**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO 513 OF 2010**

**JOSEPH MUNYAMBU KAREGA……APPELLANT**

**-VERSUS-**

**CHARLES OGOLLAH OBIERO ……...RESPONDENT**

**(*Being an Appeal from the Judgment and Decree of Senior Principal Magistrate P. Gichohi (Mrs.) dated 11th November 2010 at Milimani in Civil Suit No. 9472 of 2000*)**

**BETWEEN**

**CHARLES OGOLLAH OBIERO ……PLAINTIFF**

**VERSUS**

**JOSEPH MUNYAMBU KAREGA…..……..DEFENDANT**

**JUDGMENT**

The respondent, Charles Ogollah Obiero obtained judgment against the appellant, Joseph Munyambu Karega on account of injuries which he claimed to have sustained when a motor vehicle registration number KAA 628U a pick up owned by the appellant collided with the his motor vehicle KPE 003 a saloon car on 19th May 2000 along Outering road, Nairobi. He was successful in his claim and was awarded general and special damages of Kshs. 400,500/=, as well as costs and interest of the suit. Aggrieved by the judgment and decree of the learned magistrate aforesaid, the appellant preferred this appeal through Kangethe Waitere & Co. Advocates. The appellant faulted the learned Magistrate's judgment and decree on the grounds that:-

1. The Learned Honourable Magistrate erred in law and fact in finding and holding that the respondent had proved his case against the appellant.

2. The Learned Magistrate erred in law and the fact in failing to find and hold that the respondent had failed to prove his case to the required standards.

3. The Learned Magistrate erred in law and fact in finding and holding that the appellant was overtaking and therefore 100% liable for the accident despite evidence to the contrary.

4. The Learned Magistrate misdirected herself in the appraisal of the evidence by failing to consider that the authenticity of the police abstract had not been proved.

5. The Learned Magistrate erred in law and fact by basing her findings on the police abstract which had not been proved.

6. The Learned Magistrate erred in law and fact in finding and holding that a speed of 60-80 KPH is beyond the limit on Outering road.

7. The Learned Magistrate erred in law and fact in taking Judicial Notice that Outering road is densely populated with no evidence adduced to that effect.

8. The Learned Magistrate erred in law and fact in finding and holding that the appellant had failed to prove his counter claim.

9. The Learned Magistrate erred in law and fact in awarding an inordinately high sum in general damages.

10. The Learned Magistrate erred in law and fact in taking into account issues not pleaded.

The facts of the case as gathered from the pleadings and testimonies of various witnesses called by the parties may be briefly stated as follows:-

**PW2** an Insurance Assessor in the name of Epic Marine & General Assessors. He stated that he assessed motor vehicle registration KPE 003 at Toyota Deluxe which had been involved in an accident. He found extensive damage to the front of the vehicle and when he estimated the costs of the damages and found that it was not economical and he therefore declared the car a write off. He gave a pre accident value of the vehicle at Kshs 160,000/= and the salvage at Kshs 30,000/=

**PW3** the police officer stated that an accident was reported on 19th May 2000 to Pangani Police Station involving motor vehicle registration number KPE 003 Toyota Saloon and KAA 628U along Outering road. She averred that the police blamed the motor vehicle registration number KAA 628U for the accident but she stated that she was not able to get other records of the accident as the accident occurred a long time adding that she only had a police abstract.

She told the court that the abstract was obtained from Pangani Police Station and not Muthaiga as alleged since she had the reference number to show the document was from Pangani. She did not investigate the accident but concluded that motor vehicle KAA 628U was to blame for the accident because the police abstract indicated so.

**PW4** the Plaintiff testified that he was driving motor vehicle registration No KPE 003 along Outering Road keeping left then suddenly he was hit by a motor vehicle KAA 628U which was trying to overtake. He was later admitted at Kenyatta National Hospital for about 3 weeks. He testified that he reported the matter at Muthaiga Police Station and recorded a statement and was also issued with a P3 form. He also stated that he got the police abstract from Muthaiga Police Station. He claimed that the other vehicle did not indicate that it was overtaking. That the impact of the accident was on the front left side of his car.

**DW2** the defendant testified that he was driving his motor vehicle registration number KAA 628U through Outering road from Embakasi at around 11:30 pm. He added that the same road had a junction with a feeder road to Mathare North. He stated that the motor vehicle registration number KPE 003 was coming from Thika direction intending to join the feeder road to Mathare North but it did not stop to give way. He did not expect the other driver to just branch to the feeder road. He tried to brake but the accident occurred. He was hospitalised for 3 weeks at Aga Khan Hospital. He stated that the vehicles were inspected and his vehicle was released but the plaintiffs vehicle was retained because it was found to be un roadworthy. He was not given any police abstract.

He stated that the police abstract showed that the accident was still under investigations with KAA 628U to blame. He disputed that he was the one to blame and also disputed the time when the accident occurred. He also stated that his vehicle was damaged on the right front just as the plaintiffs vehicle was

damaged at the right front.

When the appeal came up for directions before on 19th November 2012, counsels for the parties agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently, both parties filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

This being a first appeal, the role of this Court is to re-evaluate the evidence that was before the lower Court and determine whether the decision is to stand or not. In the case of **Ephantus Mwangi and Geoffrey Nguyo Ngatia .v. Duncan Mwangi Wambugu (1982-88) 1 KAR 278**, the Court of Appeal restated the principle that ***"a court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles."***

The appellant in his first ground of appeal faulted the trial Magistrate for holding the appellant liable for material damages to the respondent's vehicle when the respondent had not established ownership of the motor vehicle KPE 003 make Toyota Deluxe. Paragraph 4 of the Amended Plaint dated 13th June 2008 stated that , "*At all material times to this suit the plaintiff was the owner of motor vehicle registration number KPE 003 whereas the defendant was the owner of motor vehicle number KAA 628U*"

Further ,paragraph 5 states that , ***"On or about 19th May 2000 the plaintiff was lawfully driving his motor vehicle registration number KPE 003 along Outering Road Nairobi when the defendant carelessly and or negligently managed and or controlled his motor vehicle registration number KAA 628U that he caused it to violently collide with the plaintiffs motor vehicle as a result of which the plaintiff sustained serious injuries bodily injuries and his motor vehicle extensively damaged beyond economic repairs and the plaintiff has suffered loss and damage."***

On perusal of the appellants Amended Defence and Counterclaim dated 24th June 2009 reveals that the ownership of motor vehicle KPE 003 by the respondent was not challenged in the appellant's defence. It is trite law that a party to the suit is not entitled to make an allegation of fact or raise a new ground of claim inconsistent with his/her previous pleadings in a suit. **Order 2 Rule 6 of the Civil Procedure Rules provides:** 6. "(1) *No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit*." The appellant first raised the issue of ownership of the Respondents motor vehicle when filing his submissions. I note that the police abstract indicated the respondent as the driver of motor vehicle KPE 003. I also on this point refer to the case of **WELLINGTON NGANGA MUTHIORA V AKAMBA PUBLIC ROAD SERVICES LTD & ANOTHER CA NO.260 OF 2004(Kisumu) (2010) eKLR** the Court of Appeal sitting at Kisumu held, ***"Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"***. I have studied the Record of appeal and note that the issue of ownership was not raised by the appellant when the plaintiff gave his evidence in chief.

The appellant also stated that the Learned Magistrate erred in law and in fact in holding the appellant was overtaking and therefore 100% liable for the accident despite evidence to the contrary. The Record of Appeal as presented had the evidence of PW4 (now Respondent) as follows; He drove motor vehicle KPE 003 along Outering road keeping left after midnight. The other vehicle KAA 628U came to his side of the road as it was overtaking and that was when collusion occurred. The road was straight and the other car did not indicate that it was overtaking and the impact of the accident was on the right side of the vehicle DW2 (now Appellant) stated that he drove his vehicle through Outering from Embakasi at around 11:30 pm. On the same Outering road there was a junction which is a feeder road on the left side as you head to Thika Road general direction .The feeder road being Mathare North. Motor vehicle registration KPE 003

was coming from Thika direction intending to join the feeder road to Mathare North .It did not stop to give way as he did not expect him to just branch to the feeder road. He concluded that his vehicle was damaged on the right front.

It is very clear that even though there was indeed an accident there are two versions of how the accident occurred as explained by the Appellant and Respondent. The police did not help at all because from the evidence of PW3 a police officer from Pangani Police Station she stated that she did not have the circumstances of the accident but had the police abstract showing the accident occurred along Outering road. She testified that the police blamed the appellant's motor vehicle for the accident. She however told the trial court that she was unable to get the police file in connection with this case as the accident occurred a long time. She did not investigate the accident but concluded that the appellant's vehicle caused the accident as per the police abstract.

A keen look at the police abstract shows that the remarks indicated that the accident is under investigation which means investigations were never concluded. The appellant also claimed that he did not record a statement with regards with the accident because the police file was missing and he could not also obtain a police abstract. The Magistrate in her judgement went by the submission of the Respondent. What is evident is that both vehicles were moving on opposite directions which explain why both cars had damaged front right sides. It is therefore difficult to ascertain who caused the said accident. In the case **of John Kiria & 6 Others –vs- Kaunda Musyoka & Anor [2010] e KLR** Okwengu J as she then was held as concerning the investigating officer and the police abstract that, "*In this case Sgnt. John Kamau who produced the police abstract was not the investigating officer .He admitted that he never visited the scene of the accident and merely produced the police file to the court as a public record.*

*At best the police abstract was only prima facie evidence that an accident involving motor vehicle KXF 502 and a motor vehicle KAH 685 J was reported to the station. Without evidence regarding how that information was procured the contents of the police abstract report with regard with the persons involved in the accident and ownership of the vehicles alleged to have been involved in the accident is of little evidential value and cannot be relied upon.* "As far as this court is concerned a Police Abstract is proof of the fact that the accident was reported to Police, and no more. It is therefore unfortunate that the trial court did not address, or resolve, this issue. Therefore it was not possible for the trial Magistrate to hold the Appellant 100% liable for the accident.

The next ground raised by the appellant is that the learned trial Magistrate erred in holding that the appellant had failed to prove his counter claim. The Magistrate in dismissing the counterclaim stated in her judgment at page 27 paragraph 4 that the appellant did not have a P3 form, or police abstract. She also held that though the appellant had produced medical records from Aga Khan Hospital on 20th May 2000 there was no evidence to show that the said accident is the subject of the matter before her and that there was nothing to connect the injuries with the accident on the material night involving his vehicle and the plaintiff. Looking at the evidence tendered in court by both the appellant and the respondent, there is no dispute that the parties herein were involved in the accident and were both rushed to Guru Nanak Hospital by good Samaritans thereafter they were transferred to different hospitals ;the appellant at Aga Khan Hospital and the Respondent at Kenyatta National Hospital. The Appellant further explained to the trial court that he was not able to obtain the P3 Form and the Police abstract from the police because the police filed could not be traced. This statement was further buttressed by PW3 the police officer who testified in court that the police file was missing.

In the case **of Stephen Kagooivo Versus Joseph Waithaka Kabai & 3 Others HCCC No. 4089 of 1988,** Justice Ringera as he then was, at page 105 the court said, ***'Defendants Counsel submitted that in the absence of admissible and admitted medical evidence, there was no basis on which the court could assess damages. I cannot agree. If the court believes the Plaintiff's evidence as I do, then it must assess damages on the basis of his evidence. Lack of medical evidence is not fatal to a Plaintiff's claim in civil proceedings where proof is on a balance of probability. Needless to state the presence of medical evidence cannot but fortify and clarify the Plaintiff's evidence on the existence nature and effects of the injuries suffered.'***

Further the Court of Appeal in the case of **Charles Maranga Bagwasi & Another –Versus- Samuel Kamonjo Muchiri & Another NAIROBI CIVIL APPEAL NO. 189 OF 1999**, in considering an appeal where the High Court had dismissed a matter because the medical report and treatment notes had not been produced after an adjournment was refused stated that***, '…..and in any case, if the Appellants as in this case gave credible and unchallenged evidence, they should have been awarded some general damages for pain and suffering …. ."*** The medical report tendered by the appellant during the trial was not objected to by the Respondent. The trial Magistrate ought to have considered the appellants counterclaim on his injuries.

However, having held that it is not possible to ascertain who caused the accident, in the absence of independent evidence of the investigating officer I find that I cannot award the damages in the counterclaim. Having stated so the appeal is allowed with costs. The judgment and decree of the lower court are set aside, and in their place an order is made dismissing the respondent's suit with costs.

Dated, signed and delivered this **12th** day of September **2014**.

**R.E. OUGO**

**JUDGE**

In the presence of:-

…….……..For the Appellant

…….For the Respondent

……...Court clerk