



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 236 OF 2007

DANIEL KALUU KIETI.....APPELLANT

VERSUS

MUTUVI ALI NYALO.....1ST RESPONDENT

WARIDI LIMITED.....2ND RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of Honourable D.Toigat (Mrs) Resident Magistrate delivered on 5th March 2007 in Nairobi CM CC No. 9003 of 2004. In that case, the appellant herein **DANIEL KALUU KIETI** was the plaintiff. He sued the respondents herein **MUTUVI ALI NYALO and WARIDI LIMITED** claiming for damages arising from a road traffic accident which occurred on 9th May 2003 along Waridi Sunrose Road while the appellant was travelling as a passenger in the course of his employment in the 2nd respondent's motor vehicle registration number KXM 027. The appellant blamed the respondents for being negligent and the 1st respondent who was the hired owner of the subject motor vehicle working for the 2nd respondent as a result of which negligence the appellant was injured. The trial magistrate heard the case and apportioned liability at 50:50 between the appellant and 1st respondent only.

In his Memorandum, of Appeal dated 4th April 2007 the appellant complains that:

1. The Learned trial magistrate erred in law and in fact in failing to consider the evidence on record and in apportioning liability at 50% against the appellant and the 1st respondent respectively while exonerating the 2nd respondent wholly from liability.
2. The learned magistrate erred in law and in fact in relying on extraneous matters that did not form part of the proceedings in arriving at the decision on liability.
3. The learned magistrate erred in law and in fact in finding that the 2nd respondent contracted out of its statutory duty of care to the appellant.
4. That the learned magistrate erred in law and in fact in failing to consider all the evidence adduced in respect of the appellant's injuries and thereby arrived at a wrong decision.
5. That the learned magistrate erred in law and in fact in making an inordinately low award in assessing general damages at kshs 20,000 and without consideration to the submissions by the appellant and the respondents.
6. The appellant prayed that the appeal be allowed and the court do revise the award of general damages upwards; the issue of liability be reassessed and that costs be awarded to him.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

Evaluating the evidence on record, the appellant testified as PW1 and called 4 other witnesses to support his claim in a fairly lengthy trial.

According to the appellant, he worked for the 2nd respondent as a casual labourer and on 9th May 2003 he boarded the 1st respondent’s bus registration No. KXM 027 together with 75 of his colleagues. The bus was hired by the 2nd respondent his employer from the 1st respondent owner thereof for purposes of ferrying workers to their respective places of work during the rainy seasons as there was a river between where most staff resided and the 2nd respondent’s premises which river would swell during the rainy season making it impossible for staff to cross over on their way to work.

When the bus reached a hilly section of the road, it suddenly started moving backwards down the hill and it hit a tree and fell on its right side. The driver struggled to control the vehicle in vain. The appellant got out through the door and was transported to the 2nd defendant’s company together with others who were injured and they received treatment at the company clinic and given sick off. The appellant sustained injuries on the wrist joint of the right hand, right shoulder and lower back. He did not report the accident to the police because the 2nd respondent had promised to compensate those who were injured and it was after the 2nd respondent reneged on that promise that the injured went to report to Athi River Police Station where he was issued with a police abstract and P3 form. He was later examined by Dr Wokabi who prepared for him a medical report. The appellant blamed the owner of the motor vehicle-the 1st respondent and 2nd respondent employer for allowing a faulty motor vehicle to carry staff to work. That the bus had no safety belts, had its exhaust pipe fastened with a rope and would go off the road and get stuck in the mud which defects had been reported to the 2nd respondent but nothing had been done about it.

In cross examination by the respondents’ counsels the appellant maintained his testimony in chief adding that he knew the 1st respondent to be the agent of the 2nd respondent and that he had not seen any contract between the 1st and 2nd respondents.

PW2 Benjamin Mathani Kioko was the appellant’s workmate at the spraying section. He was with the plaintiff/appellant in the ill fated bus on the material date of accident. He stated that the injured staff did not report the accident to the police because the 2nd respondent had promised them compensation.

Further, that he was in the union that discussed the accident and the fact that the 1st respondent’s motor vehicle was faulty and needed replacement by the 2nd respondent but they were told to continue using the same bus as there was no alternative. He maintained on cross examination that the bus reversed on a hilly section of the road, hit a tree and fell on the right but the same bus continued ferrying workers. He stated that the bus did not overturn contrary to his earlier testimony in chief.

PW3 Joseph Ndambuki Nzula a fellow worker to the appellant testified reiterating the evidence of PW1

and PW2 concerning how the accident occurred adding on cross examination that the bus rested at 45 degrees angle after the accident and they got out without much assistance and that had the 2nd respondent compensated the injured the matter would not have been reported to the police.

PW4 Edison Kirui was a clinical officer employed by the 2nd respondent. He testified that he went to the scene of accident to treat the injured and found workers alighting from an upright bus. He later treated some injured at the company clinic as per the extract from the clinic containing names of those injured and that the appellant was treated for right wrist joint injury only.

PW5 PC Charles Buto from Athi River Police Station testified that the accident in issue as reported on 16th October 2003 about 1 month and half after its occurrence, involving staff of the 2nd respondent, being ferried in the 1st respondent's bus and confirmed that the appellant was one of the 76 passengers listed as per the list given to the police by the 2nd respondent's Human Resource Manager Mr J.K. Langat. The police officer produced a police abstract showing the case was pending under investigations and that therefore it was not clear as to how the accident occurred but the driver of the bus would be charged for failing to report an accident.

PW6 Dr Wokabi examined the appellant on 13th November 2006. According to Dr Wokabi, the plaintiff complained of generalized pains over the trunk and severe pain in the chest and back and a painful right shoulder and right wrist. He had nonetheless fully recovered on examination. In cross examination Dr Wokabi stated that he relied on treatment notes and P3 form which did not state any injuries to the back or off duty. He confirmed that there was a discrepancy on injuries on P3 and treatment notes. In re-examination he stated that the injuries complained of may not have been included in the summary from the 2nd respondent's records but maintained that the injuries sustained by the appellant were consistent and such were suffered in accidents. The respondents called 4 witnesses. DW1 Urbanas Kanulu worked for the 2nd respondent as a cook. He was in the ill fated bus and it was raining and the road was muddy. After crossing the bridge, the motor vehicle was unable to climb the slope. The vehicle reversed and was held by a tree. 40 passengers were seated. Others broke windows to get out. He was not injured and according to him, no one was injured. They were then taken to the 2nd respondent's clinic for examination and they continued working. He stated that all persons walked out the motor vehicle. No one was rescued as the motor vehicle did not overturn. The same motor vehicle ferried them in the evening to Kananie. He maintained that there was no accident as the motor vehicle only skidded in the mud. He stated that the motor vehicle had no fault. He could not remember the plaintiff/appellant and further stated that the matter was never reported to the police.

On cross examination DW1 stated that he was injured, was massaged with liniment on the left leg but that the pain had been occasioned by the pushing and shoving of staff as they alighted from the bus and not as a direct result of the accident.

DW2 Mary Muthika Kimeu reiterated the testimony of DW1 adding that she was not injured in the accident and that the bus continued to ferry them to and from work for a long time thereafter. She had no knowledge of motor vehicles and did not know why the motor vehicle could not go up the slope and that only one lady was in shock and taken to Mutonguni. DW2 however did not know if anyone was injured in the bus. She stated that the bus had seat belts which they wore. She never saw anyone jump out through windows but that some windows were broken. She denied being given promotion and money to testify in court.

In cross examination she stated that she did not hear any complaint of injury after the motor vehicle had stopped and that she could not tell why people were pushing to get out of the motor vehicle but they were in a hurry to get out. She denied that the driver lost control. She heard no complaint concerning the bus defects but stated the union complained. She had no idea if anyone went to the clinic because she did not go there. In re-examination DW1 stated the bus was reversing slowly until it stopped.

DW3 Simon Maina Gatundu was the driver of the subject bus employed by the 1st respondent. On the fateful day, as he drove the bus it was raining. The road was narrow, steep and muddy because of the

rain so the bus was unable to go up the slope and it reversed resting on a tree on the side of the road after he tried to manage it. He maintained that the bus was in good condition, that it used to be serviced every month and that he used it continuously for 6 months. He maintained in cross examination that the police never looked for him after the accident as he lived in Athi River. That those who got injured were those who were pushing and trying to get out of the bus.

DW4Mhuri Ali Nyato was the owner of the subject bus. He stated that he had a contract of service with the 2nd respondent to transport its workers. That he was notified of the accident and he found the motor vehicle KXM 027 across the road near a drift and a tractor ready to pull it at 8.00a.m on the material day. That he was informed that there were no casualties and neither did he receive any complaint that his motor vehicle was defective.

The 2nd respondent called Charles Maina Kiragu a Human Resource Manager who testified that on the material day he received information concerning the accident which he confirmed that the bus had slipped and landed in a ditch as he found it leaning. He produced copy of service contract which showed that the contractor was liable for the safety of the employees and was to take insurance cover against such risks from 9th May 2001. He confirmed that people were treated at the company clinic following the accident but that there had been no complainant on the condition of the bus since the 2nd respondent required inspection certificates as evidence that the motor vehicle had been inspected.

After the close of the respective parties' cases their advocates filed written submissions both on liability and on quantum.

After considering the evidence and submissions, the trial magistrate found that there was an incident involving motor vehicle registration No. KXM 027 but that there was no evidence that the driver was negligent or careless while managing the vehicle or that the vehicle was faulty. She found that the accident was caused by the fact that it was a rainy day and while the bus was going up the slope it began to skid and since there was the effect of gravity, there was no otherwise but the driver to control it to safety on the side of the road.

On the injuries, she found that the appellant sought treatment for an injured right wrist. According to the trial magistrate the injuries were occasioned by the pushing and shoving of passengers who panicked once the bus started moving backwards, as they struggled to get out of the bus hence she held that they(including) the appellant contributed 50% to the injuries he sustained.

On who was liable for the accident, the trial court found that the 2nd respondent had been absolved by the service contract with the 1st respondent. She dismissed the claim against the 2nd respondent with costs.

On quantum, the trial court found that the injury was soft tissue on the right wrist joint and awarded the appellant shs 20,000/- general damages together with kshs 2000/- special damages plus costs of the suit.

It is that decision that provoked this appeal with the appellant who was the plaintiff complaining against the decision as arrived at both on liability and on quantum.

In his submissions dated 7th July 2015 the appellant relied on his submissions filed in the lower court adding that the apportionment of liability by the trial magistrate in the ratio of 50:50 against the plaintiff and the 1st respondent while absolving the 2nd respondent from liability was wrong. Secondly, that he had pleaded Res Ipsa Loquitor and vicarious liability in the plaint and therefore it was erroneous of the trial magistrate to absolve the 2nd respondent from liability since the appellant was its employee and in the course of duty when he was injured. He relied on **Winfield & Jolowicz on tort 13th Edition WVH Rodgers page 192** where it was held that the scope of employer's duty was said to extend to the means of access to the place of work, relying further on the decision of **Ash down V Samuel Williams & Sons [1957] 1QB 409**.

Further, the appellant contended that the 2nd respondent had a duty to ensure that the means of travel by the appellant was safe by requiring periodic inspection of the vehicle and heeding the concerns of the employees concerning the condition of the vehicle. The plaintiff relied on evidence of DW5 who testified that the road was passable as it had a murram surface, which contracted DW3 that the road was slippery, hence the motor vehicle moved backwards and that DW3 during cross exam confirmed that there was no mud, water or soil on the road yet he insisted that it was a slippery road that caused the accident. That the same witness also confirmed that the vehicle reversed backwards and hit an escarpment on the rear whereas DW1 and DW2 stated that the bus went to lean on a tree. It was further submitted that the motor vehicle had 76 passengers hence it was overloaded.

The appellant contended that DW2's testimony was full of contradictions on whether or not there were injured persons and that DW2 and DW3 contradicted one another on the presence of safety belts in the accident motor vehicle. He maintained that the injuries he sustained were as a result of the accident. It was contended that if the road was bad, the driver was under a duty of care to tell the workers to alight from the vehicle. He relied on **Laurie V Roglan Building Company Ltd [1941] ALL ER page 336 paragraph 6** where it was held that "if roads are in a bad condition then it was not safe to go at more than a foot pace, his duty is to proceed a foot pace..."

In his view, skidding of a motor vehicle is usually caused by worn out tyres which have no thread and that the owner thereof had admitted that the tyres had not been changed since its purchase.

The plaintiff also relied on **CA 23/67 Embu Public Road Services Ltd V Rimi** where the spring of the bus broke on a straight stretch and the motor vehicle overturned. The court applied the doctrine of *Res Ipsa Loquitur*.

The appellant also maintained that the 2nd respondent was under a duty to ensure that workers were carried in a vehicle that was mechanically sound; that no inspection report produced as to the vehicle's condition at the time of accident. He urged the court to find the respondents 100% liable jointly and severally.

On quantum, the plaintiff maintained that the award was inordinately low and not commensurate with court awards or the injuries sustained by the appellant and urged the court to award shs 780,000 relying on **HCC 2707/1990 Denys Mabwaka Khabusi V Mawingo; Nairobi HCC 2886/95 Jane Njoki Muraya & Another V Alice W. Kimani & Another**. He also prayed for specials of shs 2100/- costs of the suit and interest.

The 1st respondent never filed any submissions. The 2nd respondent filed submissions dated 26th October 2015 supporting the trial magistrate's decision on liability and quantum. It was submitted that the duty of care does not extend to conscious decisions made by the passengers themselves who in this case pushed and shoved upon panicking and that the award of shs 20,000/- general damages and shs 2000/- proved specials was sufficient, relying on **Kemfro Africa Limited T/A Meru Express Services, Gathogo Kanini V A.M.M Lubia & Another [1982-88] 1 KAR 777; Butt V Khan [1981] KLR 349 and Kitau V Coastal Bottlers Ltd [1985] KLR 470** to propound the principle that an appellate court should only interfere with an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate.

Further, on liability, it was submitted that the 1st appellant admitted that he was the one to be liable in the circumstances and that the 2nd defendant ought not to have been sued in the first place.

On apportionment of liability, it was submitted that it was an exercise of discretion of the trial court and so this court should not interfere, reliance being placed on **Karanja V Malele [1983] KLR 142**. It also relied on **Stephen Obure Onkanga V Njuga Consolidated Ltd [2013] E KLR** where the court refused to disturb the award of damages as awarded by the trial court. It also relied on the service contract that exonerated it from liability, urging this court to dismiss this appeal and uphold the findings

of the lower court.

I have carefully considered the evidence in the court below and as analyzed by the trial court in the impugned judgment. I have also considered the submissions made before this court by the appellant and the 1st respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal are:

1. Who was liable for the material accident which the trial magistrate described as an incident?
2. Whether the trial court erred in law and fact in apportioning liability between the appellant and 1st respondent only at 50:50.
3. Whether the 2nd respondent could be vicariously held liable for the negligent acts of the 1st defendant's driver.
4. Whether the quantum of damages awarded was inordinately low in the circumstances.
5. What order should this court make?
6. Who should bear the costs of this appeal?

On the first issue of who was liable for the accident, although the respondents had vigorously submitted and called evidence which alleged that there was no accident, the trial magistrate nonetheless found that there was an accident and that is why she apportioned liability between the 1st respondent and the plaintiff/appellant. Accordingly, I find that all the submissions as to whether or not there was an accident do not add any value at this stage to this appeal since there is no appeal filed by the respondents challenging the finding by the trial magistrate that there was an accident involving the subject bus ferrying workers. The only issue is who was to blame for the said accident and whether the trial magistrate was justified in apportioning liability between the appellant and the 1st respondent only at 50:50 and whether she erred in absolving the 2nd respondent from liability.

According to the 2nd respondent's submissions, the trial magistrate was justified in finding that the appellant and others were equally to blame for the accident for pushing and shoving when they panicked on seeing the bus reverse down the slope, as they tried to get out of the bus and that those injuries sustained must have been due to the pushing and shoving by the passengers.

From the evidence of DW1, he could not remember the plaintiff while DW2 stated that he did not remember seeing the plaintiff in the bus that morning. DW3 stated that he told people to alight slowly but several jumped out of the windows after removing the glass. He did not say that he saw the plaintiff shove and push or jump out of the windows. From the evidence as a whole, none of the defence witnesses stated that they saw the plaintiff push, shove or jump out of the vehicle out of panic and thereby injuring himself. Accordingly, I find the trial magistrate conclusion on how the plaintiff/appellant sustained injuries was unsupported and farfetched and the same is set aside.

Although the trial magistrate tended to exonerate the 1st respondent from blame though she found that there was an accident or mishap, what is apparently clear is that the bus in question which was insured to carry 40 passengers had on that material day carried 76 passengers as per the list of passengers submitted by the 2nd respondent's Human Resource Manager to the police after the injured persons reported the occurrence of the accident many months after its occurrence. This list was submitted voluntarily by the 2nd respondent. In the view of this court, accidents do not just happen. They are caused. A bus which is insured to carry 40 passengers was to be found carrying 76 passengers on the fateful day. The weather was rainy and the road was muddy and slippery. It was also hilly and therefore in my view, and on the evidence available on record the driver was unable to control the motor vehicle due to the excessive weight hence it reversed and hit a tree and it was that impact which injured some of the passengers. There must be some explanation as to why a vehicle which is well driven and which is well serviced must refuse to go forward and instead reverse on its own as per the driver's own testimony.

Section 112 of the Evidence Act is clear that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon

him. In this case, the 1st respondent claimed that the motor vehicle (bus) was well serviced and therefore it had no defects. But they did not produce any inspection report to prove that the motor vehicle was mechanically sound and not defective as contended by the appellant that it had worn out tires and that the exhaust pipe was even tied with a rope.

The mechanical condition of the motor vehicle was a matter within the knowledge of the 1st respondent. The appellant having alleged that the vehicle was faulty, it therefore follows that the burden of proving that the vehicle was not faulty lay with the 1st respondent who was in possession and use of the motor vehicle. He did not discharge that burden. Accordingly, I find that the appellant proved on a balance of probabilities that the bus was faulty and it is that mechanical fault that could have caused the mishap of reversing on the hill on its own since the driver stated that he engaged the No. 1 gear but the vehicle was unable to go uphill. Instead, it went back and rested on a tree on the side of the road.

In **Kenya Bus Services Ltd V Dina Kawira Humphrey CA 295/2000** the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that:

“Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation.”

The above decision was also cited with approval in Nyeri Court of Appeal Civil Appeal No. 22 of 2005. Similarly in **Nairobi CA 179 of 2003 Rahab Micere Murage estate of Esther Wakiini Murage V Attorney General & 2 others [2015] e KLR** the Court of Appeal reiterated that:

“Well driven motor vehicles do not just get involved in accidents.....”

In this case, the driver of the vehicle did not disprove the allegation that he was negligent. The slippery and muddy state of the road could not by itself have caused the motor vehicle to reverse on its own and land on its side after hitting a tree on the side of the road. The driver was under a duty to drive carefully and if the road was impassable, stop and make no move upon realization that the road was muddy and slippery. He driver took the risk of driving on such state of the road with 76 instead of 40 passengers. It was dangerous for the 1st defendant's driver to drive on such a road. He was endangering the lives of the passengers. That danger was foreseeable in the circumstances of this case. It is for that reason that I find that the trial magistrate failed to appreciate the weight or bearing of circumstances admitted and proved hence, this court is entitled to interfere with that finding as to the negligence of the 1st defendant ((see **Peters Vs Sunday Post Ltd [1958] EA 424.**) I do not see how the driver of the motor vehicle would have found it to be unsalable to ask his passengers to alight before attempting to go up the slope. In my view, going up when the vehicle was overloaded and the road muddy and slippery was an act of recklessness or carelessness on the part of the driver.

For those reasons, I set aside the decision of the lower court so far as it relates to liability. I reassess liability on negligence from 50:50 to 100% as against the driver of the 1st defendant. As the 1st defendant/respondent admitted that the driver was his agent or servant in the cause of authorized duty, I find the 1st defendant/respondent vicariously liable for acts of his driver, agent or servant then driving or in control of the accident motor vehicle.

The above exposition settles issues No. 1 and 2.

On whether the 2nd respondent could be held liable (vicariously for the negligent acts of the 1st respondent and or his driver, the appellant contended that the 2nd respondent having permitted its workers/employees the appellant included to be ferried in a defective bus, should be held liable as well. On the other hand, the 2nd respondent maintained that it was not aware of any defects on the bus.

Further, that it had a contract of service with the 1st respondent who undertook to ensure the safety of

employees while on transit by taking a comprehensive insurance cover, which would ensure that in case of an accident, those employees would be covered.

There is no dispute that the bus in issue belonged to the 1st respondent who had a contract of service with the 2nd respondent to transport the latter's workers. The 1st respondent was therefore a transporter contractor. It is also not in dispute that the 2nd respondent was not involved in the management or the servicing of the subject bus, or even driving it since the driver thereof was employed exclusively by the 1st respondent. It was therefore the contractor/ transporter's primary duty to maintain the bus.

However, the bus was on duty when the accident occurred. The fact that the bus did not belong to the 2nd respondent and that it belonged to the independent contractor and that therefore the 2nd respondent should not be held vicariously liable for the negligent acts of the 1st respondent's driver is a matter which was decided by the Court of Appeal in the case of **Sielle and Another V Associated Motor Boat Company Ltd and Others Civil Application 31/1967** where the Court of Appeal for East Africa was faced with the question of whether an independent contractor can be deemed to be an agent of the defendant. The court held:

“Where a person delegates a task or duty to another, not a servant to do something for his benefit, or for the joint benefit of himself and the other, whether that other person be called agent or independent contractor, the employer will be liable for negligence of that other in performance of the task, duty or act.”

From the above authoritative decision, it is clear that albeit the 2nd respondent's counsel tried to persuade this court with the contract of service and what it provided for in terms of the contractor's obligations and liability to ensure the safety of the workers and to take a comprehensive insurance cover against such risks; it was the sole responsibility of the 2nd respondent to transport its workers to and from their place of work. That being the case, it was the 2nd respondent to either use their own transport or to contract another person to do so on their behalf. This was to the 2nd respondent's benefit because it enabled its workers to get to and from the designated work place on time which must have definitely impacted on their overall performance. It was not the employees who decided which transport they should use to and from work. It was the duty of the 2nd respondent to provide the workers with a safe means to transport. If it assigned that responsibility to another person then that other person became the 2nd respondent's agent(s).

It is the humble view of this court that if the 2nd respondent had not contracted the 1st respondent and therefore the use of the subject accident bus, then liability would not attach to them but since they contracted the transporter to carry out a duty which the 2nd respondent's themselves were supposed to perform, then the 2nd respondent cannot escape liability, however tight their contract of service was on who would be liable in the event of an accident or injury to the workers. Accordingly, that ground of appeal on that issue succeeds. See also the persuasive decision of **Nzoia Sugar Company Ltd V David Nalyanya [2008] e KLR** Per W. Karanja J (as she then was).

The ancillary question therefore would be, whether the 2nd respondent was in any way negligent. The appellant pleaded as against the 2nd respondent that:-

- a. It permitted the plaintiff to be carried in a defective motor vehicle.
- b. It failed to provide a safe system of transportation to the plaintiff.
- c. The appellant further relied on the doctrine of Res Ipsa Loquitur and vicarious liability.

In the evidence by the appellant, he reiterated the acts of negligence as pleaded against both respondents which the respondents denied. The respondents also pleaded contributory negligence by the appellant in that:-

- a. He failed to fasten his seat belt.
- b. Failed to remain seated while the vehicle was still in motion.
- c. Scrambled to get out of the vehicle when it was in motion.
- d. Scrambled to get out of the vehicle when the same had safely stopped.
- e. Jumped out of the vehicle through the window when there was no cause to do so.
- f. Jumped onto the shrubs at the roadside when there was absolutely no reason to do so.
- g. Caused his own injuries as aforesaid.

It should also be noted that the 2nd respondent also filed notice of claim against the co-defendant the 1st respondent pursuant to the provisions of Order 1 Rule 21 of the Civil Procedure Rules, relying on the express written contract between them for transportation of workers wherein the 1st respondent undertook to take appropriate insurance measures against risks with regard to the usage of the motor vehicle and to keep the 2nd respondent free from and indemnified against any liability that may arise out of the usage of the motor vehicle.

As earlier stated in this judgment, there was absolutely no evidence adduced to the effect that the appellant is one of those people who scrambled or pushed or shoved to get out of the motor vehicle following the mishap. I have also not found any evidence on record to show that the appellant failed to remain seated while the vehicle was still in motion or that he jumped out of the vehicle through the window or jumped onto the shrubs at the road side when there was no reason to do so or that he caused the injuries on himself. On the contrary, there is clear evidence that the bus was overloaded with 76 passengers yet the same had the capacity to carry 40 passengers.

In my humble view, the 2nd respondent directly contributed to the occurrence of the accident. It permitted the 1st respondent's driver to carry excess passengers into the bus. It is for those reasons that I find that the appellant proved to the required standard that the 2nd respondent failed to provide a safe system of transportation to the plaintiff. This court has already found by inference that vehicles when driven, properly, maintained properly and serviced properly do not just get involved in accidents. The act of the bus reversing on a hill of its own was in my view and in the circumstances contributed to by, among others, defects on the bus and or overloading of the bus.

To my mind 76 people on a 40 sweater capacity bus is by far a large number of people and in excess of what the bus could comfortably carry, which is nearly double the number.

But with the appellant's own evidence that the bus was overloaded by nearly double the number, can he escape liability? I think not. He agreed to be ferried aboard an overloaded bus. He cannot therefore escape partial liability in this case.

Accordingly, I would in the circumstances find that the appellant was 20% liable for the accident though my finding is predicated on different reasons from those of the trial magistrate. There is no evidence that the appellant was forced to board the overloaded bus or that he was seated in the bus and protected at the excess passengers who were boarding the bus after it was full to capacity.

The doctrine of Res Ipsa Loquitur was also pleaded by the appellant. In my view, that doctrine would be applicable in the circumstances of this case even if negligence was not proved since the accident did happen, which was self involved. Even if the bus was not driven recklessly and or there was no bad weather and or bad condition of the road or overloading; the only presumption one can make out of the bus failing to climb the hill and reversing and hitting a tree is that the driver failed to manage or control the motor vehicle. And since accidents do not just happen on their own, even in the absence of evidence of overloading or mechanical defects of the vehicle, the driver would be held liable under the doctrine of Res Ipsa Loquitur.

On quantum of damages the appellant complains that the trial magistrate awarded damages that were inordinately low. I have perused the plaint which pleaded injuries sustained by the appellant as

- a. Blunt injury on the back
- b. Blunt injury on the chest
- c. Blunt injury on the right shoulder.

The medical produced by Dr Wokabi as per his examination of the appellant on 15th November 2006 stated that the appellant gave a history of generalized pain over the trunk. The chest and back pains and a painful shoulder (right) and wrist joint which pain persisted for six months after which it subsided. He was off duty for 3 days. There was on examination no abnormality in the injured areas. He had fully recovered at the time of examination. The P3 form showed that the appellant had sustained blunt injuries on the back, chest and shoulders and the degree of injury was classified as harm.

When he went for examination in 2006 before Dr Wokabi, the plaintiff complained of having been injured on the right wrist as well. He produced the sheet from the company clinic. He was No. 21 on the list of several patients attended to following the accident. He was treated for right wrist joint injuries only.

Although, the injury to the wrist was not pleaded, the trial magistrate found that it had been proved by the production of initial treatment notes. She also found that the P3 form did not reflect the initial injuries which she found irregular. There is no challenge by the respondents to that finding by the trial magistrate. It is not in dispute that the injuries sustained by the appellant were soft tissue injuries which were blunt. It is also not in dispute that the P3 was filled about 5 months after the accident and the appellant explained reasons for the delayed report to the police was because the 2nd respondent had promised to compensate the injured workers. It is further not in dispute that the plaintiff called PW4 the clinical officer who testified that the plaintiff only complained of injury on right wrist joint. It is further not in disputes that the appellant never went back to the clinic or to any other hospital for further treatment and he never adduced evidence that he sought any further medication for the alleged blunt injuries to his back, chest and right shoulder. If the appellant had suffered those injuries as pleaded, this court does not understand why he did not seek any further medication since the clinic only treated him for right wrist joint injury. He did not say that he felt the pain later and he did not explain why the P3 had different injuries from those in the I initial treatment notes. It is for that reason that I concur with the finding of the trial magistrate that the only injury proved was the soft tissue injury to the right wrist.

That being the case, I find that the award of kshs 20,000 for such a minor soft tissue injury was in the circumstances of this case sufficient to compensate the appellant for the injury sustained and therefore the complaint that the award was inordinately low is not merited and I dismiss it. I find no reason to interfere with the award and therefore I uphold the award by the trial magistrate.

In the end, except to the extend stated herein, this appeal regarding quantum of damages is dismissed. The appeal challenging liability as against the 2nd respondent and as apportioned is allowed. I set aside the decision of the trial magistrate exonerating the 2nd respondent from liability. I find that both respondents are liable in negligence for the material accident, and that the first respondent is vicariously liable for negligent acts of its driver. I also find that the 2nd respondent was liable for the negligent acts of its contractor the 1st respondent. They are liable to the extent of 80%. However, in view of the fact that the 2nd respondent issued notice of claim to the 1st defendant/respondent who did not contest the claim by the 2nd defendant/respondent, and the fact that the 1st respondent did not contest the contract to insure and compensate the 2nd respondent's workers, I find that in the circumstances of this case, the 1st respondent is wholly to blame and therefore liable to the extent of 80%. I also find that the appellant was partly to blame for the accident for accepting to be ferried in an overloaded bus. He shares 20% of the blame.

On costs, albeit costs follow the event, they are in the discretion of the court. In this case, taking into account all circumstances of the case, I order that each party bear their own costs of the appeal.

Dated, signed and delivered in open court this 3rd day of February 2016.

R.E. ABURILI

JUDGE