REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 444 OF 2011

FRANCIS MUIRURI MWANGI……..……..APPELLANT

VERSUS

JOHN NGUGI……..RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of the Senior Resident Magistrate Honourable B.A. Owino in Thika Chief Magistrate's Court Civil suit No. 791 of 2009, delivered on 5th September 2011.

The brief facts of the case in the court below are that the appellant Francis Muiruri Mwangi was cycling along Nairobi- Thika Road at Tuskys on 9th February 2009 when he was violently knocked down by motor vehicle registration No. KBF 201E belonging to the respondent John Ngugi. The appellant sustained injuries on his body and sued the respondent for recovery of general damage as well as special damages.

The Respondent denied the claim in his defence and upon hearing evidence from both the appellant and the respondent, the trial magistrate found that the appellant had not proved his claim against the respondent on a balance of probabilities and dismissed the appellant's suit, which order of dismissal prompted this appeal.

The appellant's Memorandum of Appeal dated 14th September 2011 raises ten grounds of appeal. The same was filed on 15th September 2011.

The said Memorandum of Appeal and grounds will be considered at a later stage.

The grounds of appeal as set out in the Memorandum of Appeal filed in court on 15th September 2011 are:-

1. The learned trial magistrate erred in law and in fact in failing to appreciate that the plaintiff had proved his case on a balance of probabilities.
2. The learned trial magistrate erred in law and in fact in failing to address her mind on the evidence adduced and hence, made erroneous findings dismissing the suit.
3. The learned trial magistrate erred in law and in fact in failing to address her mind on the evidence adduced by the plaintiff's doctor and hence, made an erroneous finding that his evidence did not support the plaintiff's injuries.
4. The learned trial magistrate erred in law and in fact in failing to address her mind on the evidence

adduced by the plaintiff and hence made an erroneous finding that his evidence was not corroborated.

5. The learned trial magistrate erred in law and in fact in addressing her mind to issues which were not before the court and hence made an erroneous finding dismissing the suit.
6. The learned trial magistrate erred in law and in fact in making a finding that the defendant's evidence was not challenged.
7. The learned trial magistrate erred in law and in fact in failing to consider the parties written submissions.
8. The learned trial magistrate erred in law and in fact in failing to set out the issues for determination and in failing to make specific and concrete findings on the issues in dispute.
9. The learned trial magistrate erred in law and in fact in failing to make complete, clear and intelligible record of the proceedings and thereby deprived the appellant his right to a fair trial.
10. The learned trial magistrate erred in law and in fact in failing to assess the quantum of damages she would have awarded in the event the claim was proved.

The appellant prayed that the trial magistrate's judgment be set aside, judgment on liability entered at 100% and this court do assess the quantum of damages payable to the appellant. He also prayed for costs of the lower court suit, this appeal and interest and such order further or other order as this court may deem fit to grant, inclusive of an order for a retrial.

This being the first appeal, I am reminded of my primary duty as the first appellate court to re-evaluate , re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. As was encapsulated in the case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212** where the Court of Appeal held inter alia:-

" On a first appeal from the High court, the court of Appeal should 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 witness and should make due allowance in that respect.

Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

The plaintiff's case

a. Pleadings
b. In this plaint dated 1st September 2009 and filed in court on 7th September 2009, the plaintiff pleaded that the accident in question occurred as a result of the negligence of the Defendant/ Respondent herein . The particulars of negligence pleaded were
c. Driving without due care and attention.
d. Driving at a speed that was excessive in the circumstances.
e. Failing to keep or maintain any or any proper look out. Overtaking or attempting to overtake when it was unsafe to do and hence causing the accident.
f. Driving a defective motor vehicle.
g. Failing to have due regard to the safety of cyclists reasonably expected to be cycling alongside the said road and in particular the plaintiff.
h. Failing to have due regard to other lawful road users and in particular the plaintiff.
i. Failing to warn the plaintiff of the approach of the said motor vehicle by hooting or in any other way reasonably practicable in the circumstances.
j. Failing to stop, slow down, to swerve or in any way so to manage and or control the said motor vehicle and avoid the accident.
k. In so far as is reasonably practicable under the circumstances the plaintiff will rely on the doctrine of *res ipsa loquitur*.

The plaintiff also pleaded that he sustained injuries involving dislocation of the right elbow as a result of the said accident and complained of recurrent pains on the right elbow.

He therefore claimed for general damages and special damages for police abstract Kshs 200; medical report 2000, P3 form Kshs 300, treatment and medical expenses Kshs 1080; and copy of records for motor vehicle KBF 201E- 500 all totaling Kshs 4,280.00, He also claimed for costs of the suit and interest at court rates.

Defence case.

In their defence, the defendant denied the occurrence of the accident, ownership of motor vehicle registration No.KBF 2001E and all particulars of negligence attributed to him and in the alternative pleaded that if at all such accident occurred then it was solely and or substantially contributed to by the negligence of the plaintiff in that.

a. He failed to take any adequate precaution for his own safety.
b. Failed to wear any adequate protective apparel as designed by law.
c. Entering /joining the main road without checking.
d. Failing to give way to motor vehicle KBF 201E which had right of way.
e. Cycling at an excessive speed in the circumstances.
f. Failing to property steer and control his bicycle.
g. Ramming into the defendant's motor vehicle.
h. Cycling in a dangerous and careless manner.
i. Failing to keep to the cyclist path.

The defendant denied that the doctrine if Res Ipsa Loquitor was applicable in the circumstances of this case.

The defendant also pleaded inevitable accident and denied particular of injuries , loss and damage and even receiving Demand Notice and prayed for dismissal of the plaintiffs suit with costs.

On 17th September 2009 the plaintiff filed a reply to defence joining issues with the defendant's defence and denying all particulars of contributory negligence alleged against him.

Evidence for the plaintiff:

The plaintiff testified and called two other witnesses, a doctor G.K. Karanja who examined him and prepared a medical report and Dr Lenny Oginga of Thika Level 5 Hospital who produced medical notes for Doctor Waki and Doctor Maina .

In his testimony, the plaintiff who testified as PW2 told the trial magistrate that he was a boda boda cyclist and on 9th February 2009 at 7.30 a.m. he was riding along Kenyatta road near Tusky's market in Thika town with a pillion passenger, on the left side of the road facing town and as he was about to turn right, he stretched out right hand to signal (warn motorists of his intention and suddenly, a matatu from behind hit him by the left side body panel, while trying to overtake him as he was turning. He was thrown off the bicycle and landed on a tarmac. The matatu stopped and police came to the scene. He was rushed to Thika District Hospital and treated for injuries. he was treated as outpatient. He reported to the police, and was issued with P3 form and police abstract.

He confirmed that it was motor vehicle registration No. KBF 201E that hit him that a search conducted at the Registrar of Motor Vehicles confirmed that it belonged to the defendant herein.

Following the accident, the plaintiff was injured on his right elbow which had not healed as at the time of trial. He sought for damages and costs from the defendant because the latter's driver was driving recklessly thereby causing the accident.

In cross examination, he maintained that he was hit from behind and that he saw the motor vehicle just before he started turning and that he had checked behind before he started signaling to turn and saw the motor vehicle at a distance of about 10-15 meters away and waved his right hand but the motor

vehicle came at high speed without breaking or swerving away from him yet he had time to serve or brake. He stated that the driver was overtaking him as he tried to him to the right and that it was the left side of the motor vehicle that hit him. He denied being reckless and causing he accident. He also denied being called to testify in a traffic case.

The plaintiff's witness PW1 Doctor G.K. Karanja examined the plaintiff on 1.3.2010 and prepared and produced a medical report showing that the plaintiff had a history of having been injured in a road traffic accident. That the plaintiff sustained soft tissue injury on right elbow joint with dislocation and had pain on and off. He was treated at Thika District Hospital. He was out of work for one month but had fully recovered at the time of examination. He charged shs 2000/- for medical report and Kshs 5000 for court attendance.

On cross examination by Mr Ouko advocate the doctor stated that the patient had treatment notes from Thika District Hospital and there was no mention of any loss of consciousness by the plaintiff.

Further, that the plaintiff informed the doctor that he had been given oral medication for pain only.

PW3 doctor Lenny Oginga a senior medical officer at Thika Level 5 Hospital testified and produced medical treatment notes for the plaintiff on behalf of Doctor Waki and doctor Maina who had attended to the plaintiff and filed P3 form.

According to Doctor Lenny, the plaintiff was treated for bruises around the right elbow after a road accident. That he had been hit by a motor vehicle lost consciousness. He had pain and bruises around the elbow joint with limited movement. X-ray done revealed dislocation of elbow joint which was reduced under anesthesia and that the injury healed but he complained of stiffness. He was therefore referred for physiotherapy after being discharged.

In cross examination by Mr Mwangi, the Doctor Lenny stated that the treatment notes for 18th February 2009 indicated that there was dislocation but X-ray showed no fracture, which according to him, would have shown on 9th February 2009. There was no evidence of losing consciousness, dizziness or headache. He had not seen the plaintiff's X-ray films nor even met the plaintiff in person, except that the P3 form was filed on 1st July 2009 at their hospital where he worked and that the doctor had indicated that there was possible dislocation.

According to Doctor Lenny, the person who filled the P3 form erred in not indicating the head injury which, to him, was the most serious injury as loss of consciousness if not dealt with could lead to death from a possible head injury. He clarified that pain on the elbow joint and limited movements were the clinical indications of a dislocation.

At the close of the plaintiff's case, the defence called three witnesses. DW1 Benson Macharia Kariuki testified that he was a PSV driver who plied Thika/Matuu road and on the material date of 9th February 2009 he was driving motor vehicle registration No. KBF 201B from Matuu to Thika. As he was approaching Tusky's Supermarket at OAU Road, a cyclist emerged into the main road where he (the witness) was moving. That he was driving at 50 kilometer per hour. He slowed down and applied brakes and hooted at the cyclist in vain.

The cyclist neither moved away nor stopped and instead joined the road ahead of the motorist driver/witness that is when the motor vehicle brushed against the cyclist. That the accident happened in quick succession as the cyclist wanted to turn right into the Tusky's area. He blamed the accident for the reckless of the cyclist as he was riding without due care. That is was the left side of the motor vehicle mirror that hit the cyclist who had a pillion passenger. According to DW1, the cyclist lost balance and fell down together with his pillion passenger but the latter jumped off the bicycle in time and was therefore not injured but that the cyclist sustained slight injuries on the elbow. DW1reported the accident to the police who came to the scene and found the cyclist still there. They both went to the police station and recorded statements and the cyclist even rode his bicycle to the police station.

According to DW1 it is the cyclist who did not give way on a highway by entering the road recklessly and then tried to turn right before allowing the motorist to pass, which act the DW1 did not anticipate. He denied even being prosecuted for any traffic offence. He concluded that the accident motor vehicle was owned by the defendant.

In cross examination, the witness told the court that the accident took place at 7.00am and the road was straight. Further, that the cyclist entered the road from a junction and by that time, the motorist had reached there. That he, on seeing the cyclist, slowed down, hooted and swerved to the right to avoid hitting him but the cyclist suddenly turned to the right and rammed into the motor vehicle and fell out of the road together with his pillion passenger. The witness asserted in re-examination that he was never prosecuted for any offence following the accident and that the pillion passenger walked away DW11, Doctor Isaac Nderitu also testified on behalf of the defendant that on 22nd February 2010 he examined the plaintiff/appellant and compiled a report. The examination was one year after the accident, on request from Directive Insurance Company Ltd Advocates. According to doctor Nderitu, on examination revealed no fracture on the affected elbow.

In cross examination, he stated that the P3 showed a reduction of the elbow joint was done as well as physiotherapy, but the treatment notes and X-rays showed no fracture. He confirmed that the P3 form was filled at Thika District Hospital. That he was a general practitioner in Thika.

DW3 PC Patrick Rutere from Thika Police Station Traffic Department testified that as pr their records, an accident involving motor vehicle registration No.KBF 201 E and a pedal cyclist along Gatitu Road was reported. That the motor vehicle and cyclist were headed in the same direction with the cyclist ahead and at the junction into Tusky's Supermarket, the cyclist turned right without warning and he was hit by one side of the motor vehicle . He confirmed that both the motor vehicle and cyclist were using the left lane into town and the road was straight, the morning was also clear in visibility the witness was among the first police officers to alive at the scene. He further stated that no police file was opened and that PC Simiyu who was the investigating officer was transferred.

In cross examination by Mr Kimetto advocate, the witness responded that when he visited the accident scene, the motor vehicle was there but he did not find the pedal cyclist at the scene. He asserted that the police concluded that the cyclist was to blame for the accident but no one was charged although according to the police abstract, the driver of the motor vehicle was the one to blame for the accident.

In re-examination , he answered that none of those involved in the accident was blamed for the accident officially but the report booking indicates that the cyclist suddenly changed lanes and in so doing, caused the accident.

At the close of the defence hearing, both parties agreed to file written submissions. The plaintiffs submissions were filed on 26th July 2011 supported by various authorities, whereas the defendant's submissions were filed on 8th August 2011.

In brief submission the plaintiff's advocates framed 3 issues for determination which touched on:-

1. Ownership of the motor vehicle involved in the accident
2. Whether the accident occurred, who was to blame for the said accident?
3. Quantum of damages and how much?

The defendant's counsel made submissions touching on liability and quantum.

In the judgment delivered on 5th September 2011, the trial magistrate B.A. Owino Senior Resident Magistrate dismissed the plaintiffs suit against the defendant .The trial magistrate's reasoning was that the plaintiff had not proved that the defendant's driver was to blame for the accident. That he did not call the pillion passenger who was an eye witness to corroborate his evidence , which omission could only be interpreted to mean her evidence would be adverse to that of the plaintiff, and that the

plaintiff was the author of the accident. She also found that the plaintiff did not prove that he suffered any dislocation of the elbow as alleged. It is that judgment dismissing the plaintiffs suit that provoked the appeal herein filed on 15th September 2011 setting out the 10 grounds of appeal as reproduced on this judgment.

This appeal was admitted to hearing on 20th May 2014 and directions were given on 21st July 2014 both parties advocates agreed to have the appeal disposed of by way of written submissions .

The appellant who was the plaintiff in the lower court filed his submissions on 29th August 2014. As at the time of writing this judgment , the Respondent had not filed any submissions despite the leave granted on 23rd September 2014 to file the same within 14 days, and the matter being mentioned on 23rd October 2014 and 2nd December 2014 when the date for judgment was set.

I have carefully considered this appeal, he pleadings, evidence and submissions by parties in the lower court, the judgment by the trial magistrate and the submissions by counsel for the appellant in support of the appeal, and the authorities relied on.

The issues for determination flowing from the ten grounds of appeal, as correctly framed d by the appellant's counsel are

1. Whether the appellant proved his case against the respondent on liability, on a balance of probabilities.
2. Whether the trial magistrate erred in law and fact in dismissing the appellants suit and whether she should have given an award of damages had she found the appellant had proved his case against the appellant.

In the submissions before this court, the appellant's counsel contends that the ownership of the accident motor vehicle was not denied and neither was the occurrence of the accident.

What was in issue is who was to blame for the occurrence of the said accident and the resultant injuries. I agree that the above two facts were not controverted and that what was ion controversy is who was to blame for the accident.

Section 107 of the Evidence Act provides that:-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that facts exist?"

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Under Section 108 of the Evidence Act 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 of the same Act, 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 lied on any particular person.

As the first appellate court, my duty, course, is to approach the whole of the evidence on record from a fresh perspective and with an open mind. I am enjoined, under Section 78 of the Civil Procedure Act, to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at my own independent conclusion.

In undertaking that duty, however, I reiterate that M must bear in mind that unlike the trial court which had the benefit of hearing and observing the witnesses, I make my own conclusion from the evidence as captured in the record as presented. I have no advantage of gleaning from the demeanor and enhanced communication of witnesses as they testified before the trial court . For those reasons, I must

be slow and cautious in disturbing those factual findings of the trial court unless it is clear that they were based as no evidence at all.

I have in this judgment set out the evidence as was adduced in the trial court by all parties and their witnesses as they testified.

What I gather clearly from the plaintiff/appellant's testimony is that "***he wanted to cross over"*** to the other side of the road and he did give a hard signal to the defendants driver but before he could completely turn, he was knocked by the defendants /Respondent's motor vehicle and blames the defendant's driver for not waiting for him (plaintiff) to turn. He claims that the defendant's driver tried to overtake him as he was turning.

The appellant stated that the matatu suddenly came from behind him and hit him before he could turn right completely. Although the defence tried to suggest to him that he was joining the road when he was hit. In cross examination, the appellant maintained that he was already on the road, not joining the road when he tried to turn before he was hit and that he checked behind before he stated signaling to turn. That he had seen the offensive motor vehicle at a distance of 10-15 meters away but the motor vehicle came at high speed he stated: "***I signaled and then I started to turn right. Before I could turn completely, the matatu came as if to overtake me and then hit me."***

From the above evidence of the applicant's own testimony, it is clear that the cyclist under estimated the speed of a motor vehicle coming behind him and when the signaled to turn to the right , he should have ensured that it was completely safe for him to turn to the right before making that move. That testimony by the appellant is, in fact, corroborated by the defence witness 3 No. 62812 pc Patrick Rutere of Thika police station who received the report.

According to DW3, the cyclist and the motorist were going in the same direction when the accident occurred, not that he was joining the road. The appellant states that the motor vehicle that hit him was 10-15 meters behind him when he saw it and signaled his hand to signify the intention to turn to the right at the junction. The minute in the booking report also indicated that the cyclist suddenly changed lanes and caused the accident. All parties testified in agreement that the road and visibility of the road were clear.

No charges were preferred against either the cyclist of the motorist, from the documents produced in court including the police abstract. Although the defendant's driver DW1 Benson Macharia Kariuki testified that the cyclist emerged onto the main road, suggesting that he came from some feeder road, that evidence is not supported, not even by his own witnesses. Although DW2 alleges that the event happened in quick succession, in my view, the driver ought to have seen the cyclist who was ahead o him. He does not deny seeing the cyclist before hitting him. And if both cyclist and motorist reported to the police, with DW3 replicating the evidence of PW2, this court finds that both the motorist and cyclist were going in the same direction and that the appellant was trying to change lanes to go to the right side of the road without ensuring that it was safe to do so. On the other hand, the driver of the accident motor vehicle who was following the cyclist from behind and therefore he ought to have seen the cyclist ahead of him and driven with due care and attention to avoid hitting the cyclist who says he signaled with his right hand giving an indication to turn to the right.

If the weather and road were clear and straight as per the evidence on record, in my view, nothing prevented the motorist from seeing the cyclist ahead of him and taking an action of slowing down to give way to the cyclist to cross the road d as opposed to insisting on overtaking him. Although DW1 stated that he hooted but that the cyclist did not heed, I do not believe him. According to DW1, he applied breaks then hooted but the cyclist "did **not move away or stop".**

In my view, if the cyclist was emerging from the feeder road into the main road when he was hit as alleged by DW1, then it is not clear how he could have moved away as opposed to stopping to give way to the motorist.

My own appreciation of DW1's evidence is that the appellant cyclist refused to keep to his left land and insisted on going into the right side of the road with a view to crossing to the other side of the road but since the motorist was close and did not see the signal by the cyclist, the two came into contact with each other when the motorist was overtaking the cyclist; since they were going on the same direction. That also explains the evidence by both the plaintiff/appellant and DW2 the police officer that "it was the left side of the motor vehicle that came in contact with the cyclist, who in turn got injured on his left elbow after falling off the bicycle. In my view, had the appellant been hit head on, or had the cyclist crushed into the motorist, he may not be alive today, or the injuries would be debilitating.

In the circumstances I do not believe DW2 that the appellant rammed into the motorist. Furthermore, the cyclist could only have turned to the right of the road of he was already on the road.

The respondent submitted and trial magistrate agreed with him that the cyclist having failed to call his pillion passenger who was with him during the accident, it must be inferred that the pillion passenger could have given evidence adverse to his. This principle was enunciated in **Bukenya vs Uganda (1972) EA 549.**

However, from the evidence on record, it is uncontroverted that the appellant was a boda boda rider going about his business carrying passengers for pay. In that kind of business, it cannot be expected that the appellant must know his customer who are engaged in their own business and who may never be willing to be involved in court cases. From the record, the evidence is clear that the passenger was not injured and that she walked away after the accident by jumping off the bicycle. There is no evidence that the pillion passenger was known to the cyclist appellant prior to that day of accident and or that she recorded a statement with the police regarding the material accident, attributing its occurrence to either the appellant or motorist.

For the above reason, I find that the trial magistrate's find that had the pillion passenger been called as a witness she would have given evidence adverse to the appellant. In my view, that conclusion was erroneous in principle.

This was a case of the appellant's word against the respondent, each of them blaming one another for the occurrence of the accident.

In my most considered opinion, the trial magistrate, in the circumstances of this case, did not require evidence of the pillion passenger to assess the level of blame on either side, especially, taking into account the evidence from DW3.

In the case of **Jane Wangari vs Felix Ole Nkaru HCC 191/2002** the court held that: ***"even if the defendant's vehicle was not over speeding, the traffic rules require that there be a proper distance kept between the vehicles. The vehicle behind has a greater duty to care to ensure that there is no collision between vehicles".***

In the above case, the facts were that there was no distance kept between two motor vehicles going in the same direction and when the motor vehicle ahead stopped suddenly, to avoid a collision, instead of swerving to the left side of the road the motorist behind swerved to his right side into the path of an oncoming motor vehicle.

Nonetheless, in the above authority, the learned Judge found the motorist ahead liable wholly because he had been convicted of causing death by dangerous driving and that the evidence was clear that he was reckless in his driving and failed to observe the traffic Rules.

In **Isabela W. Karanja vs W. Mabele (1982-88) KLR** the court held that where the accident involved the pedal cyclist and a motor vehicle, the latter was driving a lethal machine hence he had a greater duty of care.

Nonetheless, in the above decision, the evidence was clear that neither the driver nor the pedal cyclist

saw the other before the accident 'collision.

In that instant case, the pedal cyclist who was ahead of the motorist states that he saw the motorist behind him. The motorist too saw the pedal cyclist ahead and the weather was clear while the road was straight. None was therefore obstructed from the view of the other. In my view, both of them could have avoided the accident had they adhered to road safety regulations.

In this case, I find that it would be unnecessary to go into the precise speed to go into the precise speed of the respondent. Instead, it is sufficient to say that he was driving moderately since he had seen the cyclist ahead and he could not predict whether or not the cyclist would turn to the right while the respondent attempted to overtake him.

Had he been driving too fast, in my view, the cyclist could not have survived the impact. The appellant on the other hand, having seen the motorist approach, he should have slowed down and kept to his lane until the motorist passed him before attempting to go to the right side of the road.

It is trite law that the burden of proof lies with the party who alleges or asserts the existence of facts upon which he desires the court to give judgment as to any legal right or liability.

It was therefore the duty of the appellant to prove that the respondent was negligent by proving any of the acts of negligence pleaded.

Nonetheless, under Section 108 of the Evidence At, the burden of proof in a suit lies on the party who would fail if no evidence at all were given by either party **(see Toyota Kenya Ltd vs Express (K) Ltd (2013) e KLR.**

In this case, albeit the respondent had no counterclaim, he nonetheless pleaded contributory negligence against the appellant hence, he was under a duty to prove any of those acts of negligence attributed to the appellant.

Having anxiously considered and analyzed the evidence on record, I have come to the conclusion that both the cyclist and motorist were to blame for the accident as none of them effectively avoided the other. Each of them claimed the right of way without having regard to their own safety and the safety of others.

I would however apportion liability at 70: 30 in favour of the plaintiff/applicant against the defendant/respondent for reasons that the respondent was driving behind the appellant and therefore bore a greater duty of care since he saw the cyclist ahead of him, and should have prudently ensured that it was safe for him to overtake the appellant since he was driving a lethal machine. It is for those reasons that I find the trial magistrate's assessment of the evidence erroneous, which error made her to conclude that since the appellant did not call the pillion passenger, the latter would have given evidence that would be adverse to his interests and therefore dismissed the appellant's suit without making a finding that the respondent's evidence was not challenged.

On quantum, the appellant faults the judgment of the court below for failure to assess damages that the appellant would have been entitled to, had the court found that he had proved his case on a balance of probabilities . The record is clear that indeed, the trial magistrate did not assess any damages that she would have awarded the appellant had his claim been successful.

I agree with the appellant that such failure by the learned magistrate is against the established principles of law and practice . The lower court and this court are not courts of last resort except where the statute expressly contemplates. That being the case, it is absolutely necessary that damages are assessed even if there is no proof of liability.

In **Gladys Wanjiru Njaramba vs Globe Pharmacy & Another (2014) e KLR** the court stated that:

" it is trite law that the trial court was under a duty to assess the general damages payable to the plaintiffs even after dismissing the suit. This position is confirmed by the court of Appeal in the case of **Modekai Mwangi Nandwa vs Bhoghab Garage Ltd CA No. 124/1993(1993) KLR 448** where the Court of Appeal held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment and in the case of **Matisya Byabaloma & others vs Uganda Transport Co. Ltd, Uganda Supreme Court CA NO. 10/93 IV KALR 138** where the court held that a judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim.

From the above authorities, it is clear that the trial court fell into error by not assessing the award of general damages she would have awarded to the appellant had he been successful in proving his case on liability.

I shall now proceed to assess such damages based on the injuries sustained by the appellant . But before I do so, I must address the issue raised by the appellant and which is apparent on record in the learned magistrate's judgment at page 113 of the record of appeal. She stated:

"……..more importantly according to the plaintiff's own documents (i.e. treatment notes and P3 form) there was no conclusive diagnosis of a dislocation as alluded in the plaint."

That conclusion suggests that the appellant did not prove that he was injured as alleged in the plaint that he sustained injuries involving dislocation of the right elbow and that he complained of recurrent pains on the right elbow.

At page 30 of the record of appeal, the appellant testified that he was hit and thrown off the bicycle and he landed on the tarmac. He was taken to Thika District Hospital where he was treated and discharged. he produced the medical report through Dr G.K. Karanja, who examined him on 1st March 2010 and found that the plaintiff/appellant sustained soft tissue injuries on the right elbow joint with a dislocation. He was put on drugs and physiotherapy for one month and as at the time of examination the appellant had slight pain on the injury site on and off. He suffered 'harm' and was now fully recovered.

Doctor Lenny Oginga a Senior Medical officer at Thika Level 5 District Hospital testified and produced he appellant's initial treatment notes from that hospital on behalf of Doctor Waki and Doctor Maina who were his colleagues and who had attended to the appellant.

According to Doctor Lenny, the appellant was treated for bruises around the right elbow after a road accident lost consciousness after being hit by a motor vehicle and falling down.

On cross examination, he had limited movement at the right elbow, pain and bruises around the joint. X-ray showed dislocation of the elbow joint. It was then reduced under anesthesia. The injury healed but he complained of stiffness and he was referred for physiotherapy.

In cross examination the doctor replied that there was no fracture according to X-ray but that on 18th February 2009 the notes indicated that there was dislocation and no record of unconsciousness . He indicated that there was possible dislocation. The respondent's testimony too stated that the appellant was slightly injured on the elbow after being hit by the left side mirror and loosing balance and falling down.

DW2 Doctor Isaac Nderitu who testified on behalf of the respondent stated that physical examination of the appellant revealed no fracture on the affected elbow. He however confirmed in cross examination that the appellant's treatment as per P3 showed that a reduction of the elbow joint was done and that he indeed underwent physiotherapy, which could be done even for soft tissue injuries. He stated that although the treatment notes did not talk of fracture or deduction, the patient was referred for X-ray to rule out fracture.

I have examined the appellant's treatment notes, P3 form and medical reports. The treatment notes from Thika District Hospital serial No. 1532 show:

"C/O right elbow pain and bruises. Patient hit by a vehicle and fell; he sustained injury on the right upper limbs and reported to have lost consciousness for 10 minutes, no headache, no dizziness, limited elbow movement, pain on passive flexion bruises on posterior of elbow.

Imp:? Dislocation of right elbow joint.'

The record further shows that the appellant was referred for X-ray and was followed up to exercise and physiotherapy to improve motion. The X-ray showed no fracture. The injuries enumerated above were also replicated in the P3 form.

From the record, it is clear that there was no fracture and neither did the appellant nor his doctors even state that he had a fracture. What is clear is that he was referred for X-ray to rule out a fracture, not that he had a fracture. However, the evidence on all the fours is clear that the appellant sustained a right elbow dislocation and had to undergo physiotherapy to improve flexion. It was therefore erroneous for the trial magistrate to conclude that the documents showed no fracture or dislocation of the elbow.

On the issue of head injury and losing consciousness, the appellant did not plead it and therefore it was unnecessary to submit on those injuries that were never pleaded or proved as the appellant did not seek to amend his plaint to include extra injuries . His testimony was however scanty on the type of injuries he sustained except in cross examination where he stated that "**I was hit on my right hand / arm. I was thrown off the bicycle."**

Since the law is clear that parties are bound by their pleadings, this court finds that the appellant proved by his medical records the injury involving dislocation of the right elbow. I also find the P3 and treatment notes being consistent in all material particulars on the pleaded injuries. These injuries were corroborated by the respondent that the appellant **"was slightly injured on the elbow."** Not being a doctor, he could not, in my view, understand the depth of the injury.

Having found that the appellant was injured on the right elbow involving dislocation and bruises thereof all classified as soft tissue injuries as per the P3 and medical reports, I now proceed to exercise my discretion to assess damages based on those injuries.

In **Patel M. Kariuki vs Attorney General (2014) e KLR** the count acknowledged that the assessment of damages is a matter of judicial discretion for the trial court, which must be exercised judicially and with regard to the general conditions prevailing in the county and to prior relevant decisions.

The object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position a she would have been if he had not sustained the injury.

In this case, the appellant's injuries were soft tissue as assessed by the doctors. He was left with no permanent incapacity. After the accident, he rode himself to the police station as testified by DW3 the police officer whose evidence on that aspect was not challenged by the appellant.

In the court below, the appellants counsel proposed a sum of kshs 500,000 damages for pain , suffering and loss of amenities relying on the case of Doctor **Wolfang Farrugia & another vs the Attorney General & another Nairobi HCC 472/88** where the plaintiff sustained a comminuted fracture of the lower end of the humerus causing weakness of the 1st plaintiff's right hand. The 2nd plaintiff who sustained fracture dislocation of right elbow and radius, and ulna and reduced the junction of the right hand, he was awarded kshs 400,000 general damages.

The respondent's counsel on the other hand proposed Kshs 50,000/- relying on **Pamella Ombiyo**

Okunda vs Kenya Bus Services Ltd Nairobi HCC 1309/2002 where the plaintiff sustained

a. Blunt head injury with loss of consciousness
b. Deep cut on forehead and both legs.
c. Soft tissue to neck.
d. Subluxion of public symphisis (not proved)
e. Blunt trauma to hip and right eye.

Angawa J on 11th February 2004 awarded Kshs 50,000/- general damages.

In my view, none of the authorities cited in the lower court matched the injuries sustained by the appellant which were very precise-soft tissue injury to the right elbow joint involving dislocation of the same.

The appellant/plaintiff's advocate relied on decisions where the plaintiffs sustained very serious injuries which cannot even be classified as harm, to warrant a proposal for an award of Kshs 500,000 general damages. Similarly, the decision by Angawa J in Pamela Ombiyo Okinda is relevant and outline the test of proportionality of awards to the injuries sustained. Furthermore, the decisions cited were made over a decade preceding the impugned judgment in the lower court. There are, in my view, many decisions made in the years proximate to the date of the accident and judgment on 5th September 2011, with relevance to this case.

Doing everything I can, as no two cases are the same, taking into account the rate of inflation and decided cases, I find that a sum of Kshs 120,000/- general damages for pain and suffering is would sufficiently compensate the and I accordingly award him Ksh 120,000. The injuries sustained were classified as harm and his own doctor who examined him almost one year after the accident, fully recovered. The plaintiff suffered no permanent incapacity.

In **CA 6 OF 2012 PAUL KIPSANG[2012]eKLR** where the plaintiff sustained fracture of upper incisor tooth, loosening of other teeth and post accident pains on the left elbow and abdomen, Gikonyo J reduced an award of Ksh 300,000 by the lower court to Ksh 200,000 general damages.

In the end I allow this appeal to the extent that both the appellant cyclist and respondent motorist were to blame for the accident in the ratio of 30%:70%. The finding and order of the trial magistrate dismissing the appellant's case is therefore set aside and substituted with an order that both the appellant and respondent were to blame for the accident.

I also find that the appellant sustained an injury involving dislocation of his left elbow and I accordingly set aside the trial Magistrate's order and finding that there was no evidence of dislocation

Finally, I award the appellant as um of Kshs 120,000 general damages for pain and suffering subject to 30% contribution.

On special damages, it is trite law that they must be specifically pleaded and strictly proved. The appellant pleaded for Kshs 4280 special damages made up as follows:

a. Police abstract Ksh 200
b. copy of records Kshs 500
c. Medical report Ksh 2000
d. P3 form Ksh 500
e. Treatment and medical expenses Ksh 1080

Total 4280

During his testimony, the plaintiff produced receipts for:

i. Copy of records Ksh 500
ii. Medical report by Dr. Karanja Ksh 2000
iii. Receipt of medicine Ksh 280
iv. Receipt for court attendance by Dr.Karanja Ksh 5000
v. Physiotherapy Ksh 2000
vi. X-ray Ksh 300
vii.P3 Ksh 500
viii.Consultation Ksh 50

Total 8830

There was no proof of Kshs 200 for police abstract and the Kshs 5000 for court attendance by the doctor was not pleaded. Even if it was pleaded, the doctor's court attendance fee is a witness expense and not a special damage.

Out of the pleaded items only Ksh 3830 was proved which I accordingly award the appellant. I also award him costs of the lower court and of this appeal, and interest on general damages of Kshs 120,000/- from date of judgment in the lower court and interest on special damages from the date of filing suit in the lower court. The general damages and costs shall be subject to 30% contributory negligence.

Summary

i. Liability: 70:30 in favour of the appellant against the respondent
ii. Quantum:

a. general damages: Ksh 120,000 less 30%contribution
b. special damages: Ksh 3830

iii. Interest on general damages: to run from the date of judgment in the lower court until payment in full.

Interest on special damages to run from the date of filing suit in the lower court until payment in full.

Costs of the suit in the lower court and costs of this appeal are awarded to the appellant subject to 3% contribution.

Dated, signed and delivered in open court at Nairobi this 8th day of May, 2015.

R.E.ABURILI

JUDGE

8.5.15

Coram Aburili J

C.C. Kavata

Mr Ndungu for the appellant

Mr Wahome holding brief for Miss Nzembo Odera for the respondent

Court- Judgment was to be delivered on 11th March 2015 at 2.30pm but the same could not be delivered as the court was fully engaged.

The judgment is now read and pronounced in open court.

R.E. ABURILI

JUDGE

8/5/2015

Mr Wahome – I seek for stay of 30 days.

Mr Ndungu - I have no objection.

Court- Stay of execution for 30 days granted as prayed.

R.E. ABURILI

JUDGE

8/5/2015