



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 606 OF 2009**

**HARRISON KAMAU MUNGAI .....APPELLANT**

**VERSUS**

**KINUTHIA NGETHE .....1<sup>ST</sup> RESPONDENT**

**HENRY MBURU KARIUKI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**1. Background**

This appeal arises from the judgment and decree passed by Honourable Mr S.A. Okato principal Magistrate on 9<sup>th</sup> October 2009 in Milimani Chief Magistrates court civil suit No. 3530/2006 heard and determined as a test suit for all other related suits to the principal claim. The genesis of the appeal is that on or about the 11<sup>th</sup> day of March 2006 along Limuru road, the defendant and or his driver one Joseph Muguru Ngamiya was driving) in control or management of the motor vehicle registration No. KAP 497S when he collided with motor vehicle registration No. KAR 337 E as a result of which the claimant Kinuthia Ngethe who was a passenger in motor vehicle KAP 497S was seriously injured and he claimed d for damages arising from the said accident whose occurrence he blamed the driver and owner of the said motor vehicle KAP 497 S Nissan matatu for being negligent after conducting investigations into the occurrence of the accident, the police charged the owner of the lorry motor vehicle registration No. KAR 337E with a traffic offence of careless driving vide OB of 12<sup>th</sup> June 2006 but was on 24<sup>th</sup> December 2007 acquitted of the offence.

**2. Pleadings**

By an amended plaint dated 12<sup>th</sup> August 2008 and filed in court on 15<sup>th</sup> August 2008, the 1<sup>st</sup> respondent herein who was the plaintiff in Milimani CMCC 3530 of 2006( test suit) sued the appellant herein, who was the defendant in the said suit seeking for compensation for the injuries he sustained and for costs of the suit and interest. The second respondent herein Henry Mburu Kariuki was joined to the proceedings by the appellant herein, as a third party through a third party notice issued and dated 13<sup>th</sup> March 2007 and filed in court on 15<sup>th</sup> March 2007 to which a defence was filed on 8<sup>th</sup> May 2007 denying the defendants claim and attribution of contributory negligence on his part for the occurrence of the material accident. The appellant herein entered an appearance to the summons to enter appearance and filed its defence on 6<sup>th</sup> October 2006 through the firm of Kairu & MC court advocated, denying the plaintiff's claim in toto. As stated above, the and attributing liability if any to the negligence of the 3<sup>rd</sup>

party 2<sup>nd</sup> respondent third party too entered an appearance upon being cited as a third party and filed his defence denying the claim against him.

In the appellant's defence, the attributed the occurrence of the accident to the third party while the third party too, in denying the particulars of negligence shifted the blame to the appellant herein when pleadings closed, the suit was heard and determined by S.A. Okato(Mr) principal magistrate.

### **3. Evidence for the plaintiff**

The 1<sup>st</sup> respondent testified that on the material day of 11<sup>th</sup> March 2006 at about 8.00pm he was travelling in the appellants motor vehicle registration No. KAP 497S Nissan matatu along Limuru Road and on reaching village market, where the road descends into a corner, a motor vehicle emerged from the opposed direction and when the matatu driver tried to avoid hitting a pot hole in the middle of the road, their motor vehicle (matatu) was hit on the rear and he was injured as he was seated on the 2<sup>nd</sup> seat from the rear. He suffered injuries on the neck and right shoulder and broken glass entered his ears and face.

He was treated at Imara medical clinic and reported the accident at Parklands Police Station and was issued with a P3 form and police abstract (both of whom were produced in evidence). He did a search which established that the appellant herein was the owner of the motor vehicle in which he was travelling and he sued him because he was the owner of the vehicle which was involved in the accident.

The 1<sup>st</sup> respondent was examined by Dr Wangai Kiama Advocate who prepared a medical report of his injuries which report was produced at the trial. He also produced several medical chits and receipts for the treatment at Imara clinic, and for expenses incurred in the medication. He was also examined the second time by Dr. Wambugu whose medical report was also produced.

At the time of the trial on 19<sup>th</sup> November 2008, the 1<sup>st</sup> respondent testified that he had not fully recovered as his hand was still painful and that his right shoulder had dislocated and was in bandage for 2 weeks. In addition, that pieces of glass were removed from his eyes. He concluded by blaming the driver of motor vehicle KAP 197S for the accident because has he not swerved to the other lane of the road, the accident would not have occurred.

In cross examination he responded that the vehicle KAP 497S was speeding and was unable to negotiate a corner while avoiding the pot hole and that he was unable to see ahead but motor vehicle KAP 497S was avoiding the pot hole and after the accident he was removed from the motor vehicle. His eyes could not see properly. He did not see where the vehicles rested. When the police came to the scene, he had already been taken to the hospital. That he never saw the driver of KAR 337E and its driver was charged. In re-examination he stated that he did not know the outcome of the traffic case but he testified in the said traffic case where the driver of motor vehicle KAP 497 S was to blame.

The 1<sup>st</sup> respondent did not call any other witness and closed his case.

### **4. Defence case and evidence**

The defence called 2 witnesses. DW1 Joseph Ngarimya Mugure testified that he was the matatu driver of motor vehicle registration KAP497S of the ill fated accident on 11.3.2006 while driving from Nairobi towards Ndenderu at about 7.30pm, on reaching village market there was a corner. He met a lorry from the opposite direction which was being driven on the witness lane and when he tried to swerve to the left, the lorry hit his right side mirror and two rear windows. That he was driving at 50 kilometer per hour at the material time not speeding as there was a sharp corner. His lights were on. The lorry was KAR 337 E. The witness stopped at Village Market , police came and took measurements and blamed the lorry driver for the accident and charged him because (the lorry driver) came into the witness land while avoiding a pot hole which was in the middle of the road . In cross examination, he stated that he was the driver and had a driving licence. He had driven the said motor vehicle for 8 months

and that was his first accident and that the vehicles owner was James Mungai. That one person the plaintiff was injured in the said accident. He maintained that the area had a blood corner and the lorry went into his lane. Both vehicles were descending in the opposite direction and in between was a bridge. He saw the lorry 8 meters ahead, tried to swerve to avoid a head on collision but it still reached him and hit his side mirror. That he was a witness in the traffic case where the driver of the lorry was found guilty but that he (the witness) had nothing to show and that the lorry driver was drunk when he (the witness) removed him from the vehicle after the accident.

In re-examination he also added that it was his tout who took the 1<sup>st</sup> respondent (plaintiff to hospital) maintaining that there was a pot hole which the lorry driver avoided by getting onto his lane and that although he testified in the traffic case which found the lorry driver guilty, he did not know the sentence imposed.

DW2 PC Bruno Waswa from SOT Gigiri and stationed at Parklands Police Station also testified for the defendant to the effect that on 11<sup>th</sup> March 2006 an accident was reported to the station involving motor vehicle No. KAP 497S Nissan matatu and KAR 337E lorry Isuzu. The case was investigated by PC Karanja who had since been transferred but that motor vehicle KAR 337E was blamed for the accident for failing to keep on the left lane and its driver was charged with careless driving. He was called Henry Mburu Kariuki (the 2<sup>nd</sup> respondent herein). He produced the OB extract for 12<sup>th</sup> March 2006 the accident which occurred on 11<sup>th</sup> March 2006 as D exhibit 1 and police abstract dated 29<sup>th</sup> March 2006 as D exhibit 2 which showed that the case was pending before court.

In cross examination he stated that he did not know the outcome of the traffic case. He never went to testify in the said traffic case and he could not trace the investigation police file for the traffic case.

### **5. 3<sup>rd</sup> party case and evidence.**

At the close of the defence hearing the 3<sup>rd</sup> party Henry Mburu Kariuki who is now the 2<sup>nd</sup> respondent to this appeal testified on 27<sup>th</sup> July 2009 and did not call any other witness. In his sworn testimony, he stated that he was the driver of the lorry KAR 337E on 11<sup>th</sup> March 2006 when it was involved in an accident along Limuru Road. On the occurrence of the said accident, the 2<sup>nd</sup> respondent stated that just before Village Market there was a descend and the road was pot holed. He then saw a vehicle from the opposite direction and there was a corner. There was a pot hole in the left lane facing Limuru and the driver from the opposite direction veered to the right lane as he avoided the pot hole as a result he hit the lorry on the rear right side and his vehicle had the right rear mirror damaged. They stopped and the owner of the motor vehicle came with the police who took measurements. He recorded a statement with the police and was charged with careless driving but was acquitted on 24<sup>th</sup> December 2007 and blamed the matatu driver for the accident.

In cross examination, he stated that he was acquitted and the matatu was blamed for the accident although he did not have the proceedings in the traffic case. That his vehicle was hit on the right side. Its windows were not broken and that the pot hole was on the left lane of the matatu.

At the close of the 3<sup>rd</sup> party's case the parties agreed to dispose of the case by way of written submissions to support their respective positions.

### **6. Written submissions by plaintiff**

In his written submissions filed on his behalf by the firm of Mungai Kalande & Company Advocates, on 8<sup>th</sup> September 2009 the plaintiff submitted that his evidence on the occurrence of the accident and injuries he sustained was water tight and unshaken, restating the parties testimonies and maintaining that it was the appellant herein to blame for the accident as the defence could not exonerate himself from blame in the absence of any evidence that the 3<sup>rd</sup> party driver was convicted for the offence of careless driving or even a sketch map to show the scene of the accident. He supported the testimony of the 3<sup>rd</sup> party

driver that the accident occurred when the matatu driver was trying to avoid hitting pot holes on the road while speeding and hit the lorry from the opposite direction.

He urged the court to find that the defence case was a fabrication by trying to shift blame to the third party and to find the defendant wholly or substantially to blame for the occurrence of the accident.

On general damages, he urged the court to consider the plaintiff/1<sup>st</sup> respondent's injuries as pleaded and proved by medical reports and guided by the authorities in **Kericho HCC 70/2006 –Philip Chemiyot vs Nebco (K) Ltd & Another and Nyeri HCC 320/1998. Catherine Wanjiku Kingori & 3 Others vs Gibson Theuri Gichobi and Nairobi HCC 36128/88. Joseph Ouma vs Peter O. Sangwili** to award the plaintiff shs 400,000 general damages.

He also prayed for special damages for motor vehicle search-500/-, 1500 for medical report, although he had pleaded for shs 1200/- special damages.

### **7. Defendant's written submissions.**

The defendant's counsels Kairu & MC Court filed their written submissions dated 31<sup>st</sup> August 2009, the defendant denied all allegations on the plaint and maintained that from the evidence as adduced as a whole, he was not to blame for the occurrence of the accident and the resultant injuries sustained by the plaintiff. He urged the court to find that it was the third party who was wholly to blame for the accident and that the plaintiff had not discharged the burden of proving the culpability of the defendant for the occurrence of the material accident.

On quantum, the defendant submitted that had the plaintiff proved liability, he would be entitled to shs 70,000/- as sufficient general damages as he sustained minor soft tissue injuries and the doctors who examined him stated that he had recovered well without any complications or permanent disability. He relied on the decisions of Nairobi CA 10/2004, Nairobi HCC 1309/2002, Kisii HCCA 32/2002 to support his position. On special damages he submitted that as the plaintiff had pleaded only 1200/- he could only prove what he pleaded and not shs 2000/- as submitted.

On the whole, the defendant urged the court to dismiss the plaintiff's claim against him and to find that the defendant's claim against the 2<sup>nd</sup> party had been proved and to find the latter 100% liable for the accident and the resultant injuries to the plaintiff.

### **8. 3<sup>rd</sup> party's written submissions**

On behalf of the third party, it was submitted on 15<sup>th</sup> September 2009 by the firm of Okongo Omogeni & Company Advocates, reiterating the plaintiff's and third party's evidence as corroborating each other and dismissing the defence evidence, but admitting that the 3<sup>rd</sup> party driver though charged with the offence of careless driving, he was not found liable. He urged the court to find the defendant liable for the accident. On quantum, he proposed shs 50,000/- general damages as the injuries sustained by the plaintiff were soft tissues with no permanent incapacity.

### **9. Consideration of evidence, finding and decisions by the trial magistrate**

Upon considering the evidence, submissions by counsel and the cited authorities, the learned trial magistrate Mr.S.A.Okato Principal Magistrate on 9<sup>th</sup> October 2009 found that the plaintiff had on a balance of probabilities proved his case against the defendant. He dismissed the defendant's claim against the 3<sup>rd</sup> party and ordered the defendant to pay costs of the suit to both plaintiff and the third party. On quantum. He found shs 150,000 in favour of the plaintiff, taking into account the cited cases injuries sustained by the plaintiff and inflationary trends. He awarded the plaintiff shs 2000/- special damages as proved by receipts produced at the trial.

### **10. Appeal**

Being aggrieved by the decision of the trial magistrate, the appellant filed the instant appeal and raised a total of a 9 grounds of appeal in support of the Memorandum of Appeal set out as follows:-

1. The Learned magistrate erred in law and fact in finding the defendant 100% liable in view of the evidence produced before court and in particular the following:-
  - i. The police charged the lorry driver after conducting investigations.
  - ii. Since the police charged the driver of the lorry there was prima facie evidence that he was to blame.
  - iii. There was no evidence produced by the driver of the lorry on the Section (of the law) under which he was acquitted and whether the traffic case proceeded to hearing.
  - iv. The lorry driver admitted under cross examination that the debris of the broken window of the matatu was on the matatu's lane and not on the lorry's lane. He also admitted that the only broken windows were from the matatu and that the lorry's windows were intact.
  - v. The plaintiffs admitted that he was seated at the back of the matatu and could not see ahead and that he never even saw the lorry.
2. The trial magistrate erred in law and fact in finding that the driver DW1 moved into the lane for the oncoming vehicle to avoid a pot hole and met the oncoming lorry and that was why his vehicle was hit at the right rear side.
3. The learned magistrate erred in law in failing to find that the DW1's vehicle was hit in the right rear side as he tried to swerve to avoid the lorry.
4. The Learned magistrate erred in law and in fact in failing to discredit and disregard the evidence of the 3<sup>rd</sup> party, Henry Mburu and also erred in law and in fact in failing to find that his evidence was uncorroborated by any independent witnesses.
5. The Learned Magistrate erred in law and in fact in finding that the decision to charge the driver of the lorry was an afterthought in the absence of any evidence to support such a finding.
6. The Learned Magistrate erred in law and in fact in failing to find that the plaintiff had not proved liability against the defendant as sued.
7. The Learned Magistrate erred in law and in fact in finding that the defendant was to bear the 3<sup>rd</sup> party's costs.
8. The Learned magistrate erred in assessing general damages at an amount inordinately high that it is wholly erroneous estimate of the loss and damage suffered by the 1<sup>st</sup> respondent.
9. The Learned Magistrate erred in awarding an excessive sum for the injuries, suffered in the face of the evidence adduced and submissions made by the defence counsel.

The appellant urged the court to

- a. Set aside the entire judgment of Honourable Okato delivered on 9<sup>th</sup> October 2009 and substitute it with an order dismissing the suit against the appellant with costs.
- b. Costs of this appeal and that of the subordinate court be awarded to the appellants.
- c. Such other further orders as may be made by this court.

This appeal was admitted to hearing on 7<sup>th</sup> October 2013 pursuant to the provisions of Section 79B of the Civil Procedure Act and directions given on 20<sup>th</sup> March 2014 by Honourable Waweru J under Order 42 Rule 13 of the Civil Procedure Rules .

### **11. submissions on appeal**

When the appeal came up for hearing before me on 16<sup>th</sup> September 2014, the parties advocates agreed to file written submissions to dispose of the appeal.

The appellant's advocate filed his on 6<sup>th</sup> October 2014 whereas the 1<sup>st</sup> respondent filed his on 21<sup>st</sup> October 2014 with the 2<sup>nd</sup> respondent/3<sup>rd</sup> party filing his on 12<sup>th</sup> November 2014 .

In support of the grounds of appeal, the appellant's counsel submitted that the 1<sup>st</sup> respondent did not call any witness to support his case and that the evidence adduced did not prove the liability of the appellant in negligence on a balance of probabilities.

He maintained that the fact that the appellant's motor vehicle was hit on its right rear side, meant that it was the third party driver who was to blame for the accident. That the third party driver was charged with careless driving hence, he was culpable and as he never produced evidence to show his acquittal. That the fact that the matatu/appellant's driver was never charged with any traffic offence showed that he was innocent.

That the trial court's finding that the accident occurred when DW1 moved into the lane of the oncoming vehicle while trying to avoid a pot hole and that DW1 tried to go back to his lane to avoid hitting the oncoming vehicle as a result his vehicle was hit on the right rear side was a finding that was not supported by any evidence on record . that the trial court erred in law in disregarding DW's evidence and in finding that the decision to charge DW 3 was an afterthought in the absence of any such evidence. That he should have taken note of which he failed, the contradictory evidence of the 1<sup>st</sup> respondent and 3<sup>rd</sup> party and should have believed DW2's evidence as he was an independent witness who testified that the accident was investigated and a decision arrived at to charge the driver of KAR 337E for the accident with careless driving hence the defendant could not have been 100% liable for the accident. He cited the case of **Joseph G. Kabega & another vs George Kiumba Kangwara & 2 others CA 41/2005 Nakuru(2006) e KLR** to espouse the holding of the High court, replying on the independent evidence of the police officer who visited the scene and assessed the point of impact before reaching a determination.

On quantum, he urged the court to interfere with the discretion of the trial magistrate in awarding damages as the amount assessed was inordinately high as compared to the loss and loss suffered by the plaintiff, citing the case of **Paul Kipsang Koech & another vs Titus Osule Osore (2013) e KLR** where the court interfered with quantum made by the trial court on the ground that .....” .....the exercise of discretion was in violation of principle, and was therefore, not exercised judicially. The trial court did not also base its assessment on any known principle, was not guided by the relevant judicial authorities; failed to take into account the award proposed, and judicial authority quoted by the respondent...” He urged this court to reassess the damages.

In their submissions, the 1<sup>st</sup> respondent's counsel summarized the grounds of appeal into three issues namely

- i. Apportionment of liability
- ii. Whether the defendant should have been ordered to cater for costs of the 3<sup>rd</sup> party.
- iii. Whether the damages awarded to the plaintiff was excessive for the sum injuries sustained.

Citing the case of **Makube vs Nyamuro (1983) KLR 403** as enunciated in **Peter Kihungi & Another vs Sarah Norah Ongaro(2004) e KLR**, he urged the court “ not to 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 conclusions”. That the appeal does not meet the threshold set by the above authority to warrant interference of the trial magistrate's decision.

On liability, counsel for the 2<sup>nd</sup> respondent maintained that the plaintiff's evidence as corroborated by the third party was water tight and uncontroverted that it was the appellant's driver who was to blame for speeding and being unable to negotiate a corner while avoiding the pot hole as a result he rammed into the third party's motor vehicle. Further, that the fact of charging the 3<sup>rd</sup> party driver with careless driving was not proved as no case number or outcome of the case was adduced to prove assertions and

that the court could therefore not have relied on such conflicting unsubstantiated assertions. He supported the findings by the trial court emphasizing that there can be no liability without fault. He also supported the quantum of damages of shs 150,000/- as assessed by the trial magistrate.

The 2<sup>nd</sup> respondent/3<sup>rd</sup> party urged the court to uphold the trial magistrate's judgment and to dismiss the appellant's appeal with costs.

## 12. Analysis and determination

I have set out above, what in my view is an in depth evaluation and examination of the pleadings, reexamination of evidence and submissions by parties before the trial court as required under Section 78 of the Evidence Act cap 80 Laws of Kenya. What remains is now my own conclusion based on the evidence adduced in the lower court, bearing in mind the fact that I neither saw nor heard the witness testify and I should therefore give an allowance for that as was espoused in the cases of **Sielle vs Associated Motor Boat Company (1968) EA 123, Williamson Diamonds Ltd Vs Brown (1977) EA 1 and Arrow Car Ltd vs Bimowo & 2 Others (2204) KLR 101.**

There are five main issues for determination in this appeal. These are:

1. *Whether the plaintiff proved his case against the appellant on a balance of probability.*
2. *Whether the defendant/appellant proved his case against the third party on a balance of liability.*
3. *Who was to blame for the occurrence of the material accident.*
4. *What is the appropriate quantum of damages payable to the 1<sup>st</sup> respondent?*
5. *Who should bear the costs of the case below and of the appeal herein?*

There was no denial that the accident, subject matter of this appeal occurred. There was also no denial or dispute over the ownership of the motor vehicles involved, and the involvement of the 1<sup>st</sup> respondent in the said accident as a passenger in the appellant's motor vehicle registration No. KAP 497S Nissan matatu. It is also not disputed that the two motor vehicles involved in the subject accident were being driven from the opposite directions along Limuru Road and that both were descending as there was a bridge as one approaches from either direction of Limuru or Nairobi. It is also on record and not disputed that there was a sharp corner where the accident occurred, and that the road was pot holed, which pot holes were being avoided when the collision occurred. The issue in contention is the circumstances surrounding the occurrence of the subject accident.

In determining the circumstances surrounding an accident, guidance is found in Section 119 of the Evidence Act, Cap 80, Laws of Kenya which provides:-

***“ The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common cause of natural events, human conduct and public and private business their relation to the facts of the particular case.”***

The above provision was applied in the case of **Raphael Mwaniki Kiboi vs Joseph Njogu Kinyua Nairobi HCC 3974/1988** where the court noted that where two motor vehicles collided on a highway they do so in consequence of the negligence of either one or both of the drivers thereof. The ancillary question in this appeal is whether the accident occurred as a consequence of the negligence of one or both drivers of the appellant and or the 3<sup>rd</sup> party second respondent. The trial magistrate found the appellant wholly to blame for the accident. The trial magistrate found thus at page 73 of the record of appeal and page 19 of the judgment . ***“ On liability the plaintiff blamed the driver of motor vehicle KAP 497S for the accident. He said he was seated on the 2<sup>nd</sup> seat from the rear and witnessed the accident which he said occurred when their driver tried to avoid the pot hole in the middle of the road and veered into the land of the oncoming vehicle. Although the driver (DW1) denied the foregoing and blamed the accident on the driver of motor vehicle KAR 337E, he was not able to explain the damage on his vehicle on the rear right side.”***

***“ In my considered view the driver DW1 moved into the lane for the oncoming vehicle to avoid the pot hole because the lorry was emerging from the opposite direction and at a corner, he quickly tried to go back to his lane and that is why his vehicle was hit at right rear side. He went on “ I am fortified in my view above by the evidence of the 3<sup>rd</sup> party one Henry Mburu, although the police (DW2) said that the accident was blamed on the 3<sup>rd</sup> party’s driver who was charged with careless driving no, no evidence was tendered in court of the court proceedings and the outcome. Nothing would have been easier for the defendant to furnish the court with the court proceedings and the and he decision of the court.”***

From the evidence adduced by the plaintiff he had this to say concerning the occurrence of the accident at page 26 of the record of appeal.

***“.....A vehicle emerged from the opposite direction our driver tried to avoid hitting on pot hole in the middle of the road and our vehicle was hit on the rear I was seated on 2<sup>nd</sup> seat from the rear .....I sued the defendant because he is the owner of the vehicle .....I blame the driver of the motor vehicle KAP 497 S for the accident because if he had not swerved to the other lane of the road this accident would not have occurred.....”***

In cross examination, the 1<sup>st</sup> respondent stated ***“.....Our driver was speeding and was unable to negotiate the corner while avoiding the pot hole. I was not able to see ahead. Motor vehicle KAP 497 S was avoiding the pot hole.”***

This same 1<sup>st</sup> respondent also gave evidence in a traffic case where admittedly, the 3<sup>rd</sup> party driver was charged.

On the other hand, DW1 maintained that it was the 3<sup>rd</sup> party lorry driver came into DW1’s lane because it was avoiding a pot hole which was in the middle of the road. Further, that ***“.....I reached Village Market there was a corner. I met a lorry from the opposite direction it was being driven on my lane. I tried to swerve to the left facing Ndenderu but that lorry hit my right side mirror and two rear windows. I was doing 50 kilometer per hour. I was not speeding because of the sharp corner.”***

In re-examination, the DW1 stated ***“ the traffic case found the lorry driver guilty but I do not know the sentence. I gave evidence in the traffic case”.***

One undisputed fact that emerges from the above extracts is that the lorry driver was charged with the traffic offence as PW1 and DW1 and third party who testified in the court below stated that they gave evidence in the traffic court. Regrettably, no proceedings or verdict was produced in evidence. And whereas PW1 stated that the driver of motor vehicle KAP 497 S was found to blame, DW1 the driver thereof stated that the lorry driver was found guilty but sentence was not known. On the other hand, DW 3 the lorry driver stated that although he was charged with the offence of careless driving, he was acquitted on 24<sup>th</sup> December 2007 and that he blamed the driver of the matatu for the accident.

In the absence of any proceedings or judgment in the traffic case, this court cannot with certainty determine whether or not the lorry driver was convicted or even acquitted for that matter.

Nonetheless, would the traffic case per se impute liability on any of the parties to the accident without any other evidence to that effect? Had there been evidence of a conviction, then, no doubt, under Section 47A of the Evidence Act, the fact of that conviction, in the absence of a reversal on appeal, would be conclusive evidence of the third party’s guilt.

But a traffic offence is a criminal offence, and like all other crimes, it had to be proved beyond reasonable doubt. The fact of a charge and conviction is admissible in evidence under Section 84 of the Evidence Act which provides that:

***“ Whenever any document is produced before any court, purporting to be a record or***

**memorandum of any evidence given in a judicial proceeding or before any officer authorized by law to take such evidence, and purporting to be signed by a judge or magistrate or any such officer as aforesaid, the court shall presume:-**

- a. **That the document is genuine**
- b. **That any statements as to the circumstances in which it was taken, purporting to be made by the person signing it, are true, and**
- c. **That such evidence was duly taken.”**

From the above provisions, it is therefore not proper or even credible for any person, including DW1 (appellant) to come to a civil court and state on oath that the driver of the lorry registration No. KAR 337E was to blame for the accident because he was charged and convicted of the offence of careless driving, without any documentary evidence of proceedings and judgment of such conviction.

In my view, this evidence by DW1 was adduced merely to protect the employer's interests. DW1's evidence fell short of controverting the testimony by the 1<sup>st</sup> respondent that DW1 had swerved to the right to avoid hitting pot holes when he met the lorry and when he tried to get back to his lane, time was too short. In my view, the distance of 8 meters between the DW1 and the lorry on a descent and at a corner was too short to enable DW1 escape being hit. The lorry in my view must have been too close to be evaded fully.

In my view, the evidence of DW1 cannot be held to wholly detract from the evidence of both the respondents. DW1 does not deny in his testimony that he too was trying to avoid hitting pot holes on that road. He states that it was the 3<sup>rd</sup> party driver who was trying to avoid hitting pot holes in the middle of the road when the (third party driver) hit DW1. The 3<sup>rd</sup> party driver lays blame on the appellant's driver DW1 but does not state/admit even trying to avoid the pot holes in the middle of the road as alleged by DW1.

The accident, it should be noted, occurred at about 8.00pm. In other words it is a case where one party's word is applied against the other, without the evidence of an independent witness, since the police officer DW2 who testified in court never visited the scene of accident and neither did he or was he involved in the investigation of the material accident culminating in the traffic charges being preferred against the lorry driver (third party/2<sup>nd</sup> respondent herein).

Naturally, it is expected that in collision accidents, one driver will blame the other for the occurrence of the accident and indeed, the two drivers have blamed each other for the accident. The question that the court below ought to have asked itself is which of the two drivers evidence was credible in the circumstances.

One striking feature of the evidence in the court below as adduced by the two drivers of the offending vehicles is that none of them stated whether they warned each other of their approach, time being at night and descending at a corner. In my view, it was not sufficient in the circumstances, for the two drivers to merely swerve. The circumstances of the case required either driver to hoot or flash head lights on approaching a sharp corner at night and on a pot-holed road. None of them say to each other that **“ You failed to heed the warning of my approach.”**

Assuming the pot holes which are being blamed for the accident were in the middle of the road and not on the respective lanes or sides, the question that begs an answer is, why then would either of the drivers be driving in the middle of the road where the pot holes were and why would a driver avoiding pot holes in the middle of the road drive into the opposite lane as opposed to taking an avoiding act from his side of the road, by swerving to his left lane and side of the road?

DW2 did not help matters either, as no sketch plan for the accident scene was produced to assist the court determine the above ancillary question .

In my opinion, since the fact of the existence of pot holes on the road was undisputed, and the fact that the two drivers blamed each other for swerving on to each other's lanes, it would have been easier for both drivers, while avoiding pot holes in the middle of the road to swerve to their respective left sides of the road than crossing to the right or other side of the road. In my view, and from the evidence on record, if neither of the drivers had swerved to the wrong side of the road, no accident would have taken place. If DW1 saw the 3<sup>rd</sup> party driver approach from the opposite direction at a distance of 8 meters and he was driving at 50 kilometer per hour, in my view, he would still have swerved to his (DW1's) side and if he did swerve to the left side of the road as alleged, then his right side mirror would not have been hit. DW 1 in his evidence did not say the lorry was driven at high speed. The impact of a lorry hitting a matatu's body cannot be under estimated. Surprisingly, no evidence by way of an inspection report was led as to the scope of the damage caused to the matatu. Neither DW1's vehicle nor the 2<sup>nd</sup> respondent/third party's lorry rolled or lost control. The driver of the 2<sup>nd</sup> respondent drove on and stopped at the Village Marke . If indeed the police took measurements and blamed the 3<sup>rd</sup> party and not the (appellant) DW1 or vice versa, nothing was demonstrated to have prevented either of the two drivers from availing the police file records or tracing the actual investigating officer, to clear the air.

On the other hand, as this accident indeed culminated into a charge being preferred against the 3<sup>rd</sup> party 2<sup>nd</sup> respondent's driver, what was the motivation for the said 2<sup>nd</sup> respondent's driver failing to avail to court the proceedings and judgment to indicate that he was vindicated , if he alleges that he was acquitted and that the appellant herein (DW1) was found to blame for the occurrence of the accident? Either way, if DW1 says that the third party driver was convicted in the traffic case, why did DW1 not avail the proceedings and outcome of the traffic case to exonerate himself from blame?

In my view, it is not enough for the two parties DW1 and third party driver to shift blame towards each other. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **section 107(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, which provides:

***107. (1) 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 those facts exist.***

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in **sections 109** and **112** of the *Act* as follows:

***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 lie on any particular person.***

And in section 112 of the same Act:

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

10. The above sections of the law encapsulate the well-known aphorism, "he who asserts must prove." This point was augmented by the Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013]eKLR* as follows

***"We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. 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 those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the***

***appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.***

In my view, either one or both of the two drivers of the accident motor vehicles are culpable for the occurrence of the material accident. The evidence on record that the right mirror of the DW1's vehicle was hit together with the right rear side windows is quite telling. Had the lorry driver hit the matatu directly, or the matatu hitting into the lorry directly, the impact would not have been mere breaking of a windows and mirrors. Regrettably, I as I have stated above no motor vehicle inspection reports for both vehicles in the accident were produced to prove the extend of the damages on either vehicle.

The police OB extract produced describes the damages as on the matatu vehicle as:

***“ the damages were screen scattered on rear side of the body slightly damaged for KAP 497S and for KAR 337E, damages were on the right side mirror.”***

The impression created by the evidence above is that there was no direct head on collision between the two motor vehicles, although there is no dispute that the two vehicles did hit each other as they bypassed each other. In the premise, I find that none of the motor vehicles kept on their respective sides/lanes of the road, owing to the sharp corner that each of them negotiated as they approached the bridge and as they each avoided the pot holes on the road. Albeit DW2 produced a police abstract which showed that the driver of KAR 337 E was to be charged for failing to keep to the proper traffic lane, I do not find any conclusive evidence on record to satisfy me that the third party did completely leave his lane and a crush into DW1, and neither is there conclusive evidence that DW1 completely left his left lane and crushed into the third party lorry. I find that both motor vehicles “collided” when the respective drivers realized that they were on the wrong sides of the road, at a sharp corner, descending, on a potholed road and when they tried to return to their respect lanes, the distance between them was too close and as they bypassed each other, they had an encounter. This so as the 1<sup>st</sup> respondent's evidence as to how the accident occurred was clouded by the fact that he did not see the 3<sup>rd</sup> party lorry driver as it approached them, since he was seated at the rear second last seat from the back and considering that it was at night, there was no evidence that the 1<sup>st</sup> respondent was so observant that he could see other vehicles as they approached from the opposite direction. It is therefore unlikely that PW1 could, with certainly wholly blame DW1 for the occurrence of the accident. In his testimony during cross examination, he stated that ***“ Our driver was speeding and was unable to negotiate the corner while avoiding the pot hole. I was not able to see ahead.”***

In addition, whereas PW1 testified that: ***“.....our driver tried to avoid hitting on pot hole in the middle of the road and our vehicle was hit on the rear.....”*** during examination in chief, the third party driver testified that ***“ the pot hole was on the left lane of the matatu.”*** This evidence is at variance and cannot be said to corroborate each other, as stated by the trial magistrate. In addition, DW1 testified that the pot holes were in the middle of the road as stated by PW1.

With the above analysis, I am satisfied that the trial magistrate erred in law and fact in finding that the appellant was wholly to blame for the material accident.

In my view, this a proper case where liability between the defendant/appellant herein and the third party should have been apportioned equally based on the evidence available. Accordingly, I find and hold that both the appellant and the third party contributed in equal measure to the occurrence of the material accident and I find them liable in the ration of 50:50.

I therefore set aside the decision of the trial magistrate on liability arrived at 100% against the appellant and substitute it with an order splitting liability between the appellant and the 2nd respondent third party equally.

The above exposition, in my view, settles issued Nos 1,2 and 3 as framed.

As to what is the appropriate general damages payable to the 1<sup>st</sup> respondent, commencing with the pleadings in the subordinate court, the 1<sup>st</sup> respondent's plaint outlines the injuries sustained as a result of the material accident as:-

1. Injuries on the face.
2. Injuries to the neck.
3. Dislocation of the right shoulder.

The 1<sup>st</sup> respondent testified that he sustained injuries on the face and ears as broken glass entered into his face and ears and that he was also injured on the right shoulder. He was treated at Imara Medical Clinic and the medical chits produced in evidence show that the 1<sup>st</sup> respondent sustained multiple bruises on the shoulder, face, painful eye and dislocation of the right shoulder and that he was referred to Kenyatta National Hospital for further management.

The P3 form filled on 14<sup>th</sup> March 2006 showed injuries sustained being bruises on the face, stiff neck, dislocation of the right shoulder and bruises on the shoulder. The medical legal report prepared by Dr. Kiama Wangai show that the 1<sup>st</sup> respondent sustained injuries that involved bruised right shoulder, bruised face and dislocation of the right shoulder, as pleaded. Further, he had blurring vision of right eye and unable to lift heavy objects with the right arm. He however had no permanent disability anticipated as at 31<sup>st</sup> August 2006 during the medical examination. Dr Wambugu PM who re examined the 1<sup>st</sup> respondent on 22<sup>nd</sup> October 2008 found blunt trauma right shoulder joint, facial bruises, with some foreign bodies right side of face and that patient asserted that no X rays were taken whatsoever.

At the time of examination, the 1<sup>st</sup> respondent complained of occasional right shoulder joint pains. He had a pain free movement in the right shoulder joint. He had made full recovery without any further complications or permanent incapacity.

Whereas the 1<sup>st</sup> respondent submitted for an award of shs 400,000/- general damages in the lower court, the appellant submitted an award of shs 70,000/- to be appropriate in the circumstances, while the third party proposed an award of shs 50,000 each replying on various rival authorities.

The trial magistrate, after comparing the injuries as pleaded and those made in the cited authorities awarded the 1<sup>st</sup> respondent shs 150,000/- general damages and shs 2,000/- special damages proved. The appellant laments that the general damages as awarded was manifestly excessive.

On whether the general damages for pain and suffering were inordinately excessive as alleged by the appellant, having considered the injuries sustained by the 1<sup>st</sup> respondent as contained in the amended plaint, his testimony in court, medical notes from the hospital where he was first attended to and the two medical reports by Dr Kiama Wangai and Dr Wambugu, I have no doubt in my mind that the said injuries were consistent. Although Dr. Wambugu's report which was made in 2008, over 2 years after the accident states that the plaintiff (1<sup>st</sup> respondent informed him that no X rays were taken to confirm the dislocation of the right shoulder the medical notes from Imara Medical Clinic dated 11<sup>th</sup> March 2006 where the 1<sup>st</sup> respondent was first attended before he was transferred to Kenyatta National Hospital for further management as well as the P3 form filled on 14<sup>th</sup> March 2006 showed that indeed the 1<sup>st</sup> respondent had injuries which were pleaded herein, confirmed by Dr.Kiama Wangai, which included dislocation of the right shoulder. It is worth noting that there was no challenge to the nature of injuries sustained by the 1<sup>st</sup> respondent which were classified as grievous harm, according to the P3 form.

In addition, the 1<sup>st</sup> respondent was never cross examined on his injuries and neither was Dr Wambugu or Dr. Kiama Wangai cross examined on their respective medical reports which were produced by consent. It is however an undisputed fact that as was found by Dr Wambugu, apart from occasional pain in the right shoulder, the 1<sup>st</sup> respondent injuries had healed as at 22<sup>nd</sup> October 2008 with no permanent

disabilities.

The question therefore is whether shs 150,000/- as awarded by the trial magistrate was manifestly excessive.

The 1<sup>st</sup> respondent who had prayed for shs 400,000 general damages and the 2<sup>nd</sup> respondent who had proposed shs 70,000/- support the award made by the trial magistrate whereas the appellant laments that the trial magistrate, in making an award of shs 150,000/- failed to take into account the evidence adduced, the submissions by the appellant and the authorities cited on comparable injuries and awards.

In deciding whether it is justified to disturb the quantum of damages awarded by the trial court, an appellate court must be guided by some principles. In **Kemfro Africa Ltd T/A Meru Express Services Gathogo Kanini vs A.M. Lubia & Olive Lubia (1982-1988) 1 KAR 727**, Kuella JA at page 730 stated that:-

*“ The principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either that the judge in assessing the damages, took into account an irrelevant factor or left out of account of relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage( citing with approval Ilango vs Manyoka (1961) EA 705,709,713; and Lukenya Ranching and Farming Co-operatives Society Ltd vs Kavoloto (1970) EA 414, 418,419). This court follows the same principles.”*

The appellant in his submissions complains that the trial magistrate did not cite any authorities to justify his findings on quantum of damages, and relies on his submissions and authorities made before the lower court. He charges that had the trial court considered the evidence adduced and submissions, it would not have assessed the sum of shs 150,000/- which the appellant considers inordinately high, compared to the loss, urging this court to reassess the damages, citing the decision in **Paul Kipsang Koech & Another vs Titus Osule Osore (2013) e KLR** where the court held that:

*“.....the exercise if discretion was in violation of principle, and was therefore , not exercised judicially. The trial court did not also base its assessment on any known principles; was not guided by the relevant judicial authorities; failed to take into account the award proposed, and judicial authority quoted by the respondent “ per F. Gikonyo J.*

The 2<sup>nd</sup> respondent supports the award as being in tandem with judicial authorities where similar injuries were compared. The 1<sup>st</sup> respondent's submissions were general on the issues raised in the appeal and he prayed that the lower court decision be upheld.

I have carefully examined the judgment in the lower court as contained in pages 71-75 of the record of appeal. The trial magistrate at pages 74-75 clearly set out what the plaintiff/1<sup>st</sup> respondent had proposed as an award, the authorities relied on, as well as what the defendant proposed cited a figure of shs 70,000 which was proposed by the third party.

However, she cited at page 74 of the record of appeal all the three authorities relied on by the appellant/defendants counsel, and found that the injuries as enumerated in Dr Kiama Wangai's medical report were confirmed by Dr Wambugu's report Pexhibit 9.

She then proceeded to state that:

*“I have compared the injuries the plaintiff herein suffered with the injuries the plaintiff in the cited cases sustained and the awards given I have taken into account the age of the said authorities and award the plaintiff shs 150,000/- as general damages.”*

In my humble view, I do not find that the trial magistrate failed to consider or take into account any factors or principles applicable in assessing general damages. In as much as he referred to shs 70,000/- as having been proposed by the defendant instead of the third party, he nonetheless referred to all the decisions relied on by the defendant and compared them with the authorities cited by the plaintiff.

In my view, therefore, the trial magistrate did consider the authorities cited, injuries, inflation and time lapse since those cases were decided to guide her on the assessment of damages and I find that he therefore exercised his discretion judicially. In addition, I do not find that the award made by the trial magistrate was not in consonance with decided cases and neither is it inordinately excessive in the circumstances or a wholly erroneous estimate of the damage to warrant interference by this court.

In my assessment of damages in this appeal, regard being had to the nature, seriousness and extent of the injuries sustained by the appellant which, as indicated in the pleadings, testimony, medical notes P3 and 2 medical reports, were soft tissue injuries

I do not find the **Paul Kipsang Koech** case (supra) cited being applicable to this case as in that case, it was clear that indeed the trial magistrate had not, in making an award of shs 750,000/- general damages for soft tissue injuries, relied on any known principle, or guided by any relevant judicial authorities and had not taken into account the proposals made, judicial authorities quoted by the respondent and this latter error was demonstrated by the statement made by the trial magistrate that “ the defence ( Read-respondent) on the other hand has made no proposals on quantum yet the respondent in their submissions had proposed some figures 70,000/- as reasonable damages for injuries suffered, and quoted authorities to support the proposal.

In this case, the trial magistrate referred to shs 70,000/- as the proposed figure by the appellant and therefore I do not find that he committed any error as to have occasioned any prejudice to the appellant, as he went on to appreciate all the authorities relied on by the appellant before making his determination on quantum. Special damages were not contested. They remain as awarded.

The upshot of all the above is that the appeal on liability allowed to the extent that liability between appellant and 2<sup>nd</sup> respondent is shared and apportioned at 50:50. The trial magistrate’s findings on liability are set aside.

The Appeal on quantum of damages is dismissed. Award by trial magistrate upheld. Damages of Kshs 150,000 to be paid equally between appellant and third party 2<sup>nd</sup> respondent. I award costs of the suit below to the 1<sup>st</sup> respondent to be paid equally between the appellant and the 2<sup>nd</sup> respondent.

On Costs of appeal, the appellant has succeeded half way. I shall award only ½ costs of appeal to the appellant to be shared equally between the respondents. Interest on general damages from date of judgment in the lower court until payment in full and to be shared between appellant and 2<sup>nd</sup> respondent. Interest on special damages from dated of filing suit in the lower court until payment in full.

**Dated, signed delivered at Nairobi this 9<sup>th</sup> day of October 2015.**

**R.E. ABURILI**

**JUDGE**