REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 314 OF 2010

FAL AZAD.....1ST APPELLANT

VIRDA FURHAD AZAD.....2ND APPELLANT

VERSUS

PETER MUBUA KARANJA.....1ST RESPONDENT

JAMES NJEHIA NDEICHI.....2ND RESPONDENT

LABAN MWANGI GATHI.....3RD RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. B. Atiang, Senior Resident Magistrate,

Nakuru delivered on 17th November, 2010 in Nakuru CMCC No 167 of 2009)

JUDGMENT

1. The appellants are the registered owners and driver respectively of motor vehicle **Registration No. KAU 285F** that on the 5th December 2008 collided with a another vehicle Registration **No. KAS 976K** along the Geoffrey Kamau road in Nakuru. The first Respondent was a fare paying Passenger in motor vehicle Registration KAS 976K while the second and third Respondents were the owners and driver respectively of motor vehicle Registration No. KAS 976K.

2. The first Respondent sustained injuries in the accident and sued both the above vehicles through the owners and drivers for negligence blaming both and sought special and general damages.

After a full trial the court apportioned liability equally between the owners and drivers of the two vehicles.

3. Being aggrieved by the judgment that both vehicles were equally to blame for the accident, they preferred this appeal on four grounds all on the issue of liability, that the evidence on record did not prove any iota of negligence against the appellants, that, as the first respondents evidence was unchallenged and pointed blame upon the second and third respondent, the trial court erred in law and fact by apportioning liability and holding the appellant 50% to blame. It is urged that the trial courts findings on contributory negligence be set aside and the second and third respondents be held wholly to blame for the accident.

4. The first respondent's in his statement of claim blamed both vehicles for causation of the accident. In particular he blamed the driver of motor vehicle **KAS 976K** wherein he was a passenger for driving at an excessive speed in the circumstances and hitting motor vehicle **Registration No. KAU 285F** for suddenly applying emergency brakes on the road without any good reason.

5. In his evidence in Chief, the first Respondent testimony was that motor vehicle Registration **No. KAS 976K** hit the vehicle that was ahead of it at the rear as it was being driver at high speed, and that it had not kept a safe distance. It was his further testimony that the vehicle ahead **Registration No. KAU 285F** stopped suddenly and he did not know why it stopped suddenly.

On cross examination, he stated that motor vehicle registration **Number KAU 285F** was in motion and had break lights. He stated that the driver of motor vehicle **KAS 976K** was charged and convicted for the offence of careless driving.

The investigating officer did not testify but the police file and police abstract were produced by PC Jamlick Ngari from Nakuru traffic office. He confirmed occurrence of the accident, and stated that the driver of motor vehicle **Registration No. KAS 976K** was charged and convicted for careless driving.

None of the defendants in the primary case now the appellants testified. The first respondent filed submissions by this Advocates. In his judgment, the trial court made findings as follows:

> ***"That whereas the plaintiff blamed second Defendant for driving fast and failing to keep distance and fourth defendant for stopping abruptly the defendants did not call any evidence to contradict the plaintiffs testimony I will therefore hold the second and fourth defendants equally contributed to the occurrence of the accident and first defendant and third defendant are vicariously liable."***

6. From the above testimony and findings of the trial court, this court is to determine whether the trial court's findings were supported by the evidence tendered and the applicable law and principles of negligence in particular causation and blameworthy.

All parties have filed written submissions

7. **The appellant's submissions** are that the trial court misapprehended the law on negligence and disregarded the evidence, and relying on **Sections 107, 108 and 109 of the Evidence Act** submitted that the first Respondent's evidence squarely placed blame on the third and fourth Respondents and discharged the burden of prove and as the fourth Respondent was charged and convicted, in terms of **Section 47A** of the **Evidence Act,** the trial court ought to have found the fourth Respondent having been convicted in the traffic court that, such conviction was conclusive evidence that he was the one to blame.

8. The first Respondent's submissions are that he discharged his burden of proof of negligence between the two vehicles and agreed with the trial court's judgment that both vehicles were equally to blame. It was submitted that conviction under **Section 47A of the Traffic Act** does not conclusively place all the blame on an accused in a civil trial, and a civil court ought to consider the evidence tender to determine culpability of the parties. The court was urged to disallow the appeal.

9. The second and third Respondents submissions are that the first Respondent failed to discharge the burden of proving that the driver of motor vehicle **KAU 285F** (second Appellant) was to blame for the accident as he stated that motor vehicle Registration Number KAS 976K hit the said vehicle from the rear and thus was careless and negligent.

It was submitted that since the drivers of vehicles failed to testify, the first respondents evidence remained unchallenged and uncontravated. They urged this court to uphold the trial court's judgment as having been founded on a plausible and unchallenged evidence.

This court being the first appellate court is under an obligation to consider the evidence tendered, re-

evaluate it and make its own findings and conclusions. In doing so, the court will also consider that it neither saw nor heard the witnesses testify – as stated in **Selle & Another -vs- Associated Motor Boat Board Co. Ltd -vs- (1968) EA, Sumaria & Another -vs- Allied Industrial Ltd (**2007) **2 KLR.**

Further, it is a principle of law that an appellate court will not readily interfere with a Judges findings on facts unless it is demonstrably shown that it is based on no evidence or is a misapprehension of the evidence.

See **Makube -vs- Nyamuro (1983) KLR 403 and Kemfro Africa t/a Meru Express Services & Another (1982-88) KLR 727.**

10. **Evaluation of Evidence and findings**

The court has considered the evidence tendered by the first Respondent which is repeated on Paragraph 5 above. There is no doubt that he blamed the two drivers for the causation of the accident.

He stated:

> ***"I do blame both motor vehicles. The one I was traveling in was driven fast. It did not keep enough distance, if he kept distance he would not have hit that motor vehicle. I blame KAU 285F as it stopped abruptly. I do not know why it stopped abruptly."***
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> **See Page 21 Records of Appeal."**

That evidence was not shaken in cross examination nor was it challenged as none of the two drivers testified. To that end, this court concurs with the trial court's finding that both drivers were equally to blame, which finding he reached upon analysis of the evidence.

> **Section 47A of the Evidence Act** states:
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> ***"A final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after thedate of the decision of any appeal therein which ever is the latest be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."***

11. It is the court's considered view that whether or not a party is convicted under the above provision in a criminal case, that alone cannot be conclusive evidence of guilty in a civil case as the burden of proof in both are different, the proof in a criminal ease being higher, and beyond reasonable doubt whereas it is on a balance of probability in a civil trial. See **Veronica Kanorio Sabari -vs-- Chinese Technical Team for Kenya HCCC No.376 of 1989.** None of the parties disputed that the fourth Respondent was charged and convicted. As I have stated above, such conviction does not absorb him form blame in view of the unchallenged evidence tendered by the first Respondent. The submission by the appellants that such conviction is *prima facie* evidence of negligence and therefore he ought to have been held 100% to blame is not sound submission in a civil case. See **HCA NO. 118 of 2010 Kagogi M'mugaa & Others -vs- Peterson Muthaura Kajogi (2012) KLR and HCCC No. 754 of 2005 Cornelia Elaine Wamba -vs- Shreji Enterprises Ltd,** the above issue was discussed; and the holding above reached: I have no reason to depart from the said holding.

Where the above issues were discussed.

A court of Appeal will normally not interfere with the trial courts findings of fact unless they are based on no evidence. There is no doubt that the first respondents' evidence was unchallenged and straight forward. This court has no reason to interfere with with the said findings of fact. - See **Mwanasokoni -vs- KBS Ltd (1982-88) 1 KAR 278.** He blamed both vehicles as stated. Had the appellants drivers testified, the degree of blame on each would have been reached but since none testified it was just that the court held both drivers equally to blame.

12. It is not always that when evidence is unchallenged or uncontraverted the court ought to take it at face value. It has to be interrogated and evaluated. It is also not true that whenever two vehicles collide and evidence is not quite clear on which caused the accident, that both must held equally to blame. Evidence was that motor vehicle Registration **No. KAS 976K** was being driven on high speed and did not keep a safe distance thus contributed to the causation of the accident. Likewise, motor vehicle registration **No. KAU 285F** stopped suddenly. Its driver failed to testified as to the sudden stop, causing the other to knock it from the rear. As such, the only reasonable conclusion is that both drivers were equally to blame.

as stated, for no reason causing the vehicle behind to ram onto its rear. The reasons to why there was a sudden braking was not explained as the driver failed to tender any evidence. Without such explanation, it was sound to blame it for the sudden breaking also causing the accident. The above analysis was ably captured in the trial magistrate's judgment. This court has no reason to fault the trial Magistrates findings of fact. See **HCCC NO.HCA No. 190 of 2007 – George Kiboi Wiathaiga -vs- Joseph Simba and HCA No. 564 of 2011 Sammy Ngugi Mugo -vs- Mombasa Salt Lakes Ltd – (2014) KLR.**

Evidence and make a finding on the most probable cause. Justice Visram as the then was the in the case **Amalgamated Saw Mills Ltd -vs- Stephen Murutinguru HCCC No. 75 of 2005** sated that it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury, tht the evidence adduced must on a balance of probability connect the two.

On uncontraverted and unchallenged evidence, of the firs Respondent, it is the courts finding that had vehicle Registration **No. KAS 975K** been driven on reasonable speed and kept a safe distance from the vehicle ahead Registration Number **KAU 285F** it would have been able to break and avoid ramming onto the vehicle ahead. The appellants having opted to tender no evidence in support of their positions and the court having carefully re-evaluated the evidence tendered in court, the inevitable conclusion has been reached that the appeal is unmerited and the trial courts findings on liability cannot be faulted and or interfered with. To answer what the appellants term as the unsettling question to who was to blame for the accident, this court's finds that both the driver of motor vehicle registration **No. KAS 975K** and **KAU 285F** on equal measure.

13. The said drivers being the authorised agents and/or servants of the registered owners of the said two vehicles are vicariously liable for their negligence. The upshot of the above is that the appeal is dismissed with costs to the respondents.

Dated, signed and delivered in open court this 9th day of February 2016.

JANET MULWA

JUDGE