**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 750 OF 2016**

**APOLLO TOURS & TRAVE LTD.....APPELLANT**

**VERSUS**

**SAMUEL KINYANJUI GITAU.....1ST RESPONDENT**

**SAMUEL KINYITA MBUTHI .....2ND RESPONDENT**

**PHOEBE GITHAIGA.....3RD RESPONDENT**

**NYERI MOTORS SERVICES LTD.....4TH RESPONDENT**

***(Being an appeal from the judgment of the Chief Magistrate's Court at Milimani (E. Nyaloti) C.M. in CMCC No. 1395 of 2009 delivered on 15th November 2016)***

**JUDGMENT**

The 1st respondent sued the appellant and the 2nd, 3rd and 4th respondents in the lower court for damages following a road traffic accident that took place on 1st November, 2007. The 1st respondent was travelling as a lawful passenger in the motor vehicle of the appellant registration No. KAV 643P which is said to have collided with motor vehicle registration No. KAX 184C owned by the 2nd, 3rd and 4th respondents.

As a result of the said accident the 1st respondent suffered several injuries set out in the plaint. The appellant and the 2nd, 3rd and 4th respondents denied the 1st respondent's claim. After a full trial however, the lower court found in favour of the 1st respondent against the appellant herein and the 3rd respondent after holding them liable to the 1st respondent.

Earlier on, the 2nd and 4th respondents had failed to enter appearance or file any defence and an interlocutory judgment was entered against them following that default. The lower court held that the 1st respondent had proved his case on a balance of probability noting that, the appellant had acknowledged that he, the 1st respondent, had proved his case to that standard. The court also noted that the appellant did not adduce any evidence to counter the 1st respondent's evidence.

Following that finding, the lower court awarded 1st respondent Ksh.1 million general damages, Kshs. 6,100/= special damages plus costs of the suit. It is that judgment that aggrieved the appellant herein followed by this appeal.

It is the appellant's case that the lower court erred in law and fact for holding it liable contrary to the evidence on record and without giving any reasons. Further, the court was faulted for proceeding with the trial when there was a stay order of any cases touching on the policy holders of the insurer, Blue Shield Insurance Company Limited. It was also the appellant's complaint that submissions were not considered and the award of damages was wrong in that the court should have dismissed the case for want of proof.

Finally, the lower court was faulted for not following the principles relating to a finding on liability and award of damages, and should have apportioned liability accordingly.

As the first appellate court, it is my duty to reconsider and evaluate the evidence adduced before the trial court in order to arrive at independent conclusions. This I have done. Both parties have also filed submissions which I have considered.

The 1st respondent based his claim on the negligence of the appellant and its driver. He was a passenger in the appellant's motor vehicle. Particulars of negligence were expressly set out in the plaint. The 1st respondent testified before the trial court and repeated what he said in

his statement to the effect that the motor vehicle was being driven very fast. He had his safety belt on and that is why he survived the accident while the driver of motor vehicle registration no. KAV 643P did not fasten his seatbelt, as a result which he died later on the day. It was his evidence that the driver was driving at a speed of around 100 kilometres per hour.

There was also some blame attributed to motor vehicle registration No. KAX 418C which was in front and braked suddenly without giving any indication. It is instructive that, the appellant in the statement of defence also blamed the driver of motor vehicle registration No. KAX 418C for the accident. The record does not show however, whether or not the appellant gave notice of indemnity against the owner or driver of the said motor vehicle.

The appellant and the 2nd, 3rd and 4th respondents did not testify. One of the reasons given is that the driver who was driving the appellant's motor vehicle died as a result of the accident. The accident however, must have attracted the insurers of the appellant who should have conducted an investigation and called the investigator to testify. It is not enough therefore, to state that no evidence was available on the part of the appellant.

Where a party to a suit fails to call evidence in support of its pleadings, the said pleadings remain mere statements of fact and remain unsubstantiated. Such pleadings do not quality to be evidence and cannot be used to challenge a plaintiff's case.

Where therefore, a plaintiff adduces evidence in support of his pleadings to the required standards, then in the absence of any evidence from the defence, the evidence of the plaintiff remains uncontroverted- see **North End Trading Company Limited Vs. City Council Of Nairobi (2019) E Klr, Trust Bank Limited V Paramount Universal Bank Limited & 2 Others [2009] Eklr Janet Kaphine Ouma & Another Vs. Marie Stopes International (Kenya) Kisumu Hccc No 68 Of 2007.**

The appellant's motor vehicle in which the 1st respondent was travelling, rammed into another vehicle which had stopped to pick students along Thika road. The testimony of the 1st respondent that the driver was fast and driving at around 100 kilometres per hour has not been contradicted. In his plaint the 1st respondent blamed the accident entirely on the driver of motor vehicle registration No KAV 643P for failing to have any or adequate control of the motor vehicle, and driving without any or adequate regard for other vehicles reasonably expected to be on that road. That the accident occurred, draws the presumption that the driver did not break, swerve or stop the vehicle before the collision and confirms that the speed was excessive. Above all, the driver drove without due care and attention.

The trial court did not say much on liability, but the totality of the evidence presented shows that the 1st respondent discharged his duty as required under Section 107 of the Evidence Act. The 1st respondent had also established his case against the appellant on the doctrine of vicarious liability for the negligent actions of its driver.

On quantum the trial court relied on the medical reports produced and said as much in the judgment. The cited authorities were also considered, and the principle that comparable injuries should be compensated by comparable awards. I have looked at the medical reports, the injuries sustained by the 1st respondent and the residual permanent incapacity cited by the doctors.

The appellate court may not interfere with the awards made by the trial court unless they are inordinately high or low to attract that intervention. The appellant has not persuaded the court to disturb the award made by the lower court.

I have come to a conclusion that the appeal lacks merit and is hereby dismissed with costs to the 1st respondent.

***Dated, signed and delivered at Nairobi this 5th Day of December, 2019.***

**A. MBOGHOLI MSAGHA**

**JUDGE**