REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

CIVIL APPEAL NO. 228B OF 2013

(Appealing from the judgment of the Senior Principal Magistrate

at Machakos Hon. Mr. Gesora delivered on 29-10-2013

in Machakos CMCC No. 1119 of 2011)

STEPHEN PSIWA CHEPROT.....APPELLANT

VERSUS

MARY MUTHEU MUIA.....1ST RESPONDENT

DAVID MUMAMA.....2ND RESPONDENT

JUDGEMENT

1. By a plaint dated 7th December, 2011, the 1st Respondent herein, **Mary Mutheu Muia**, sued the Appellant herein claiming General Damages, Special Damages, Costs and interests arising from a road traffic accident which occurred on 10th September, 2011 along Machakos- Nairobi Road at Katheka Kai involving Motor Vehicle Reg. Nos. KBG 628R and KAR 984G.

2. It was pleaded that on the said day, the plaintiff was lawfully traveling in Motor Vehicle Reg No. KBG 628R when Motor Vehicle Reg No. KAR 984G belonging to the Defendant was as a result of negligent driving caused to veer onto and remain on the lane of Motor Vehicle Reg No. KBG 628R leading to a collision in which the plaintiff sustained severe injuries.

3. According to the Appellant the particulars of negligence against the said Respondent were that her driver acting as her agent was culpable of:

a) Driving at a speed that was excessive in the circumstances.

b) Veering onto and remaining on the lane of motor vehicle registration number KBG 628R.

c) Driving without any or any sufficient care and attention.

d) Failing to maintain any or any proper or effective control of the said motor vehicle registration number KAR 984G.

e) Failing to see motor vehicle registration number KBG 628R in time or at all so as to avoid the accident herein.

f) Failing to stop, swerve, brake, slow down or in any other way so to steer the said motor vehicle registration number KAR 984G.

g) Driving the said motor vehicle carelessly and recklessly without due regard to passengers in motor vehicle registration number KBG 928R and in particular the plaintiff herein.

4. Apart from the pleaded particulars of negligence the said Respondent also relied on the doctrine of *res ipsa loquitor*.

5. It was pleaded that the said Respondent sustained blunt chest injury and a cut wound on the right wrist region and incurred special damages in the sum of Kshs 2,400/=.

6. On the part of the Appellant, then the Defendant, it was pleaded that he was not the registered owner of Motor Vehicle Reg No. KAR 984G. It was further denied that the 1st Respondent was a passenger in motor vehicle reg. no. KBG 628R and that in any case if the collision occurred it was solely caused by or contributed to by the negligence of the driver of Motor Vehicle Reg No. KBG 628R whose particulars were given as:

a) Driving at a speed that was excessive in the circumstances.

b) Failing to keep a proper look out.

c) Failing to see motor vehicle Reg. No. KAR 984G in time or at all in order to avoid the said accident.

d) Driving on the wrong side of the road without due regard to other road users.

e) Driving dangerously and recklessly.

f) Failing to exercise or maintain any or any proper of effective control of motor vehicle Reg. No. KBG 628R.

g) Failing to take any or adequate precautions while driving along the said road.

7. Accordingly the Appellant denied liability for any loss occasioned to the 1st Respondent.

8. In the said suit the 2nd Respondent was joined as a third party thereto by the Defendant on the allegation that he was the registered owner of motor vehicle reg. no. KBG 628R whose negligence led to the said accident. On his part the 2nd Respondent denied ownership of the said Motor Vehicle Reg No. KBG 628R and denied liability to indemnify the Defendant for the damages due to the Plaintiff. He however pleaded that the accident was caused by the negligence of the driver of the Defendant's vehicle whom he accused of:

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

b) Failing to slow down, brake, swerve and or stop so as to avoid the said accident.

c) Failing to exercise due and reasonable care so as to avoid the accident.

d) Driving the said motor vehicle carelessly and dangerously without any regard to the passengers on board and to the safety of other road users and especially motor vehicle registration No. KAR 984G.

e) Failing to take proper look out or at all.

f) Causing the accident.

g) Driving unroadworthy and/or defective motor vehicle.

h) Driving on the lawful lane of motor vehicle registration No. KAR 984G.

9. He stated that he was unaware of any injuries sustained by the plaintiff.

10. This suit was selected as a test suit for several other suits arising from the same accident.

11. The first witness to testify on behalf of the 1st Respondent was **Dr Judith Kimuyu** who testified as PW1. According to her the injuries sustained by the 1st Respondent were classified as harm and she produced the P3 form and medical report as exhibits in the case. It was her evidence that the 1st Respondent had responded well to the treatment and by the time of her testimony ought to have fully healed.

12. PW2 was the 1st Respondent herself. According to her, on 10th September, 2011 she was travelling from Nairobi to Machakos in Motor Vehicle Reg No. KBG 628R when Motor Vehicle Reg No. KAR 984G approached from the opposite side at high speed and in a zig-zag manner and collided with Motor Vehicle Reg No. KBG 628R which overturned on the left side while facing Machakos which was the same side on which they were. According to the witness she was sitting in the passenger cabin and was therefore able to see ahead.

13. It was the 1st Respondent's evidence that the driver of Motor Vehicle Reg No KAR 984G was to blame for the accident as it was being driven at a high speed and moved from its lane to that of Motor Vehicle Reg No. KBG 628R. Following the accident, the 1st Respondent was injured on the chest and wrist and was treated and discharged though by the time of her testimony she had healed save for occasional chest pains. Following the accident, she reported the matter to the police and was issued with a police abstract which she exhibited. She also produced her treatment notes, a copy of the records of the offending vehicle and receipts for the expenses she incurred.

14. In cross examination, the 1st Respondent stated that the vehicle in which she was traveling was a minibus which has a separate driver's cabin with a window in the cabin which allows one to clearly see ahead. The time according to her was 5.00pm and there was natural light. While the vehicle she was traveling fell on the eft side, the other vehicle according to her fell on the right side as one faces Machakos. However the point of impact was on the road and the point of collision was on the driver's side. It was her evidence that there was no oncoming vehicle and there was no vehicle that was being overtaken. She maintained that the oncoming vehicle was zigzagging on the road and that the driver of the vehicle she was traveling in tried to avoid the accident and was not moving at high speed. She testified that she heard their driver hoot at the time of the accident. It was her evidence that at the point of impact they were ascending uphill and there was no way the accident could have been avoided.

15. PW2 was **Anthony Ndolo Muema** who was also travelling in motor vehicle reg. no. KBG 628R minibus. He was also seated in the driver's cabin and saw Motor Vehicle Reg No. KAR 984G approach at high speed while zigzagging. It then hit the vehicle in which he was travelling on the left line as one faces Machakos. He therefore blamed the driver of the saloon for the accident. He disclosed that the driver of the said vehicle was charged with the offence of careless driving and that he testified in the traffic case.

16. In cross-amination he reiterated that he was seated in the front cabin and that the terrain was hilly and that their driver tried to avoid the accident by veering to the left but the accident still occurred. In his evidence the time was about 4.00pm.

17. At the close of the plaintiff's case, the Appellant testified as DW1. According to him, on 10th September, 2011 he had gone to see his child in school in Makueni and was driving his Motor Vehicle Reg No. KAR 984G. About 2 Km from Machakos Town when facing Nairobi, he saw a minibus approach from the opposite side which minibus was trying to overtake another vehicle. According to him, although he tried to avoid the accident the said minibus hit him and he stopped off the road. According to him, the traffic case was concluded and he was acquitted.

18. In cross-examination, he admitted that motor vehicle reg. no. KAR 984G was his. It was his evidence that at the time of the accident he was with his wife, son and two of his neighbour's children. He testified that the vehicle which the minibus was overtaking was never hit and that the impact was in the middle of the road. He disclosed that he was charged with careless driving but was acquitted in a technicality. In his evidence he stopped at a distance of 5 metres and that he hit the *matatu* on the right side and the *matatu* fell on the left off their lane.

19. On behalf of the 2nd Respondent, he called **Gregory Musyoki** who on 10th September, 2011 was driving Motor Vehicle Reg No. KBG 628R. According to his evidence, as he was going downhill, he met with a Saloon Motor Vehicle Reg No. no. KAR 984G which was at high speed and moved to his side. Though he went off the road, the said vehicle hit his and removed the front axle and his vehicle fell on the left side of the road. He however denied that he was overtaking at the time. In his evidence though he slowed down the other vehicle which was over-speeding lost control and hit his vehicle.

20. In cross-examination he stated that he had a valid driving licence and that the saloon which was heading towards Nairobi veered onto his lane and hit his vehicle despite him trying to avoid t by moving off the road. To him, he was on his lane throughout hence the driver of Motor Vehicle Reg No. KAR 984G was to blame. He stated that the point of impact was partly on the road.

21. In his judgement the Learned Trial Magistrate found that the accident did occur and that the 1st Respondent was indeed injured. According to her whereas PW3 and the driver of the minibus were clear that the said vehicle was neither overtaking another vehicle nor moving at high speed and that the point of impact was on the left lane when facing Machakos general direction, the defendant was not clear on the exact point of impact apart from stating generally that it was in the middle of the road. H accepted the evidence of the 2nd Respondent's driver that he never moved from his lane. It was therefore his finding that the defendant moved speedily and lost control as a result of which the accident occurred and he was wholly to blame.

22. On quantum, based on the p3 form the medical report, it was the Learned Trial Magistrate's finding that the 1st Respondent sustained blunt injury to the chest and a wound on the wrist but has recovered satisfactorily. It was therefore his finding that the 1st Respondent sustained soft-tissue injuries and based on the authorities cited before him, he awarded Kshs 110,000.00 in general damages and Kshs 2,400.00 as special damages.

23. The Appellant's appeal was based on the following grounds:

> **1) The learned trial magistrate erred in law and in fact when he held the appellant 100% to blame for causing the accident giving rise to the original suit.**
>
> **2) The learned trial magistrate erred in law and in fact by disregarding the evidence of the appellant as to how the accident occurred and therefore arrived at a wrong decision in law.**
>
> **3) The learned trial magistrate erred in law and in fact when he found that the evidence of the respondents was sufficient to prove negligence on the part of the appellant when no evidence of an expert was called by the respondent.**

24. It is clear from the said grounds that the appellant's appeal is restricted to the issue of liability. It was submitted that the 1st Respondent did not prove that the Appellant was wholly to blame for the accident. To the contrary the Appellant proved that the 2nd Respondent was to blame.

25. It was submitted that from the evidence tendered at the hearing, it was clear that the accidence occurred in the middle of the road and that after the accident each vehicle went off the road and stopped on the opposite sides of the road. An attempt to prosecute the appellant was however thwarted by the Court hence it was submitted that the police did a shoddy job.

26. On behalf of the 1st Respondent it was submitted that the evidence of PW2 was well corroborated by PW3 and the 2nd Respondent's driver, that it was the Appellant who lost control, zigzagged on the road, veered off onto the lane of the other vehicle and hit the same. It was submitted that though the appellant alleged that the minibus was overtaking, he did not give the particulars of the vehicle that was being overtaken. Further, though he was not alone in his vehicle, the appellant did not bother to call any of the occupants of his vehicle to testify. It was therefore submitted that the evidence of the said persons would have been adverse to the defendant's.

27. As regards the defendant's acquittal it was submitted that the same was merely on a technicality as the police did not issue him with notice of intended prosecution. However, it was submitted that the mere fact that the defendant was charged is a *prima facie* evidence of negligence.

28. It was submitted that the Trial Court analysed the evidence and arrived at a proper conclusion.

29. 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."**

30. 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.

31. 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."**

32. In this case, the Learned Trial Magistrate was faced with two contradictory versions of the incident and he set out the evidence in support of both versions.

33. The case for the 1st Respondent was that on the material day, she was travelling in the 2nd Respondent's motor vehicle Motor Vehicle Reg No. KBG 628R (hereinafter referred to as "the minibus") which was being driven by the 2nd Respondent's driver when suddenly the Defendant's vehicle, a Saloon Motor Vehicle Reg No. no. KAR 984G (hereinafter referred to as "the saloon") emerged from the opposite side at high speed, lost control and despite the 2nd Respondent's driver's attempt to avoid a collision, collided with the minibus. According to the 1st Respondent there was no other vehicle in site at the time of the collision. This evidence was substantially supported by the evidence of PW3 who was similarly a passenger in the minibus. It was also supported by the evidence of the 2nd Respondent's driver. All the said witnesses testified that after the accident, the minibus overturned on the left side of the road as one faces Machakos which was its correct side of the road.

34. The Appellant's case on the other hand was that though he was driving on the said road at the material time, it was in fact the 2nd Respondent's driver's attempt to overtake another vehicle that led to the accident. However he did not disclose the particulars of the vehicle which was alleged to have been overtaken. Apart from that although he stated that he had other occupants in his vehicle none of them was called to corroborate his case. Whilst this Court appreciates that the onus was upon the 1st Respondent to prove her contention that the

accident was caused by the negligence of the Appellant's driver, section 109 of the ***Evidence Act*** provides that:

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

35. It therefore follows that whereas the burden was on the 1st Respondent, as the person who desired the court to give judgment as to her legal right dependent on the existence of facts which she asserted as giving rise to the Appellant's liability in negligence, pursuant to section 107 of the ***Evidence Act***, to prove that those facts exist; since it was the Appellant who was asserting that the 2nd Respondent's driver was overtaking dangerously, it was upon the Appellant to prove the existence of that fact. See **Maria Ciabaitaru M'mairanyi & Others vs. Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA 280**

36. In his evidence, the 2nd Respondent stated that he stopped at a distance of 5 metres and that he hit the *matatu* on the right side and the *matatu* fell on the left off their lane. By his o evidence, it was the Appellant's saloon vehicle that hit the 2nd Respondent's minibus.

37. It is therefore clear that there was evidence on the basis of which the Learned Trial Magistrate could justifiably find that it was the Appellant who caused the accident. The principle in **Peters vs. Sunday Post Limited** (supra) is to the effect that the jurisdiction of the appellate court to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand should be exercised with caution: and it is not enough that the appellate court might have come to a different conclusion. Therefore I cannot fault the findings of the Trial Court even if it was my view that I would have arrived at a different conclusion if there is evidence on the basis of which the findings of the Learned Trial Magistrate could be justified. In this case upon my own analysis and re-evaluation of the evidence on record, I am satisfied that the said decision should not be disturbed. There was abundant evidence to support his findings. Moreover it is quite clear that while he believed the Respondents' evidence he disbelieved that of the Appellant and the reason for his disbelief appears quite sound. See **Selle vs. Associated Motor Boat Co. [1968] EA 123.**

38. It is trite that where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court hardly interferes with the conclusion made by the trial court after weighing the credibility of the witnesses. See **Nyagwoka Ogora Alias Kennedy Kemoni Bwogora vs. Francis Osoro Marko Civil Appeal No. 271 of 2001.**

39. An issue was raised as to the effect of the Appellant's acquittal by the Traffic Court. It was however admitted that the said acquittal was based on a legal technicality being that the Appellant was not served with a notice of intended prosecution before the charges were levied against him. This issue however brings into focus the relevancy of traffic proceedings to civil proceedings. 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."**

40. 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."

41. **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."**

42. It must always be remembered that the decision of who to charge where there is 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 cannot be taken o be conclusive evidence of who between the two drivers is culpable. I therefore do not read too much into the fact that the Appellant was charged and acquitted of the traffic offence.

43. Before concluding this judgement, it is important to deal with the liability of third parties in proceedings where they are joined since the Appellant contended that it ought not to have been found wholly liable for the accident. In other words the Appellant's contention was that the liability to the 1st Respondent ought to have been, in the least apportioned as between the Appellant and the 2nd Respondent.

44. Order 1 rule 15 of the ***Civil Procedure Rules*** provides as hereunder:

> ***(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—***
>
> ***(a) that he is entitled to contribution or indemnity; or***
>
> ***(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or***
>
> ***(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.***

45. It therefore follows that a third party's liability is only in respect of ***contribution towards the defendant's liability or to indemnify*** the defendant for the amount that the Court finds due from the defendant to the Plaintiff. The second scenario is that the defendant has a claim against the third party for a relief or remedy relating to or connected with the subject-matter of the suit between the Plaintiff and the defendant which is substantially the same as some relief or remedy claimed by the plaintiff. In other words the Defendant claims that it also has a substantially similar claim against the third party as the claim the plaintiff makes against the defendant. In this instance it would be as if the defendant is making its claim against a defendant. The third scenario is where there is similar question to be decided in the plaintiff's claim against the defendant as in the claim by the defendant against the third party. It is clear that in all the three scenarios there is no question of the plaintiff making a claim against the third party. To the contrary the claim in the third party proceedings relates to the third party's liability to the defendant. In other words, there is no claim by the Plaintiff as against the Third Party. It was in this regard that it was held in **Commissioner for Transport vs. F O Boero [1954] 27 LRK 9** that third party procedure is a means for trial of questions between the defendant and the third party of liability of the third party to make contribution or indemnity and not for the joining of a third party as a co-defendant.

46. It was therefore held by **Platt, J** in **Zanfra vs. Duncan & Another (1969) THCD 135** that a third party is not a defendant unless the plaintiff decides to make him one and he is not concerned with the claim but with the contribution to the defendant. Therefore as was held by **Birech, Commissioner of Assize** in **George O. Obondo vs. Matiko Agoy Akedi Kisumu HCCC No. 306 of 1995**, the action between a defendant and a third party being one based on contribution and indemnity the cause of action accrues when the judgement is given against the defendant or when he pays the amount admitted in discharge of his liability. What this means is that the liability of the third is conditional upon the finding of liability by the defendant to the plaintiff so that if the plaintiff's suit fails, no issue arises with respect to the third party's liability to the defendant. In other words, third party proceedings are not the same as a claim against a co-defendant or a counterclaim against another party.

47. Having considered this appeal, it is my considered view that the instant appeal has no merit.

48. In the premises the appeal fails and is dismissed with costs to the Respondents.

49. Orders accordingly.

Dated at Machakos this 5th day of July, 2018

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Mutua for Mr Mulwa for the Appellant

CA Geoffrey