REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HIGH COURT CIVIL APPEAL NO. 15 OF 2016

ONESMUS MACHARIA KIMANI.....APPELLANT

-VERSUS-

SK (minor suing through his father

and next friend LKK).....1ST RESPONDENT

HAMISI JUMA KOMBO.....2ND RESPONDENT

(Being an Appeal for the whole Judgment of the Chief Magistrate's Court at Malindi by Hon. Mrs. CM Nzibe R.M delivered on 29th day of April 2015 in Civil Suit No. 111 of 2012)

Kairu & Mccourt for the Appellant

Mr. Wambua for the Respondent

JUDGMENT

S K the 1st Respondent herein and a minor suing through his father and next friend LKK filed **Malindi CMC Civil Suit No. 111 of 2012** against Onesmus Macharia Kimani, the Appellant, by way of a Plaint dated 9th March 2012 seeking general damages for pain, suffering and loss of amenities. The suit was predicated upon the following facts: that on or about 30th April 2011 along the Malindi-Mombasa road at Patanani area whilst the 1st Respondent/Plaintiff was lawfully travelling as a fare paying passenger in Motor Vehicle registration number KAN 544B, the 2nd Defendant so negligently drove, managed and or controlled the said vehicle that it hit Motor Vehicle registration number KBA 810H from behind as a consequence whereof the plaintiff sustained severe injuries. The Plaintiff listed the particulars of negligence of the driver of Motor Vehicle registration number KAN 544B as:

i. Driving at a speed that was excessive and dangerous under the circumstances

ii. Driving carelessly and recklessly

iii. Driving without proper lookout and attention.

iv. Failing to slowdown, swerve, stop or otherwise so as to avoid the said accident.

v. Failing to have regard to the safety of his passengers in particular that of the Plaintiff herein

vi. Failing to heed to the Highway Code and the traffic rules.

vii. Failing to notice Motor Vehicle registration number KBA 810H in sufficient time so as to avoid the said accident.

viii. Driving in a zigzag manner

The Plaintiff placed reliance on the doctrines of Res Ipsa Loquitur and vicarious liability and further averred that the 2nd Defendant was charged with the offense of careless driving contrary to **Section 49(1) of the Traffic Act** and pleaded guilty vide Malindi Traffic Case 843/11.

Per the Plaint, a case was made out that as a consequence of the said accident the 1st Respondent/ Plaintiff sustained severe injuries, loss and damage for which he holds the defendants jointly and severally liable. The 1st Defendant was vicariously liable for the negligence of his authorized driver, agent and or servant the 2nd Defendant.

When the matter came up for trial, the first to take the stand was **PW1 Dr. Arthins Mwadena**. His testimony was that the Plaintiff sustained a soft injury of the back and left knee. On Cross Examination, he stated that he expected the Plaintiff was fully recovered.

PW2 Corporal George Karaka on his part produced the Police abstracts and confirmed the facts of the accident noting that the motor vehicle involved in the accident was indeed Motor Vehicle registration number KAN 544B which he confirmed was being driven by one Hamisi Juma Kombo and that it was registered to one Onesmus Macharia. He further confirmed that Hamisi Juma Kombo the 2nd Defendant was charged with the offense of careless driving contrary to **Section 49(1) of the Traffic Act**, found guilty and fined vide Malindi Traffic Case 843/11. On Cross Examination, he admitted that the case was investigated by Senior Sergeant Omwogo and that he did not have the police file but had the occurrence book.

The testimony of **PW3 LKK** was that he was a next friend of the Plaintiff who was a minor. He averred that the Plaintiff was injured on the left and on the hip, that it was the right ankle joint that was injured.

The Plaintiff **SK** testified as **PW4**. His testimony was that he was involved in a road traffic accident on 30th April 2011 along Malindi-Mombasa Road in vehicle registration number KAN 544B while seated at the front next to the driver with his brother. He further testified that the vehicle he was travelling in knocked the other from behind, the accident occurred at a flat place and that he was treated at Malindi District Hospital. On Cross Examination, he averred that he did not check the speed of the vehicle and did not seek to alight from the vehicle and that the road was flat so he could see ahead. The Plaintiff's testimony marked the close of his case.

From the Record of the Lower Court, at the close of the Plaintiff's case, the Defendants sought an adjournment to call their witnesses. At the next hearing on 10th September 2013, the Defence was still not ready proceed and they sought a further adjournment, raising issues of a moratorium and indemnity notice. The Court in that instance noted that the matter had proceeded for hearing on 12th February and 11th June 2013 and in both instances the issue of a moratorium and indemnity notice was not raised. This marked the close of the Defence case and the parties were directed to file their submissions.

Subsequently, by an application dated 27th September 2013, the 1st Defendant/ Appellant sought to re-open his case and be allowed to call his witnesses. As far as I can tell from the Lower Court's Record of typed proceedings, by a Ruling dated 18th March 2014, this request was acceded to. However, there is no evidence that the Defence used the lifeline it had been granted to good effect.

Consequently, having evaluated the evidence adduced by both parties and the submissions made on their behalf, the Learned Trial Magistrate found that the Plaintiff had proven his case against the Defendants on a balance of probabilities and went on to apportion liability at 100% as against the Defendants jointly and severally. She went on to award Ksh. 120,000.00/- as general damages and loss of amenities and Ksh. 2,500.00/- as special damages as well as costs.

Disgruntled with the whole of the judgement of the Learned Trial Magistrate, the Appellant/ 1st Defendant proffered the current Appeal vide a Memorandum of Appeal dated and filed on the 19th May 2016. The Court directed that the Appeal be disposed-off by way of written submissions which both parties subsequently filed and exchanged.

Appellants Submissions

Whilst the Appellant had raised nine grounds of appeal in his Memorandum of Appeal, Counsel for the Appellant coalesced them into two main issues for determination to wit: liability and quantum.

It was the Appellant's submission that the Learned Trial Magistrate's finding on Liability was erroneous as was the award made on quantum which was without due regard to the injuries suffered by the 1st Respondent; Judicial Authorities commensurate to the injuries and the Appellant's submissions on record.

The Appellant faulted the Trial court for ignoring and failing to consider his evidence and submissions and failing to find full or contributory negligence against the Respondents and in particular the 2nd Respondent despite overwhelming evidence in support of the Appellant's case. It was contended that the learned magistrate erred in finding the Appellant vicariously liable for the actions of the 2nd Respondent/Defendant and erred in finding the 2nd Defendant/ Respondent as the driver of Motor Vehicle KAN 544B when he was not.

Citing the testimonies of PW4 Sammy Katana and PW3 Corporal George Karaka Counsel submitted that as Corporal George Karaka was not the Investigating Officer or an Eye witness in the matter, his evidence must be considered with much caution as to its veracity. Counsel further contended that the Investigating officer in the accident that brought forth this suit, one Senior Sergeant Omwongo prepared two Police Abstracts to both parties herein the Appellant and the 1st Respondent details which bear contradiction and raise doubts as to the thoroughness or veracity of the Investigations and the evidence of PW2. It was Counsel's submission that the Learned Trial Magistrate misdirected herself and erred in finding the 2nd Defendant (Hamisi Juma) as the driver of Motor Vehicle KAN 544B when he was not; and failing to find full or contributory negligence against the driver of Motor Vehicle KBA 810H one Hamisi Juma; and erroneously relying on the evidence of PW3 and as such arrived at an erroneous finding.

It was further submitted that the Testimony of Nyevu Mzungu, Plaintiff in Malindi CMCC 119/2011 shed light on how the accident occurred. It was contended that she was as an eye witness to the accident and in the subject Motor vehicle. The Court was urged to consider

her evidence in establishing liability as the matters were related and address the same issue especially with respect to liability. She testified that the accident occurred as a result of a malicious sudden stop by the driver of Motor Vehicle KBA 810H which was ahead of KAN 544B and who ought to bear the blame.

Citing **Kanyariri & Another vs Dominic Gitau Kiambu High Court Civil Appeal No. 92 of 2016** Counsel submitted that in that case, in reapportioning liability at 25% to the driver of an unidentified stationary matatu, Prof. Ngugi held that the un-identified stationery matatu was partly to blame for the accident that resulted to the injuries of the respondent.

It was further submitted that in the cases of **Karanja vs Malele (1983) KLR 142** and **Berkeley Steward Ltd, David Coltel & Jean Susan Colten vs Lewis Kimani Waiyaki (1982-88] 1KAR 101-108** the court held that where there is no crucial evidence on who was to blame between the two parties, both should be held equally to blame.

Submitting that the standard of proof in civil cases is proof on a balance of probabilities Counsel relied on **Ignatius Makau Mutisya vs. Reuben Musyoki Muli (2015) eKLR** for a definition of what exactly amounts to a balance of probabilities.

Advocate for the Appellant went further to submit that it was not enough for a party to allege that the other was negligent without any proof. He submitted that the law was very clear where the burden of proof lies and proof of particular facts and **Sections 107, 108 and 109 of the said Evidence Act Cap 80** of the Laws of Kenya clearly captures these aspects. On this limb, Counsel cited the cases of **V.O.W vs Private Safari (EA) LTD [2010] eKLR; Eastern Produce (K) Limited Vs Christopher Atiado Osiro High Court at Eldoret Civil Appeal No.43 Of 2001**; **Statpack Industries vs James Mbithi Munyao Civil Appeal Case No. 152 of 2003**;

Rounding off on the issue of Liability, Counsel for the Appellant submitted that the 1st Respondent herein had failed to prove the Appellant's liability on a balance of probability. He urged the Court to review the decision of the Learned Trial Magistrate and find full or contributory negligence against the Respondents and in particular against the 2nd Respondent who was the driver of Motor vehicle KBA 810H Nissan Matatu and reapportion liability accordingly; the accident occurred as a result of a malicious sudden stop by the driver of Motor Vehicle KBA 810H which was ahead of KAN 544B and who ought to bear the blame.

On Quantum, the Advocate for the Appellant submitted that the Learned Trial Magistrate erred by relying on wrong principles to arrive at such a high award of Ksh.120,000.00 as general damages for mild soft tissue injuries.

Citing **Kigaragari vs Aya (1982-88) 1 KAR 768** and **Chege vs Vesters (1982-88) 1 KAR, 1021**, Counsel submitted that in assessing general damages for pain, suffering and loss of amenities, courts are guided by decided cases but also give regard to what is affordable within the limits of the economy. In this regard court must exercise its discretion judiciously.

Relying on the holding of Onyancha J. in **Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR** it was submitted that in determining quantum, courts have held that the general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts.

Counsel listed the particulars of the 1st Respondent's injuries according to the Respondent's Plaint as being: Blunt injuries on the back; Blunt injuries on the left knee; Blunt injuries on the right ankle joint. Counsel further referred to the 1st Respondent's P3 form dated 30.04.2011 filed in the lower court, noting the findings upon examination as: Normal head and neck: tenderness of the lumber and ankle joint.

It was contended that the Learned Trial Magistrate's finding on general damages and award of Ksh. 120,000.00 for soft tissue injuries was based on a misapprehension of the law, facts and evidence in view of the injuries sustained by the 1st Respondent. Per Counsel, the Learned Trial Magistrate seemed to have totally disregarded the Appellant's submissions and authorities on quantum and acted on wrong principles in reaching her conclusion and award.

A submission was put forth that it was trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. Reliance was placed on **Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] KLR** where it was held that the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

Counsel submitted that the award herein was inordinately high compared to the injuries suffered and was founded on wrong principles. Accordingly, reliance was placed on the following cases: **Godwin Ireri v Franklin Gitonga [2018]** where the claimant sustained soft injuries being a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. The trial court awarded Kshs. 300,000 as general damages for soft tissue Injuries. The Appellant being aggrieved with the said award, appealed to the High Court where D.S Majanja J held that the award was inordinately high and set aside the same with an award of Ksh. 90,000.00 for the injuries as reasonable and just; **Sokoro Saw Mills Limited v Grace Nduta Ndungu [2006] eKLR** where the Court of Appeal reduced an award of Ksh. 80,000 to Ksh. 30,0000 as general damages and **Peter Kahungu & Anor vs Sarah Norah Ongaro [2004] eKLR** where the High Court on appeal reduced the award of Kshs 150,000 to Kshs 80,000.

Further reliance was placed on the case of **George Kinyanjui t/a Climax Coaches & Anor. vs Hussein Mahad Kuyale [2016] eKLR** where the Respondent sustained injuries on his chest, neck, knees and lost two teeth and the trial court awarded Ksh. 650,000.00 as general damages. However, on appeal, Kimondo J relying on both parties' medical reports which indicated that the Respondent suffered soft tissue injuries, found that the loss of two teeth was unrelated to the suit accident and therefore the award was manifestly high for the said injuries and proceeded to set it aside and assessed general damages at Ksh. 109,890.00

Counsel for the Appellant went on to submit that the Learned Trial Magistrate erred by relying on wrong principles to arrive at such a high

award of Ksh. 120,000,.00 as general damages for fracture of the tibia and fibula. Per Counsel, an award of between Ksh. 60,000.00 and Ksh. 90,000.00 was reasonable in the circumstances. Counsel went further to quote Ksh. 70,000.00 as a reasonable figure in light of the cited authorities. Reliance was placed on **Duncan Mwenda & 2 others vs Silas Kinyua Kithela [2018] eKLR** where the court **quoted George Kiriaki Laichena vs Michael Mutwiri NRB CA Civil Appeal No. 162 of 2011 [2011] eKLR**.

On the basis of the foregoing, Counsel urged this Honorable Court to allow the Appeal as prayed with costs to the Appellant.

1st Respondent's Submissions

Advocate for the 1st Respondent begun by reiterating that as this was a first appeal, this court was duty bound to re-evaluate the evidence tendered before the trial court while warning itself that it did not have the advantage of hearing or seeing the witnesses.

On liability, it was submitted that the trial court did not err on this issue. According to Counsel, the trial court considered all the evidence and correctly found the Defendants 100% liable. The Plaintiff before the trial court proved on a balance of probability that the driver was negligent in the manner he controlled, managed and/or drove motor vehicle registration no. KAN 544B.

Rehashing the facts of the case at the Trial Court, Advocate for the 1st Respondent noted that the 1st Respondent/Plaintiff then had been a fare paying passenger in motor vehicle registration no. KAN 544B matatu on 30/4/2011 along the Malindi-Mombasa road when an accident occurred at Patanani area. The driver of the said matatu was sued as the 2nd Defendant and it was proved that he drove the said vehicle so carelessly and recklessly that it hit motor vehicle registration no. KBA 810H from behind. The speed was excessive and dangerous, did not have proper lookout and attention and did not mind the safety of other road users. The 2nd Defendant had been arrested and charged with the offence of careless driving contrary to **Section 49 (1) of the Traffic Ac**t and pleaded guilty.

Counsel further noted that while the Appellant herein was the registered owner of the vehicle KAN 544B, he entered appearance for himself and filed a notice of indemnity of co-defendant against the 2nd Respondent/Defendant. Per Counsel, this was funny considering that the 2nd Defendant was the driver/employee of the 1st defendant. According to Counsel, the Appellant did not file a statement and neither did he testify. All the allegations contained in the statement of defence were not proved since no evidence was tendered.

It was submitted that through the testimony PW2 Corporal Karaka who investigated the accident, it was established that the 1st Respondent/Plaintiff was in the vehicle KAN 544B matatu and the driver was Hamisi Juma Kombo who was the 2nd Defendant and the vehicle belonged to Onesmus Macharia, the Appellant herein.

It was further submitted that the 1st Respondent testified that the driver of the vehicle KAN 544B was over-speeding and while attempting to overtake noticed an on-coming vehicle and to avoid a head-on collision tried to go back his lane but due to the high speed hit the vehicle ahead from behind. Hence, it was submitted, the 1st Respondent had proven negligence and without the defendants evidence, the trial court was right to find the Defendants 100% liable.

It was further submitted that the witness testimonies and the police abstract proved that the 2nd Defendant was the driver employed by the 1st Defendant. Hence vicarious liability proven. Furthermore, Counsel fronted the submission that the Appellant neither filed a statement nor testified to deny that the 2nd Respondent was his employee or that he was not in the course of employment. Since the doctrine of vicarious liability makes the employer liable for the negligence of his employee, though the Appellant was not the driver, he was equally to blame.

Addressing the Court on the issue of quantum of damages, the Advocate for the 1st Respondent submitted that the Trial Court did not err at all. According to Counsel, the 1st Respondent /Plaintiff was entitled to compensation having sustained injuries while in a matatu that was involved in an accident. He testified and proved his injuries. So did his doctor. Various treatment documents were also produced at the trial without any objection to their authenticity. The trial court carefully analyzed the injuries. The award of damages was not excessive or exaggerated but was a fair representation of awards for similar injuries. The plaintiff had quoted quantum at Ksh.250,000/- while the Defendants had submitted Ksh. 80,000/= as their figure. The Court's award of Ksh. 120,000/= was therefore fair. Counsel submitted that the trial court considered both submissions and the authorities cited. The cited authority by the appellant was irrelevant in that the injuries suffered were far too low and different. The authority cited by the plaintiff was spot on.

Counsel went on to submit that awards of general damages are discretionary. Authorities first guide so that similar injuries should be awarded almost similar damages. The Appeal Court should thus not interfere with discretionary awards unless it is evident that the trial court took into consideration extraneous matters or that the award was too exaggerated as not to fall within the limits set by precedents. It was argued that this was not the case in the instant case.

The Court was therefore urged to dismiss the instant appeal with costs.

The Law, Analysis and Determinations

With a full appreciation of the written submissions of the able advocates of the parties' and due consideration being given to the authorities relied on by the respective counsel, as the Appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty of the court in a first appeal was established in **Selle & Another vs Associated Motor Boat Co. Ltd. & others [1968] EA 123**. The same position had been taken by the Court of Appeal for East Africa in **Peters vs Sunday Post Limited [1958] EA 424**. This duty is best restated through the principles as summarised in **Michael Murage v Dorcas Atieno Ndwala [2019] Civil Appeal 390 of 2017 eKLR; Mary Wanjiku Gachigi v Ruth Muthoni Kamau Civil Appeal No. 172 of 200** and **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000** below:

> ***'a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
>
> ***b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and***
>
> ***c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.'***

Having fulfilled my duty to reanalyze the evidence in the first part of this judgment, I find that the questions that arise for determination are twofold. First, did the learned trial magistrate err in apportioning liability in the ratio of 100% against the appellant? Secondly, did the learned trial magistrate err in deciding quantum?

The Appellant's argument for reapportionment of liability is anchored on the premise that the 2nd Defendant was the driver of Matatu KBH 810H and not KAN 544B and that it was the former vehicle and driver that caused the accident hence he ought to be found culpable and liability reapportioned to him as he was partly to blame. It is the Appellant's case too that the 1st Respondent ought to be found liable by way of contributory negligence. However, do the facts support this contention?

Before going any further, I'd like to point out at this juncture that the Plaintiff's evidence remained uncontroverted since from the record of court proceedings of the lower court in Malindi CMCC 111/9 of 2012, the 1st Defendant did not testify and neither did he elect to call any witness despite having adequate opportunity to do so. I note that an application was filed seeking to reopen the defence case and allow them to call their witnesses, which application was granted but per the court records nothing came of it. The Defence filed by the 1st Defendant, without being tested at trial, amounted to mere allegations and denials. In **Trust Bank vs Paramount Universal Bank Limited and 2 Others Nairobi HCC 1243/01** it was it held:

> ***"Where a party fails to call evidence in support of its case the party's pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings. Further that failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."***

It is my view that the Learned Trial Magistrate was correct in finding that the Plaintiff's evidence sufficiently established the 2nd Respondent/Defendant as the driver of the motor vehicle KAN 544B despite the desperate inferences that he was not, made by the Appellant herein. The evidence of the 1st Respondent further revealed that the Appellant was the registered owner of the motor vehicle KAN 544B. It is trite law that he who alleges must prove the same. Section **107, 108 and 109 of the Evidence Act** places the burden of proof of a particular fact on the person who wishes the court to believe in its existence unless it is proved by law that the proof of the fact shall lie on any particular person. No evidence was adduced by the Appellant to disprove the conclusion that the 2nd Respondent was the driver of the vehicle that was registered to him (the Appellant). The Learned Magistrate did not misdirect herself in finding the Appellant vicariously liable. **Salmond on the Law of Torts 17th Edition at pg. 466** opines:

> ***"A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at the time when the servant is engaged on his master's business, it must be committed in the course of that business, so as to form part of it, and not be merely coincident in time with it."***

In **Muwonge v A.G. of Uganda [1967] EA** the court held inter alia that *'The master is exempted only when the servant was on his own business.'* While in **Selle & Another v Associated Motor Boats Co. Ltd*(supra)*** the circumstances under which an owner can be held liable for an agent's negligence were found to be that:

> ***"Where, however a person delegates a task or duty to another, not a servant or employs another, not a servant, to do something for his benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be."***

Similarly, in **Joseph Cosmas K. v Gigi & Co. Ltd & Another Civil Appeal 119 of 1986 KLR** it was held:

> ***"In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied on his instructions and was doing so in performance of the task or duty delegated to him by the owner."***

On vicarious liability the Court of Appeal **Kaburi Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR.** stated as follows:

> ***"Where the issue for determination was among others, what level of control over the negligence acts of person B who is directing person A on the doing of those acts, as being held vicariously liable for the negligence, the court of appeal held – vicariously liability arises when the tortuous act is done in the scope or during the course of one's employment."***

As regards the issue of contributory negligence, the 1st Respondent testified to being a fare paying passenger in the vehicle that caused the accident. He was at no point in a position to influence the negligent actions of the 2nd Respondent driver. I am guided by the sentiments of **Okwany J** in **James Gikonyo Mwangi v DM (Minor Suing through his Mother and next Friend, IMO) Civil Appeal 1 of 2012 [2016]**

eKLR where she stated thus:

> ***"51. The appellant and his driver did not furnish the court with any testimony to counter the allegations that he was negligent in the manner in which he drove managed or controlled the suit motor vehicle thereby allowing it to veer off its lane and ram into an oncoming motor vehicle.***
>
> ***52. In his defence filed in the lower court, the appellant alluded to the fact the respondent was guilty of contributory negligence. The respondent was a passenger in the suit motor vehicle and as such I find that there is no way that he could have caused or contributed to the said accident.***
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> ***Charlesworth and Percy on Negligence*** *states at page 1943-04 as follows on contributory negligence:*
>
> ***"The expression contributory negligence ..... applies wholly to the conduct of the plaintiff. It means that there has been some act or omission on the plaintiff's part which has materially contributed to the damage."***
>
> *53.* ***The appellant did not give any evidence to show how the respondent contributed to the suit motor vehicle veering off its lane and ramming into an oncoming vehicle. The version of PW1 on how the accident happened has not been contradicted by any other evidence. The respondent was a passenger in the appellant's motor vehicle and therefore the appellant's driver was primarily 100% responsible for his safety and the safety of the rest of the passengers in order to ensure that they arrived at their destinations safely."***

All of this is to say that this court finds that the Learned Trial Magistrate did not err in apportioning liability at 100% against the Defendants. She considered all the relevant factors and properly applied the doctrine of vicarious liability having come to the similar conclusion as I have that the 2nd Defendant was the driver of the KAN 544B which was registered to the Appellant. I see no reason therefore to disturb the lower court's finding on liability. The position I've taken is one well settled by the law. In the case of **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu [1982-88],KAR 278** it was stated inter alia that an appellate court ought not to interfere with a finding on fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles.

I now turn to the issue of quantum of damages. An indulgence in the jurisprudence on quantum reveals that an Appellate Court is always reluctant to interfere with a trial judge on any question of fact, it is particularly reluctant to interfere with a finding on damages unless it is satisfied either that the judge applied the wrong principle of the law bas by taking into account some irrelevant factor or leaving out of account some relevant one or short of this that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. Per Gicheru, Muli and Akiwumi JJA, in **Joseph Ndirangu vs Honourable The Attorney General Civil Appeal No. 83 of 1991 [1991] LLR 4925 (CAK).**

In the case of **Kemfro Africa t/a Meru Express & Anor vs A.M. Lubia & Another [1988] 1 KAR 727** the Court of Appeal laid down the following principles to be taken into account when assessing damages: the appeal court must be satisfied either that the judge, in assessing damages, took into account an irrelevant factor, or left out of account of a relevant one, or that the amount is so inordinately low or so in inordinately high that it must be wholly erroneous estimate of the damage. On appeal therefore, the Appellant ought to effectively demonstrate with the provisions of law and fact that the trial magistrate misdirected or partly or wholly took into account an irrelevant matter or ignored a relevant one in exercising discretion to award damages.

In the instant case, **PW1 Dr. Arthins Mwadena** presenting his medical report testified that the Plaintiff sustained a soft injury of the back and left knee. As a measure of damages, the 1st Respondent at the trial court proposed a figure of Ksh. 250,000/- while the Appellants were of the opinion that Ksh. 80,000/- was commensurate to the injuries suffered. The Learned Trial Magistrate awarded the sum of Ksh. 120, 000/-. Given the nature of the injuries suffered, I am of the opinion that the award of Ksh. 120,000/- by the trial magistrate was indeed appropriate as the 1st Respondent suffered soft tissue injuries only and had fully recovered.

That being the view of this court, this appeal is hereby dismissed with costs to the 1st Respondent. The decretal amount deposited as security for due performance of the decree be released by the Deputy Registrar to the 1st Respondent forthwith.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 3RD DAY OF JULY, 2019.

……

R. NYAKUNDI

JUDGE