REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 7 OF 2018

LWK (A minor suing through father and next friend **SKD).....APPELLANT**

-VERSUS-

KIRIGU STANLEY.....1ST RESPONDENT

WILSON WANYOIKE .....2ND RESPONDENT

(Being an appeal from the judgement delivered by the Honourable I.M. Kahuya, Senior Resident Magistrate in Machakos CMCC 254 of 2013 delivered on 18.1.2018)

BETWEEN

LWK (A minor suing through father and next friend **SKD).....PLAINTIFF**

-VERSUS-

KIRIGU STANLEY.....1ST DEFENDANT

WILSON WANYOIKE .....2ND DEFENDANT

JUDGEMENT

1. The appellant herein, a minor, instituted a suit before the lower court through father and next friend **SKD.** According to the plaint, on or about 7th September, 2011, the plaintiff minor was lawfully travelling in motor vehicle reg. no. KAZ 683F when upon reaching Kathome along Machakos-Nairobi Road, the Respondent's driver, agent or servant drove and/or controlled or managed the said motor vehicle so negligently that he permitted the same to ram into the rear of motor vehicle reg. no. KBA 667H-ZC 3003 as a result of which the plaintiff minor sustained serious injuries. The particulars of negligence, injuries and special damages were itemised.

2. **SKD**, PW3 relied on his statement in which he stated that he was the father of the plaintiff minor who was on 7th September, 2011 travelling in motor vehicle KAZ 683F in the company of her mother and sister when the said vehicle was, due to the negligence of its driver caused to ram into the rear of motor vehicle reg. no. KBA 667H-ZC 3003. According to him, the minor plaintiff's mother sustained fatal injuries and succumbed on 10th November, 2011 while the plaintiff's sister just like the plaintiff sustained serious injuries. According to him the matter was reported to the police who issued a P3 form and police abstract.

3. In his evidence before the court, PW3 reiterated the foregoing and added that he carried out a search on the accident motor vehicle and produced a copy of the record therefor and that the plaintiff was treated at Machakos Level 5 hospital and later had a medical report prepared for her for which he paid Kshs. 2,000/- and produced a receipt for the same. He also produced the P3 form and testified that the plaintiff had not fully healed and that she is slightly paralyzed on one side and walks with a gait, one eye is blind and she feels pain when swallowing food. I had a medical report prepared to outline the condition. He therefore sought compensation as per the plaint.

4. In cross-examination PW3 stated that he was not present when the accident occurred and only relied on hearsay evidence. He was however aware that two motor vehicles were involved in the accident but he did not know who was to blame for the same. He only perceived that the driver of the *matatu* which carried the victim was to blame.

5. PW1, **PC Tomlo** stationed at Machakos Traffic Base testified based on the relevant police file. According to him, the accident occurred at Kyumbi involving two motor vehicles KAL 662F and KBA 667H *matatu* and Trailer respectively. It was his evidence that one **LW** was a passenger in motor vehicle KAL 662F and sustained bodily injuries and was issued her with a police abstract dated 6th February, 2012 which he produced.

6. In cross-examination, he testified that two motor vehicles were involved in the accident and the driver of KBA 667H trailer was charged and convicted of the offence of obstruction. It was therefore his evidence that the driver of KBA 667H was to blame for the accident and not the driver of KAL 662F. He however had no traffic court proceedings to confirm the conviction of the driver of the trailer.

7. **Dr. Kimuyu Judith** stationed at Machakos Level 5 and partly for Machakos Medical Clinic who the records treat as PW1 though he ought to have been PW3 since there was a PW1 who was stood down, testified on behalf of her colleague whose handwriting and signature she said she was familiar with. She proceeded to produce the medical report of **LW** dated 28th March 2012. It was her testimony that the plaintiff had been involved in an accident in 2011 with her mother and sustained severe injuries as captured on the face of the report which she produced as exhibit.

8. In cross-examined she stated that an injury to the brain was likely to cause slurred speech. However, brain was not affected. She stated that in preparing the report reliance was placed on the treatment notes to develop the report and that while the victim was in ICU for 22 days, she could not say how long she was in a coma. In her opinion, it was possible for the limping to vanish a year after the report was made.

9. In re-examination she stated that the impact to the brain is what led to the coma and weakness on one side of the body as well as the twitching of the eye.

10. The plaintiff relied on her witness statement filed in the case. According to the plaintiff, she was a Form 3 pupil at [particulars withheld] Secondary School. On 7th September, 2011 she in the company of her mother and her younger sister were traveling in motor vehicle reg. no. KAZ 683F at about 7.45 pm along Nairobi Machakos Road in the Nairobi direction. Though it was dark the road was well illuminated by the headlights and she was able to see the motor vehicles ahead. At Kathome area she spotted a lorry ahead of them whose yellow reflectors were visible from a distance. It was her evidence that the vehicle in which they were travelling was being driven very fast and instead of overtaking the said lorry it rammed on its rear and the plaintiff lost consciousness for several days. According to her she and her sister sustained severe injuries from which she had not recovered. Their mother however sustained fatal injuries. It was her evidence that the driver of motor vehicle reg. no. KAZ 683 was not alert and that he was driving at a high speed and hence failed to control his vehicle hence the collision.

11. It was her testimony that her left eye was weak and it shuts involuntarily and that her concentration levels have gone down due to headaches. In cross-examination she confirmed that before the accident, she had a normal walk before the accident.

12. On behalf of the Respondent, DW1, **PC Kinyua** based at Machakos Traffic Base produced a police

abstract in relation to OB. No. 23/7/9/2011. According to him, the accident was fatal by nature and the scene of crime visited by 3 officers. It was his evidence that the *matatu* (KAZ) driver on reaching at the scene of crime which was at Kathome area hit a stationery motor vehicle (trailer) and as a result 4 passengers died on the spot. It was his testimony that there were no life savers to warn the on-coming motor vehicle of the stationery trailer. According to him, the driver of motor vehicle KBA (trailer) was charged with the offence of causing obstruction (TR 2534/11) but the driver of KAZ (matatu) was not charged. It was his evidence that the driver of the trailer convicted and fined Kshs. 50,000/- for the offence of causing obstruction. Upon the objection being taken the court only admitted the police abstract dated 21st October, 2011.

13. In cross-examination, DW1 clarified that he was not the investigating officer and that he did not have the sketch map with him. He admitted that he had not produced the latest police abstract or proceedings in the traffic case to show that the driver to the trailer was to blame for the accident since the police abstract that was admitted showed that the matter was pending under investigations.

14. In re-examination, he however stated that the matter was no longer pending under investigation because the trailer driver was convicted of causing obstruction.

15. DW2, **Simon Maina Kariuki**'s evidence was that on 8th September, 2011 at around 8.30pm he was driving motor vehicle registration number KAZ 683F from MACHAKOS towards Nairobi ferrying 5 passengers. Upon reaching Makutano junction he rammed into a stationary lorry which had stalled in the middle of the road on his lane. It was his testimony that there were no life savers on the road to indicate that the vehicle had developed mechanical problem. According to him, despite applying brakes, he still hit the stationery trailer due to the fact that no life savers had been put forth. He therefore blamed the trailer driver for the accident. He stated that he was never charged for this accident.

16. In cross-examination, he stated that though his motor vehicle had a speed governor, he did not have the inspection report in court to confirm the same. He however insisted that his vehicle had functional head lights and that he spotted the trailer ahead. The weather, according to him was good and there were on coming motor vehicle and that that was his 1st trip to Nairobi. He stated that the motor vehicle was owned by the 2nd defendant who was his employer and reiterated that the accident occurred before Makutano Junction. He insisted that the stationery trailer was on his lane and that there were no life savers. He admitted that in his statement, the date of the accident is indicated as 8/9/2011 not 7/9/2011.

17. In re-examination he explained that the trailer ahead was stationery and that he would not have done anything more to avoid the accident.

18. DW3, **Dr. Sophia Opiyo** produced a medical report dated 19th June, 2013 in respect to **LW**. According to her, the plaintiff sustained severe head injuries and was treated at Kenyatta National Hospital. Upon examining the plaintiff on 17th June, 2013 the plaintiff had normal walking gait but had a sprint in one eye. Muscle power was normal and she had a scar on the neck. Her conclusion was that the plaintiff suffered severe head injuries which had healed well and she produced her report as exhibit.

19. In cross-examination she stated that she was a doctor at Kenyatta National Hospital but used to work at Direct Line Insurance and that her report was prepared while she was still working for Direct Line. She did notice that the patient was walking with a normal gait but denied that her report was biased. She however assumed that the eye injury was not as a result of the accident.

20. According to her, the plaintiff did not sustain any physical injuries as a result of the accident and since her report was the latest, it was her opinion that it gave a true picture of the plaintiff's health.

21. In her judgement the learned trial magistrate found that there was consistent evidence from the police officers called by both the plaintiff and the defendant that the driver of motor vehicle reg. no. KBA 667H was to blame for the accidence hence the reason he was charged and convicted of obstruction. The Court then proceeded to dismiss the suit with costs.

22. In this appeal, it has been submitted by the appellant that that the Appellant's evidence revealed three elements of negligence on the part of the Respondents' driver. One that he was speeding and it was night time. Secondly, he was not alert as he failed to slow down as he neared motor vehicle registration number KBA 667 H-ZC 3003. Thirdly, he rammed into the rear of the motor vehicle ahead of him and in totality, the said three elements irresistibly point to negligence and recklessness on the part of the Respondents' driver. According to counsel, the Respondents' Counsel did not challenge the Appellant's evidence on liability hence urged the court to find that the Appellant had proved her case on liability on a balance of probabilities and that she is entitled to a judgment on a 100% basis against the Respondents. According to counsel, the trial Court relied on the evidence of the police / traffic officers to address the issue of liability and the said evidence is to the effect that the blame was not on the driver of motor vehicle registration number KBA 667 H-ZC 3003, Trailer. It was counsel's submission that the trial Court's reliance on the testimony of the police to rule on liability was a misdirection for the same was hearsay and yet there was an eye witness account of the incident.

23. Counsel for the Respondent supported the findings of the trial court and consolidated the appeal into the issue of liability. On the issue of liability, counsel submitted there ought to be affirmative evidence of negligence that caused the accident and added that all the circumstances pointed blame to the vehicle KBS 667H-ZC 3003 as the cause of the accident hence the evidence on record exonerated the respondents of blame.

Determination

24. I have considered the submissions of the parties in this appeal. 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."**

25. 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.

26. 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."

27. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** 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."

28. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

29. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

30. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."**

31. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent.

32. In this case there were two eye witness to the accident, the plaintiff/appellant and the driver, DW2. According to the Appellant, there was a stationary lorry ahead of their vehicle and she saw it before the accident and believed that the driver was going to overtake it. However, the driver rammed into the vehicle instead. That there was a lorry that was packed on the road ahead of the said *matatu* is not in dispute. There is also sufficient evidence that no life savers were placed on the road. However, while the both the Plaintiff and DW1 from their evidence saw the lorry before the collision, DW1 stated that he attempted to swerve but still rammed onto the lorry.

33. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

> **"Negligence is not actionable *per se* but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of; and where the damage was caused by the negligent acts of different persons, to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or among them accordingly…There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."**

34. In that case the court further found that:

> **"When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it…A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object…Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently… There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."**

35. That was the position in **Tart vs. Chitty and co (1931) ALL ER Pages 828 — 829** where **Rowlat, J** had this to say.

> **"It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be in things and people and animals in the way at any moment and he is bound to**

go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it."

36. In **Karisa and Another vs. Solanki and Another [1969] EA 318** it was held that:

"The car driver, driving at a speed of about 65 mph which was not in itself negligent, when he saw the oncoming bus, whose presence on the road reduced the area available to take evasive action should any emergency occur and whose lights to some extent impaired the area of vision provided by its own lights, only reduced his speed to about 60 mph. This action was one which a reasonably careful driver, and the duty which the car driver owed to the plaintiff was that of being a reasonably careful driver, would not have taken, as the speed in those circumstances enormously increased the potential danger of an accident. While, therefore, a speed of 60 mph is not negligence, it is that speed in the particular circumstances which constitutes negligence; and the Judge was wrong in considering the question of speed separate from the other circumstances of the case…We are not satisfied that the car driver could not and should not as a reasonably careful driver, keeping a particular keen look-out, have seen the lorry in time to have swung to the left on the verge, no matter how uncertain his knowledge of the precise terrain there, rather than run straight into the stationary lorry… Looking at the facts of the case as a whole, the Judge tended to consider the two main circumstances of speed and a proper look-out separately and not part of a comprehensive whole, and it was this failure to look at the facts as a whole which led him into the manifest error of coming to the conclusion that there was no negligence on the part of the car driver. He was clearly wrong in failing to find negligence on the part of the car driver. Consequently the car driver found to have contributed to the accident to the extent of 20 per cent."

37. In **Vyas Industries vs. Diocese Of Meru [1976-1985] EA 596; [1982] KLR 114**, it was held that An appellate court will not interfere with apportionment of liability unless the Judge has come to a manifestly wrong decision or based his apportionment on wrong principles and this was the case since the greater blame attaches to a driver who runs into an unlighted stationary lorry on a straight road.

38. In this case, from the judgement of the learned trial magistrate, it is clear that what influenced the decision was the evidence of the police officers. As regards the relevancy of the police investigations to civil proceedings, it must always be remembered that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other or no one at all cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

39. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

"It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim…"

40. In **Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 OF 1998**, it was held by the Court of Appeal that:

"Admitting in evidence the record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings as it is always open to the advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of the facts deposed to therein, although the witness is not called as a witness in the

civil suit, provided the agreement is clear and unambiguous…It is not for the Judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness…Equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination."

41. Accordingly, in **Ochieng vs. Ayieko [1985] KLR 494** , **O'kubasu, J** (as he then was) held that:

"Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored."

42. **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** was of the opinion that:

"Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it… Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent…The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him."

43. Apart from the evidence from the police, there was evidence from the Plaintiff and DW1 who were present when the accident occurred. The court ought to have considered that evidence before arriving at its decision. It was therefore a misdirection for the court to have completely ignored that evidence in arriving at its decision. As **Goddard LJ** said in **Mahon vs. Osborne [1939] 1 All ER 535** at page 556:

"The most that can be required is that the judge, in addition to stating the law correctly, shall give a fair summary of the evidence and of the contentions of either side."

44. In this case, the complete failure by DW1 to see the lorry while approaching a junction can only lead to the conclusion that DW1 did not exercise due attention expected of him. Accordingly, some negligence must be attributed to him. However, he cannot be held to have been 100% negligent since the act of leaving the unlit lorry on the road without warning was similarly negligent.

45. In **Eliyaforo Hosea vs. Fraeli Kimaryo Arusha HCCA No. 2 of 1967** it was held that:

"Leaving an unlighted, stationary vehicle in a road at night is *prima facie* evidence of negligence."

46. It is however not easy to determine who between the two was more negligent than the other. The Plaintiff ought to have sued the owner of the said lorry as well in the event that she did not know who between the drivers of the said vehicles was negligent. This particularly in light of the provisions of Order 1 rule 7 of the ***Civil Procedure Rules*** which provides that:

Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

47. On the other hand, the Respondent ought to have joined the owner of the said lorry as a third party to the said proceedings as provided under Order 1 rule 15 of the ***Civil Procedure Rules***. I associate myself with the decision in **Loyce Anyona Olum vs. Benjamin Kimondo Kisumu HCCC No. 105 of 1993** that a defendant ought to apply for a third party notice if allegations are made against the third party.

48. Having considered the evidence on record in its totality I find that the dismissal of the Appellant's case was improper.

49. Having considered the evidence before me and as there is no evidence on the basis of which I can apportion liability between the drivers of the two vehicles who were both clearly negligent, the best I can do in the circumstances is to apportion liability to the Respondent at 50%. **Madan, J** as he then was in **Welch vs. Standard Bank Limited [1970] EA 115** expressed himself as hereunder:

"When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Everyday, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame…Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, in its judgement, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion…There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does hold so in this case."

50. In **Eliyaforo Hosea vs. Fraeli Kimaryo** (supra) the court found for the plaintiff and apportioned damages evenly between the two parties, so that the plaintiff was entitled to one half of his proved damages.

51. Following the beaten path, I am inclined to apportion the Appellant's damages as against the respondent at half of the award.

52. In the premises, this appeal succeeds, the decision dismissing the case is hereby set aside. As no issue has been taken as regards the quantum of damages and having considered the same there is no reason to

interfere with the award proposed by the learned trial magistrate. In the premises, I award the Appellant Kshs 475,000.00. and Kshs 2,000/- special damages with interest. The Appellant will have the costs of the proceedings in the lower court and half the costs of this appeal.

53. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 20th day of November, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Ngolya for the Appellant

CA Geoffrey