate was correct in holding that the 2nd Respondent did not owe the Appellant a duty of care as it was impossible to know he was present at the back of the lorry given the weather conditions of that day and further due to the fact that the lorry was full of goods it was inconceivable that someone would board the truck from the rear hence the Appellant was the author of his own misfortune.

24. It was submitted that the general principles applicable to that defence was stated in the case of **United Millers Limited & Another vs. John Mangoro Njogu [2016] eKLR**.

25. It was submitted that by boarding the truck without knowledge or authority of the driver, and at the rear where the same was not by design capable of carrying passengers, he exposed himself to risk which he knew he ought not to. That no evidence was adduced to prove that the Appellant was an employee of the Respondents so as to lay an obligation on him to have travelled aboard the truck. That it was laid out in trial that the Appellant was unknown to DW1 and was under no obligation to have travelled aboard the truck. In this regard, the Respondents relied on the decision of **Jamal Ramadhan Yusuf & Another vs. Ruth Achieng Onditi & Another [2010] eKLR.**

26. It was submitted that in dismissing the claim against the Appellants, the Magistrate affirmed that he found that there was no evidence that the Respondents solely caused the accident and or substantially contributed to the same. That the evidence on record was insufficient to prove that the Respondents were negligent and caused the accident. It was submitted that in the light of the facts adduced at the trial it was incumbent upon the Appellant to comply with Section 107 and 108 of the ***Evidence Act***.

27. It was submitted that the Appellant failed to discharge this burden to prove negligence on the part of the Respondents and that the Appellant ought to be found 100% liable for assuming the risks and being the author of his own misfortune. It was urged that this appeal be dismissed with costs to the Respondents.

Determination

28. I have considered the submissions on record. 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."

29. 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.

30. 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."

31. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held 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."

32. In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved his case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

33. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

34. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

35. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

36. In this case, the appellant was clearly not an employee of any of the Defendants. In fact it was his evidence that he did not know the driver of the said lorry before the accident. He however insisted that the same driver permitted him to board the said lorry which was clearly overloaded. **Makhandia, J** (as he then was) dealt with similar circumstances in **Paul Kimani Muna vs. Raphael Ndaiga Gathaiya Nyeri HCCA No. 40 of 2006** where he held that:

> **"Since the appellant had denied that the respondent was its employee it was incumbent upon the respondent to adduce evidence to prove that he was the appellant's employee which he did not do. The subject vehicle having been a lorry and by the respondent's own admission was not authorised to carry passengers, it was extremely important that he proves that he was an employee of the appellant. If he was not an employee of the appellant and he jumped onto the subject motor vehicle knowing very well that it was not authorised to ferry passengers then the appellant owed him no duty of care. In other words, the respondent knew that the subject motor vehicle was not routinely used to carry people for hire or reward and if he accepted to be carried in it, he knew that he was taking a risk. The appellant owed no duty of care to a person who, like the respondent, were carried in his vehicle an unauthorised passenger."**

37. Similarly, in **Shighadai vs. Kenya Power & Lighting Co. Ltd & Another [1988] KLR 682** it was held that:

> **"In the instant case the plaintiff knew the accident vehicle was not ordinarily used in carrying people for hire or reward yet she boarded it. The vehicle had the colours of the 1st defendant, which the plaintiff was aware of and she knew it was assigned to the 2nd defendant for use in discharge of duties assigned to him or the defendant. By accepting or requesting to be carried in the accident vehicle she knew she was taking a risk."**

38. The decision in **Phyllis Wairimu Macharia vs. Kiru Tea Factory [2016] eKLR** is clear on the point. It was in that case held that:

> **"That the deceased may have been tempted to climb a moving vehicle is also apparent from the eyewitness' testimony that the vehicle was "not moving very fast" and that "it was moderate"…Viewed differently, I cannot see why the deceased should have attempted to travel at the back of an open lorry which was designed to carry tea leaves and not passengers. Irrespective of the circumstances under which the accident occurred, it was always going to be risky if not illegal for the deceased to travel at the back of a lorry which by design did not cater for passenger safety. That the deceased may have been tempted to climb a moving vehicle is also apparent from the eyewitness' testimony that the vehicle was "not moving very fast" and that "it was moderate."**

39. I associate myself with the position adopted by **Mativo, J** in **United Millers Limited & another vs. John Mangoro Njogu [2016] eKLR** that:

> **"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.* [4]"**

40. Considering that the only evidence on record as to how the Appellant found himself on the back of the lorry was the uncorroborated evidence of the Appellant which evidence discredited by the Respondent, the learned trial magistrate cannot be faulted for arriving in the decision she did. Whereas the Appellant contended that he was permitted by the driver of the vehicle in question, in his own evidence, he did not know who the driver was. That kind of evidence can only be explained on the basis that the driver did not in fact permit him to board the vehicle and that he did so due to lack of alternative means of transport and due to the state of weather at that time. He cannot, however, blame the Respondent for having chosen to take that risk.

41. In the premises, this appeal fails. I have however noted that the record of appeal was not properly prepared as it did not incorporate the judgement appealed against.

42. In the premises there will be no order as to costs of this appeal.

43. It is so ordered.

Read, signed and delivered in open Court at Machakos this 4th day of April, 2019

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey