**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**HIGH COURT CIVIL APPEAL NO. 14 OF 2016**

**ONESMUS MACHARIA KIMANI.....APPELLANT**

**-VERSUS-**

**TK(minor suing through his father and next friend LKK).....1ST RESPONDENT**

**HJK.....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 Kilonzo for the Respondent**

**JUDGMENT**

TK the 1st Respondent herein and a minor suing through his father and next friend LKK filed **Malindi CMC Civil Suit No. 116 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 facts at trial were 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. It was averred that the 1st Respondent/ Plaintiff sustained severe injuries, loss and damage for which he holds the Appellant and 2nd Defendant jointly and severally liable. The 1st Defendant was vicariously liable for the negligence of his authorized driver, agent and or servant the 2nd Defendant.

The Plaintiff's first witness was the medical officer one **Dr. Arthins Mwadena** who produced his medical report, treatment notes, receipts and a P3 Form and testified that the Plaintiff sustained a cut wound on the left foot, a bruise on the right knee and a soft tissue injury on the area under the sternum. 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 HJKand that it was registered to one Onesmus Macharia. He further confirmed that HJKthe 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 right foot and chest.

**Sammy Katana** 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, the Plaintiff herein. 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. This marked the close of his case.

From the Record of the Lower Court, it is apparent that the Defence did not call any witnesses in support of their case.

On evaluation of the evidence and submissions, the Learned Trial Magistrate found that the Plaintiff had sufficiently demonstrated 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. 150,000.00/- as general damages and loss of amenities and Ksh. 2,500.00/- as special damages as well as costs.

The Appellant/ 1st Defendant filed the current Appeal vide a Memorandum of Appeal dated and filed on the 19th May 2016 being dissatisfied with the whole of the judgement of the Learned Trial Magistrate. The Appeal be disposed-off by way of written submissions.

**Appellants Submissions**

The firm of Kairu McCourt on behalf of the Appellant raised nine grounds for appeal which were later condensed into two main issues for determination; liability and quantum.

The Appellant submitted 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 questioned why trial court ignored and failed to consider his evidence and submissions and further declined 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. Counsel submitted 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.

Pointing the court to 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.

A submission was made 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.

The Testimony of Nyevu Mzungu, Plaintiff in Malindi CMCC 119/2012 was touted as shedding 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.

The case of **Kanyariri & Another vs Dominic Gitau Kiambu High Court Civil Appeal No. 92 of 2016** was cited for the submission that the court ought to reapportion liability. 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.

For a definition of the standard of proof in civil cases, Counsel relied on **Ignatius Makau Mutisya vs. Reuben Musyoki Muli (2015) eKLR** as well as **Sections 107, 108 and 109 of the said Evidence Act Cap 80** of the Laws of Kenya. Further reliance was placed on 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**;

The Appellant's advocate in closing submitted that the 1st Respondent herein had failed to prove the Appellant's liability on a balance of probability. The Court was urged to interfere with 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 as 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.

It was further submitted that as regards quantum, the Learned Trial Magistrate erred by relying on wrong principles to arrive at such a high award of Ksh.150,000.00 as general damages for mild soft tissue injuries. Reliance was placed on **Kigaragari vs Aya (1982-88) 1 KAR 768** and **Chege vs Vesters (1982-88) 1 KAR, 1021** for the submission 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. Further reliance was placed on **Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR** and 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.

It was contended that the Learned Trial Magistrate's finding on general damages and award of Ksh. 150,000.00 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. According to Counsel, 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. Counsel sought to draw inspiration from **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.

For the submission that the award made by the trial court was inordinately high compared to the injuries suffered and was founded on wrong principles, the advocate acting on behalf of the appellant referred the court to several authorities to wit: **Godwin Ireri v Franklin Gitonga [2018]; Sokoro Saw Mills Limited v Grace Nduta Ndungu [2006] eKLR**; **Peter Kahungu & Anor vs Sarah Norah Ongaro [2004] eKLR** and **George Kinyanjui t/a Climax Coaches & Anor. vs. Hussein Mahad Kuyale [2016] Eklr**.

The position taken by Counsel for the Appellant was that the Learned Trial Magistrate erred by relying on wrong principles to arrive at such a high award of Ksh. 150,000,.00 as general damages. Per Counsel, an award of between Ksh. 60,000.00 and Ksh. 90,000.00 was reasonable in the circumstances. This argument was buttressed by the cases of **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**.

The antecedent arguments formed the basis upon which this appellate court was asked to overturn the trial court's judgment and allow the instant appeal as prayed with costs to the Appellant.

**1st Respondent's Submissions**

After reminding this court of its duty as an appellate court, Mr. Wambua for the 1st Respondent submitted on liability making the argument that the trial court did not err on in finding the Defendants 100% liable. Per Counsel, 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.

Restating the facts of the case at the Trial Court, Mr. Wambua urged 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. Further and according to Counsel, as the Appellant failed to call witnesses and testify, the averments contained in his defence were not proved. It was further 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 HJKwho was the 2nd Defendant and the vehicle belonged to Onesmus Macharia, the Appellant herein.

Counsel made the submission per witness testimony, 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 placed the 2nd Defendant as the driver employed by the 1st Defendant. Hence vicarious liability had been established.

For quantum of damages, it was submitted that the Trial Court did not as the 1st Respondent /Plaintiff was entitled to compensation having sustained injuries while in a matatu that was involved in an accident; he had testified and proved his injuries and had established that it was

the negligence on the part of the 2nd Respondent driver that had caused the accident. That the trial court carefully analyzed the injuries and made an award of damages that was neither excessive nor exaggerated but was a fair representation of awards for similar injuries. The Court's award of Ksh. 150,000/= 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.

It was Mr. Wambua's further submission that general damages are discretionary, and the appellate court ought not to 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. On this premise, I was urged to dismiss the instant appeal with costs.

**The Law, Analysis and Determination**

This being a first appeal, I am bound to render judgement within the precincts laid out in the oft quoted **Peters vs Sunday Post Limited [1958] EA 424**. This duty was summed up in **Michael Murage v Dorcas Atieno Ndwala [2019] Civil Appeal 390 of 2017 eKLR** in the following manner:

> ***'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.'***

I have reconsidered and reevaluated the evidence on the record at the onset of this judgment. It is agreed that the issues for determination are whether the Honourable judicial officer at trial erred in apportioning liability and in her estimation of quantum.

The Appellant argued for the reapportionment of liability on the basis 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. As such, it was contended that the 2nd Respondent ought to bear culpability too. A case was made for the attribution of negligence to the 1st Respondent. Whether such argument holds water is pretty clear on analysis of the evidence on the record.

As the Appellant herein elected not to testify nor call any witnesses to his aid, the matter was decided solely on the basis of the Plaintiff's evidence. Having not been put to the test of cross examination, the Appellant's defence remainedmere 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."*

Against the foregoing backdrop, the Learned Trial Magistrate having assessed the evidence she had on hand arrived at the conclusion that the 2nd Respondent/Defendant was the driver of the motor vehicle KAN 544B. She further found, correctly so in my view, 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.

Once the Plaintiff had established on a prima facie level that his injuries were attributable solely to the negligence of the 2nd Respondent who was the driver of the accident causing vehicle, the onus fell upon the Defence to disprove this notion. Further, 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 **Selle & Another v Associated Motor Boats Co. Ltd and Others [1968] EA 123** 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 D M (Minor Suing through his Mother and next Friend, I M O) 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.***

***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."***

The above cited authorities lead me to the inescapable conclusion that the finding by the Learned Trial Magistrate on liability at 100% against the Defendants was spot on. She gave due inspection to the evidence she had on hand and correctly applied the doctrine of vicarious liability and concluded that the 2nd Defendant was the driver of the KAN 544B which was registered to the Appellant.

As for quantum, my point of departure is the finding in **Mbogo & Another v Shah [1968] EA** where it was stated:

> ***"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it had acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

Similarly, in **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu [1982-88] KAR 278** it was held 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 am quick to note that per the rationale in **Joseph Ndirangu vs Honourable The Attorney General Civil Appeal No. 83 of 1991 [1991] LLR 4925 (CAK),** 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 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.

Likewise, the Court of Appeal in **Kemfro Africa t/a Meru Express & Anor vs A.M. Lubia & Another [1988] 1 KAR 727** established that in 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. The Trial Magistrate awarded the sum of Ksh. 150, 000/- upon establishing that the injuries suffered by the 1st Respondent were a cut wound on the left foot, a bruise on the right knee and a soft tissue injury on the area under the sternum and that he had fully recovered.

Taken in its entirety, the Appellant's case both at the lower court and in this appeal leave me unconvinced as to the alleged error by the trial magistrate. In the end, it is my finding that the trial magistrate correctly applied the law and her discretion and therefore this appeal is unmeritorious. It is hereby dismissed and 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**