



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 198 OF 2012

MERCY NJOKI KAMAU.....APPELLANT

VERSUS

TINY M. ROYAL COMPANY1ST RESPONDENT

JOHN WANYOIKE.....2ND RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Honourable Mr J. Gathuka Principal Magistrate at Muranga in Muranga Principal Magistrate's Court Civil Case No. 125 of 2010 delivered on 26th March 2012.
2. The claimant in the subordinate court was Mercy Njoki Kamau, the appellant herein. She instituted suit against the respondent Tiny Royal Company Ltd vide plaint dated 15th April 2010 seeking for special damages and general damages arising from injuries she allegedly sustained in a road traffic accident which occurred on 19th September 2009 along Kenol-Muranga Road involving motor vehicles registration Nos. KAY 723B and KBA 587 H. She claimed the accident was due to negligent acts of the driver/agent or servant of the defendant then driving motor vehicle registration No. KAY 723B, a hearse wherein the plaintiff claimed to have been a passenger.
3. The defendant entered an appearance and filed defence dated 20th August 2010 denying the plaintiff's claim as pleaded and in the alternative pleading that the material accident was solely caused and or substantial contributed to by the driver, agent or servant of motor vehicle registration No. KBA 589H.
4. The defendant also issued a Third Party Notice to the owner of the motor vehicle registration No.KBA 589H. The plaintiff filed reply to defence on 1st September 2010 and the Third Party, John Wanyoike upon being served with a Third Party Notice dated 2nd December 2010 entered an appearance on 21st March 2011 and filed defence dated 31st March 2011 on 4th April 2011 denying the defendant's claim against him and solely attributing the occurrence of the material accident to the negligence of the defendant's driver/agent or servant then driving motor vehicle registration NO. KAY 723B.
5. The plaintiff's case was heard. The defendant and third party never called any evidence.
6. In his judgment delivered on 26th March 2012 the trial magistrate dismissed the plaintiff's suit with costs to the defendant and Third Party. It is that judgment of 26th March 2012 that the plaintiff/now appellant is challenging before this court through a Memorandum of Appeal dated 13th April 2012 and filed in court in 20th April 2012 setting out seven grounds of appeal

namely:

1. *The learned magistrate erred in law and fact in dismissing the plaintiff's/appellants suit while overwhelming evidence was tendered in support of the same.*
2. *The learned magistrate erred in fact and in law in finding that the plaintiff/appellant did not prove his case as against the defendant/respondent.*
3. *The learned magistrate erred in fact and in law in ignoring that the plaintiff/applicant was a passenger in the defendant's/respondent's motor vehicle and hence would not be held liable or on contribution for the occurrence of the accident.*
4. *The learned magistrate erred in fact and in law in disregarding the plaintiff/appellant unshaken evidence.*
5. *The learned magistrate erred in fact and in law in not applying the doctrine of Res Ipsa Loquitor which was well pleaded.*
6. *The learned magistrate erred in law by completely disregarding the plaintiff/appellant submissions on the evidence, facts and issues before court.*
7. *The learned magistrate erred in fact and in law in not entering judgment in liability, general damages and special damages together with costs and interest as pleaded, submitted and pleaded.*

7. The appellant urged this court to allow the appeal, enter judgment and award general damages, special damages plus costs and interest to the plaintiff/appellant, set aside the orders of the learned magistrate and award costs of the subordinate court and of this appeal to her.
8. This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the lower court record and the evidence before it and arrive at its own conclusion. This principle of law was well settled in the case of **Selle Vs Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De Lestang stated that:

“ This court must consider the evidence, evaluate it itself and draw its own conclusions 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(Aldul Hammad Sarif Vs Ali Mohammed Solan [1955,22 EACA 270].”

9. And in the case of **Mbogo -Vs Shah & Another [1968] EA 93**, the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

“ I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing do arrived at a wrong conclusion.”

10. Assessing the evidence in the court below, the plaintiff testified that she was travelling in a hearse registration No. KAY 723B heading for burial from Nairobi when the hearse driver who was speeding met a pot hole and swerved to avoid hitting it and in the process collided with an oncoming motor vehicle KBA 587H Nissan matatu. That there was a yellow line and the hearse had left its lane. The driver could not slow down to avoid the pot hole. The hearse was damaged on the windscreen, driver's side mirror and back panes. A glass splinter injured her left eye.
11. The plaintiff maintained in cross examination that the hearse driver was over speeding and that other occupants in the hearse implored him to slow down and that on impact, the matatu driver

- driving motor vehicle registration No. KBA 587H was properly on its lane.
12. The plaintiff also stated that she is the only one who was injured in that accident and that the driver was new on that road and had left his lane to the matatu lane when the accident occurred.
 13. The plaintiff called PW3 Austin Osari a police officer attached to Maragua police station who testified that the accident was reported to Maragua police station. It involved the two motor vehicles KBA 587H hearse and a matatu. He stated that the driver of the hearse Peter Muiruri, had admitted being in the wrong and also admitted liability by signing an agreement undertaking to repair the other motor vehicle. PW3 produced a police abstract as an exhibit. He conceded that he was not an eye witness and that the police abstract showed that the case was pending under investigations but that the police had closed the file. He also stated that the accident was reported as non injury but later the complainant went to claim that she had been injured and a P3 was issued on 28th October 2009.
 14. The defendant and third party filed defences denying the claim but did not call any evidence. The trial magistrate at page 5-6 of the judgment found that the plaintiff had not proved her case on a balance of probabilities and dismissed her case and assessed quantum of damages at shs 300,000 general damages and shs 17,720 special damages. He awarded costs of the suit to the defendant and the third party.
 15. Being dissatisfied with that judgment, the plaintiff filed this appeal. The parties advocates in this appeal which was admitted to hearing on 12th October 2015 and directions given on 13th November 2015 agreed to have the appeal canvassed by way of written submissions within the given time lines but as at the time of writing this judgment, only the appellant's counsel filed their submissions dated 8th February 2016. The respondents never filed any submissions for consideration, in opposition of this appeal. The appeal is therefore unopposed and so I shall proceed to determine the issues that flow from the 7 grounds of appeal and the submissions filed by the appellant's counsel vis a vis the evidence adduced in the lower court as reviewed herein, and the authorities relied on.
 16. The appellant urged the court to consider two issues namely,

1. *Did the learned magistrate misapprehend the evidence presented before him*
2. *Did the learned magistrate misapprehend the law applicable?*

17. In answering the first question as to whether the learned magistrate misapprehend the evidence before him as presented, the appellant submitted that had the trial magistrate correctly apprehended the evidence presented before him, as opposed to him speculating, he would have found that :- an accident occurred on 19th September 2009 along the Kenol- Muranga road near Kwa Muguruki; that the appellant/plaintiff being a passenger in motor vehicle KAY 723B witnessed the accident and gave a clear account of how the same occurred; that the appellant blamed the driver of KAY 723B for the occurrence of the accident; that not all passengers in a motor vehicle that is involved in an accident must be injured; That the driver of KAY 723B hearse admitted liability and entered into an agreement with KBA 587H matatu on liability. That there was no evidence that the hearse was tinted or at all or that it was tinted in such a manner that the appellant would not see outside the hearse and that a tint only bars a person from outside seeing those inside and not the other way; that the plaintiff as an adult did not need her evidence to be corroborated by an adult since she was a credible witness and that her evidence was not challenged; that the appellant did not need to be a driver to as to tell if a vehicle was being driven at high speed; the plaintiff did not have to produce sketch plans, a police file for an accident whose occurrence was admitted; and that the 1st respondent and 3rd party 2nd respondent did not lead any evidence rebutting the plaintiff/appellant's case.
18. The appellant relied on **HCC 1162 of 2002 Robert Gichuhu Maina V John Kamau** citing **Msuri Muhhiddin V Nazzor Bin Serf El Kassaby & Another [1960] EA 201** where it was stated :

“ The speed of a vehicle in relation to the particular road conditions was a most material factor and one which normally was within the control of the driver and there was certainly a duty on a driver to keep a proper look out to ascertain the condition of

the road and to adopt the speed of the vehicles to it”.

19. It was therefore submitted that from the evidence adduced by the appellant, it was clear that the 1st respondent's vehicle was over speeding; the driver could not control the vehicle so as to avoid hitting a pot hole; the driver instead of slowing down tried to swerve and caused a collision with motor vehicle KBA 587H; the 1st respondent's motor vehicle left its lane and encroached on KBA 587H; the appellant could see the road ahead of her; the driver was not familiar with the road; he had been requested to slow down but declined; and that he had admitted having caused the accident and undertaken to repair motor vehicle Registration No. KBA 587H.
20. In the appellant's view, liability was proved and the judgment should have been entered in her favour. She urged this court to upset the trial magistrate's decision and find the 1st respondent liable.
21. On the second issue of whether the trial magistrate misapprehended the law applicable, it was submitted by the appellant's counsel that the standard to be applied by a prudent driver is that established in the case of **Boniface Waiti & Ellen Waithira V Michael Kariuki Kamau as cited in Embu Public Road Services V Riimi [1968] EA 22**. The appellant submitted that the trial magistrate imposed a burden that was outside the well established standard in **Embu Public Road Services V Riimi** Case (supra). It was submitted that the appellant gave the probable cause of the accident attributed to the negligence of the driver of the hearse and the driver of the hearse did not lead any evidence to show how the accident could not have been avoided.
22. The appellant further submitted that the trial magistrate made presumptions which he turned to presumptions and thereby misdirected himself and seriously erred on issues of law by taking judicial notice of matters outside those specified in Section 60 (1) (a) to (o) of the Evidence Act. In particular, it was submitted that the trial magistrate assumed that all hearse vehicles are tinted which was not the case and also assumed that if a vehicle is tinted then its occupants cannot see outside which is the opposite of the factual position and that therefore those are not matters which judicial notice could not be taken.
23. The appellant further submitted that the trial magistrate erred in law in failing to apply the doctrine of Res Ipsa Loquitur and infer that the accident was caused by the negligence of the 1st respondent, in the absence of any explanation by the 1st respondent's driver. The appellant relied on **HCC 48/1999 Obed Mutua Kinyili V Wells Fargo & Christian Claus Michael Walters**.
24. The appellant further submitted that the 1st respondent failed to seek for directions under Order 1 Rule 18 of the Civil Procedure Rules on the proper question to be tried as to the liability of the 3rd party and neither did he adduce any evidence to prove any liability against the third party hence the case fell wholly on the 1st respondent.
25. The appellant's counsel also relied on their submissions filed in the lower court and prayed that this appeal be allowed and judgment be entered in favour of the appellant with costs.

Determination

26. I have carefully considered the appeal herein as filed, the grounds of appeal, the evidence as adduced by the appellant and her witnesses in the lower court, the parties' respective rival submissions both in the lower court and the appellant's submissions before this court together with the authorities relied on and the relevant statutory and procedural law.
27. From my analysis of the evidence and trial record as a whole, in my humble view, the main issues for determination in this appeal are:
 1. *Whether there was an accident on the material date involving the appellant and the two pleaded motor vehicles and whether the plaintiff was injured as a result of the material accident?*
 2. *Who was to blame for the material accident?*
 3. *Whether the trial magistrate erred in law and fact in dismissing the appellant's suit with costs on the basis that she had not proved liability against the 1st respondent on a balance of*

probabilities .

4. What orders should this court make and
5. Who should bear the costs of the case in the lower court and of this appeal.

28. I shall determine the above issues together and systematically. The law is trite that it is he who alleges that must prove. This is a principle that is espoused in Section 107-109 of the Evidence Act, Cap 80 Laws of Kenya. In addition, the Court of Appeal in **Nkube V Nyamuro [1983] KLR 403** has made it clear that:

“ A Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”.

29. Nonetheless, the Court of Appeal in the above **Nkube V Nyamuro** case made it clear that the appellate court is not bound by the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally. In **Ndiritu V Ropkoi & Another** the Court of Appeal was clear that the appellate court should be slow to differ with the trial court and should only do so with caution and with cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the trial court acted on wrong principles of law in arriving at the findings he did. The above principles were also restated in **Mwangi & Another Vs Wambugu [1983] 2 KLR 100**.

30. On whether there was an accident subject matter of the suit in the court below and in this appeal, it is an undisputed fact as evidenced by the testimony of the appellant and the police officer who testified that an accident did occur, one of a collision involving two motor vehicles one belonging to the 1st respondent/defendant and the other to the 2nd respondent/ Third Party. This accident was reported to the police as shown by the Police abstract produced in evidence as an exhibit. It is also not disputed that the appellant herein was a passenger in the 1st respondent's motor vehicle registration No.KAY 723B which was a hearse transporting a deceased body to his final resting place when the accident occurred.

31. The 1st respondent denied in his defence the occurrence of the accident as pleaded by the appellant but in the alternative pleaded that if at all such accident occurred then it was due to the negligence of the 3rd party/2nd respondent. He also set out particulars of 3rd party's negligence and issued him with a third party notice. The 3rd party filed defence denying all those particulars of negligence attributed to him by the respondent. However, it should be noted that whereas the appellant testified in court and gave a detailed account of how the material accident occurred, the 1st respondent never adduced any evidence in defence to challenge the appellant's evidence which was given on oath. In addition the 1st respondent despite pleading that the accident was caused by or substantially contributed to by the 2nd respondent/ 3rd party, he never attempted to give any evidence to prove the negligence of the 2nd respondent/ 3rd party.

32. In this case, although no third party directions were given, it was the responsibility of the appellant to prove the negligence of the 1st respondent whom she had sued and in the same vein, it was the responsibility of the 1st respondent to prove how the 2nd respondent/3rd party was responsible for the occurrence of the material accident, and or that he substantially contributed to the occurrence of the said accident.

33. In the absence of any evidence by the 1st respondent on how the accident could have been caused by the 2nd respondent, this court is only left with the evidence of the plaintiff tending to prove her case on a balance of probabilities which is the standard of proof required in civil cases.

34. Thus, although the 1st respondent's counsel seriously submitted in the lower court urging it to discredit the evidence of the appellant/plaintiff, this court does not find those submissions building the defence case for the 1st respondent. It is trite law that pleadings and submissions are not substitutes for evidence. They are allegations which are not made on oath and

therefore remain mere allegations which are not substantiated. This is a principle which was enunciated in the case of **Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & Another [2014] e KLR** where the Court of Appeal in CA 240/2011Nairobi stated as follows.

“.....the first respondent had failed to prove his claim by evidence. What appeared in submissions not come to his aid. Such a course only militates against the law and we are unable to counterpane it. Submissions are generally parties “marketing language” each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.....”.

35. On the effect of failure to call evidence to rebut the plaintiff's case and testimony this court notes that although it is the primary responsibility of the plaintiff to prove her case against the defendant on a balance of probabilities, even where the case proceeds by way of formal proof, as espoused in Sections 107, 108 and 109 of the Evidence Act, Section 108 thereof provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Under Section 109, 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 be on any particular person.
36. Therefore, the above provisions require the plaintiff claimant to prove by way of oral or documentary evidence how negligent defendant was in the manner in which his motor vehicle/hearse was being driven at the material time by his agent/servant/employee, giving rise to the accident thereby injuring the plaintiff. On the other hand, it is incumbent upon the defendant to lay before the court evidence on a balance of probabilities to prove how the material accident was caused by and or substantially contributed to by the negligence of the third party in order for the court to find for the defendant.
37. The detailed uncontroverted evidence as adduced by the appellant is clear that the driver of the hearse who was new on that road, was driving extremely fast and hitting pot holes. The appellant and other passengers in the hearse called on the driver to slow down but he could hear none of it. He continued speeding and as he was avoiding a pot hole, he left his lane, swerved to the opposite lane and met an oncoming matatu and as a result a collision took place. After the accident, the driver of the hearse came out of the hearse, admitted liability and wrote an agreement with the driver of the matatu whereby the hearse driver undertook to repair the damaged matatu. The plaintiff was injured when broken glass entered her eye. That is the summarized version of the appellant's case in the lower court, which evidence was not controverted.
38. In my humble view, the trial magistrate 'invented' his own evidence upon which he based the decision. I say 'invented' because there was no evidence that the hearse was so tinted that the plaintiff could not see the outside of the motor vehicle since she had been seated at the cabin where the coffin was. The idea of it being *“common knowledge that hearses are normally constructed in such a way that the windows at the coffin cabin are tinted making it impossible for an onlooker to purview the coffin inside the hearse or the occupants therein”* and that since the plaintiff was not a driver posed the question as to what led to her concluding that the vehicle was over speeding” and that because “she was nowhere near the driver's cabin she could not tell at what speed the vehicle was travelling” was, in my humble view, farfetched conclusions which were not supported by any facts on record, evidence as adduced and or any known law of the land.
39. I have carefully examined the plaintiff's testimony and the testimony of PW3 No. 78833 PC Austin Orari, I do not find anywhere in their evidence whether in chief or in cross examination where they gave the description of the hearse or even mentioned that it was tinted. This court is also not aware of any known common knowledge that all hearses are normally tinted therefore the passengers in the cabin and the passengers therein being incapable of seeing outside. That assumption by the trial magistrate, in my view was unsupported and wholly erroneous and I reject it and upset it forthwith. This is so because according to PExhibit 7 copy of records, motor vehicle KAY 723B is a Toyota minibus matatu blue in colour. Therefore, where

- did the trial magistrate get the idea that the hearse was tinted?
40. Further, there is no known fact or law that if one is not the driver then they cannot tell whether or not a motor vehicle they are travelling in is moving very fast. That conclusion by the trial court, in my view, was an erroneous conclusion that was not supported by any evidence on record. I therefore set aside that finding.
 41. Further, there was no evidence to counter the plaintiff's evidence that she saw pot holes on the road and that the driver was new on that road. There was also no rebuttal of her evidence that the driver drove very fast as he avoided potholes on the road. The evidence by the plaintiff was very vivid and detailed. In my view, that kind of evidence can only come from a person who saw or heard. The defendant did not attempt to provide a different version of how and why the accident occurred, different from the version given by the plaintiff.
 42. I further find that the trial magistrate's conclusion that failure to produce a note wherein the driver of the hearse admitted liability and the police file were not produced thereby forming the basis for dismissing the plaintiff's suit with costs was an erroneous conclusion. This is so because the standard of proof required in civil cases is that of on a balance of probabilities and not beyond reasonable doubt.
 43. Further, it was not demonstrated that the plaintiff's claim against the defendant wholly depended on the production of the note where the hearse driver admitted liability and the police file. The court is entitled, in my humble view, to decide the case on the basis of the evidence adduced and find whether that evidence meets the standard required in civil cases.
 44. In addition, it was not shown that the plaintiff deliberately avoided to adduce/produce the note on admission of liability by the defendant's driver or the police file in order for the court to make an inference that had the plaintiff produced those documents, that evidence would have been adverse to her.
 45. In my humble view, the evidenced adduced by the plaintiff in the lower court, taken as a whole, was sufficient to prove on a balance of probabilities that the driver of the hearse was over speeding, that he left his lane and encroached on the 3rd party oncoming vehicle's lane and that he collided with the oncoming vehicle. I also find that it is not sketch plans that would have conclusively determined the liability of the defendant for the material accident.
 46. Furthermore, a police abstract is a public document extracted from an accident report made to the police. Although the trial magistrate claimed that PW3 relied on hearsay evidence, I beg to differ in that PW3 was clear in his testimony that he received summons to produce a police abstract issued to the plaintiff at Maragua police station regarding an accident that had occurred along Kenol-Muranga road at Kwa Muguruki involving two vehicles KAY 723B hearse and KBA 587H PSV matatu.
 47. Such details are undoubtedly those that are normally recorded by the police who receive accidents reports. PW3 did not have to be an investigating officer in order for him to produce abstract form which is an extract of a public record of a report of an accident received by the police, since police officers do not serve in the same police stations on a permanent basis. In my view, it was sufficient, in this case, that PW3 produced a police abstract report of the accident whose details as to how the accident occurred were narrated by the plaintiff/appellant in her evidence in chief and which evidence was not even shaken during cross examination. Neither did the defendant provide his different version of how the material accident occurred from the plaintiff's version and or how the third party was responsible for the accident. In any event, the plaintiff having been a passenger, the sketch plan by the police would only have indicated the point of impact following the collision between the two motor vehicles, and would only have assisted the court to determine the level of contribution if any from the third party. Thus, that evidence of a sketch plan would have been only useful for determining the extent to which the third party contributed to the material accident since the plaintiff's evidence wholly points to the defendant's driver as the one whose negligence was responsible for the material accident. Furthermore, evidence of contribution could only assist the defendant in shifting part of the liability. The defendant chose not to adduce that evidence to assist him. In **Embu Public Road Services Ltd V Riimi [1968] EA 22** the court stated that

“.....where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable

cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence.....”

48. In this case, I reiterate that the 1st respondent chose not to advance his theory of how the accident occurred or that there was a probable cause of the accident which did not connote negligence or even an explanation for the accident consistent only with an absence of negligence on his part. In **Nandwa V Kenya Kazi Ltd [1988] KLR 488**, the Court of Appeal stated that:

“In an action for negligence, the burden to prove that the accident was caused by the negligence of the defendant. However, if in the cause of that there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff’s favour unless the defendant’s evidence provides some answer adequate to displace that inference....”

49. This court in finding that the plaintiff’s evidence, prima facie and on a balance of probabilities proved that the defendant/1st respondent was negligent adopts the holding by the Court of Appeal in **Kenya Bus Services Ltd V Dina Kawira Humphrey CA 295/2000** where the Court of Appeal observed, quite accurately that :

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

50. In this case, there was an accident involving two vehicles which collided. The plaintiff has elaborately described how the accident occurred, laying full blame upon the defendant. The defendant has not given any explanation which could exonerate him from liability. In that case, even the doctrine of Res Ipsa Loquitur would be applicable.

51. It is on the basis of the above analysis that I find that it is necessary to interfere with the findings and decision of the trial magistrate on the liability of the 1st respondent. That decision by the trial magistrate was in my humble satisfactory view, clearly wrong because the trial magistrate misdirected himself and made wrong inferences which he ought not to have made and failed to consider matters which he ought to have considered or taken into account and in so doing arrived at wrong decision. Accordingly, I allow this appeal, set aside the judgment of the trial court on liability and substitute it with judgment for the plaintiff/respondent on liability against the 1st respondent at 100%. He is vicariously liable for acts of its driver, agent/servant.

52. On whether the plaintiff was injured as a result of the material accident, the plaintiff testified that upon the two motor vehicles colliding, the broken glass (glass splitter) injured her left eye. She nonetheless proceeded to the funeral after which she proceeded to hospital where she was cleared and referred to Kenyatta National Hospital. She produced hospital treatment notes P exhibit is a treatment note from Muranga District Hospital. It is dated 19th September 2009, on the same day of the accident. On 21st September 2009 she was admitted at Kenyatta National Hospital and discharged on 23rd September 2009 and the problem was eye piercing.

53. Although PW3 stated that initially the report of the accident was a non injury one, it was clear that the plaintiff proceeded to hospital the same day of the accident and later returned to the police at Maragua where she was issued with a P3 form and a police abstract.

54. The plaintiff sustained a corneal laceration(perforation) of her left eye. She had to undergo an operation. She lost nearly all vision in the injured eye. She uses an artificial lens. The plaintiff is satisfied with the award of general damages awarded by the trial magistrate had he found the defendant liable. In the end, the sum of shs 300,000 general damages for pain and suffering and loss of amenities assessed by the trial magistrate is sustained and upheld. I also uphold special damages of shs 17,720 awarded. I further award the plaintiff/appellant costs of the suit in the lower court and costs of this appeal to be paid by the 1st respondent only.

55. I further award her interest at court rates on general damages from 26th March 2012 the date

of judgment in the lower court. Interest on special damages at court rates is awarded from the date of filing suit in the lower court until payment in full.

Dated, signed and delivered in open court at Nairobi this 12th day of July, 2016.

R.E. ABURILI

JUDGE

In the presence of Miss Mwaniki h/b for Makumi for appellant

N/A for Respondents

CA: Adline