



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & MURGOR, J.J.A.)

CIVIL APPEAL NO. 215 OF 2010

BETWEEN

JOHN WAINAINA KAGWE .....APPELLANT

AND

HUSSEIN DAIRY LIMITED.....RESPONDENT

*(An appeal from the decision of the High Court of Kenya at Mombasa (Odero, J.) dated 4<sup>th</sup> June, 2010*

*in*

*H.C.C.C. No. 118 of 2004)*

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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (*Odero, J.*) dated 4<sup>th</sup> June, 2010. The genesis of the appeal is the *Civil Case No. 118 of 2004* filed in High Court of Kenya at Mombasa in which *John Wainaina Kagwe, “the appellant”* sued *Hussein Dairy Limited, “the respondent”* as a result of a road traffic accident which occurred on 29<sup>th</sup> October, 2002 along Mombasa-Malindi highway near Whitesands Hotel at Bamburi. In the plaint, it was pleaded that on the material day at about 5 a.m. the appellant was lawfully driving his motor vehicle registration number. *KAG 571S, “the car”* along the said road when it violently collided into the rear of the respondent's motor vehicle registration number *KAE 894 LZ7387, “the lorry”* which was dangerously and obstructively parked on the said road. Consequently the appellant sustained severe bodily injuries, loss and damage which he averred was a direct consequence of the negligent acts and omissions on the part of the respondent's agent, driver and or servant one, *Abdalla Salim Kibiriti “Kibiriti”*.

The injuries sustained by the appellant as a result of the accident were listed as follows:-

- *Comatose for 3 days*
- *Cut wound on the forehead*

- *Cut wound on the tongue*
- *Nasal bleeding*
- *Swollen and red left eye*
- *Deep cut wound on the left knee*
- *Fractured right clavicle*
- *Fractured 5<sup>th</sup> and 6<sup>th</sup> right ribs*
- *Fractured 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> left ribs, small hemothorax bilaterally*
- *Intracranial air, fluid in both maxillary sinuses*
- *Fracture left maxilla and left periorbital*
- *Loss of vision and squinted left eye*
- *Memory loss*
- *Lack of sleep*
- *Reduced hearing with a ringing sound in the left ear.*

In terms of special damages, the appellant prayed for a total sum of Kshs.762,980/= made up of the pre-accident value of the car which became a write-off following the accident being Kshs.350,000/= medical expenses incurred of Kshs.409,980/= and Kshs.3,000/= for medical examination and report.

In its defence, the respondent admitted that indeed an accident involving the two motor vehicles occurred on the date, time, place and the road stated in the plaint, but denied that the accident was solely caused by the negligence of its agent, driver and or servant, **Kibiriti**. In the alternative, the respondent pleaded that the accident was caused and or substantially contributed to by the negligence of the appellant in driving, managing and controlling his car.

The hearing of the suit soon thereafter commenced before **Odero, J.** on 10<sup>th</sup> June, 2009. Prior to that however, parties had by consent agreed on special damages of Kshs.210,733/=. Accordingly a consent order was recorded in those terms. The learned Judge considered all that was placed before her but ended up dismissing the appellant's suit. In the course of the judgment the learned Judge observed:-

***“... The plaintiff of his own volition got into his motor vehicle and drove off after nearly six hours of imbibing alcoholic drinks. He has no one to blame for the consequences of his short sighted action other than himself. The cause of accident was not the presence of the trailer on the road but rather the negligence of the plaintiff in driving recklessly and disregarding its presence on the road. I am satisfied that the defendant took all the measures including moving the trailer off the road, having reflective chevrons on their vehicle and placing branches on the road to warn oncoming drivers of its presence on the well-lit and straight road. I find no liability to attach to the defendant. On the contrary I find the plaintiff 100% to blame for the occurrence of the accident. In the absence of liability no damages can flow. I note that the plaintiff did suffer serious injury – indeed it is a miracle that he survived the accident but sadly he is the author of his own misfortune. He is not entitled to any damages. This claim fails entirely and I do hereby dismiss this suit with costs to the defendant.”***

It is the foregoing that has given rise to this appeal in which the appellant through his advocate, **Ngoiri Njoroge Esq.** filed a memorandum of appeal setting out the following grounds of appeal:-

- (1) *The learned honourable judge erred in law by failing to assess the quantum of general damages for pain and suffering – irrespective of her finding on liability.*
  - (2) *The learned honourable judge erred in law and fact in disregarding the appellant's uncontroverted evidence in its totality and wrongly holding that the accident was caused by the appellant's manner of drive (sic).*
  - (3) *The Learned honourable judge erred in law and fact in failing to hold the respondent fully and vicariously liable (sic) the subject accident and all its direct consequences.*
  - (4) *The learned honourable judge erred in law and fact in failing to find the respondent fully liable in negligence despite the fact that it did not adduce any evidence to controvert the appellant's evidence on record.*
  - (5) *The Learned honourable judge erred in law and fact in failing to find that the appellant had fully discharged his legal burden/onus and fully proved a case of negligence against the respondent on a balance of probabilities – as required by the law.*
  - (6) *The Learned honourable judge erred in law and fact by finding that the appellant was inebriated at the material date and time – which was not a finding of fact or evidence.*
  - (7) *The Learned honourable judge erred in law and fact in failing to adequately consider the appellant's un-controverted evidence and in failing to find that the subject accident was caused by the respondent's agent, driver and/or agent.*
  - (8) *The Learned honourable judge misdirected herself on the weight of the evidence adduced by the plaintiff and his witnesses and particularly failed to find that the respondent's motor vehicle was dangerously obstructing other motorists and particularly the appellant's motor vehicle at the material date and time.*
  - (9) *The Learned honourable judge erred in law and fact in failing to appreciate the legal essence of the traffic charge and conviction against the respondent's driver/servant and/or agent in Mombasa Traffic case No. 8517 OF 2002 – Republic of Kenya v Abdalla Salim Kiberiti.*
  - (10) *The learned honourable judge erred in law in failing to consider the express provisions section 47(A) of the Evidence Act, chapter 80, Laws of Kenya.*
  - (11) *The Learned honourable judge misdirected herself by being persuaded by decided authorities which were legally and factually distinguishable from the appellant's case.*
12. *The learned honourable judge erred in law and fact in totally disregarding the appellant's un-controverted evidence on record and persuasive written submissions in making her judgment.*

This appeal came up for hearing before us on 20<sup>th</sup> May, 2013 when **Mr. Gikandi** and **Mr. Shikely**, learned counsels appeared for the appellant and respondent respectively.

In his submissions, **Mr. Gikandi** stated that the appellant sustained extremely serious injuries. Though his suit in the superior court was dismissed, the trial court did not proceed to assess damages as is the normal practice. Counsel further submitted that there was uncontroverted evidence that the lorry was dangerously parked on the road. Indeed as a result of the accident, **Kiberiti** was subsequently arrested,

charged and convicted on his own plea of guilty for the traffic offence of causing obstruction contrary to **section 53(1)** as read with **section 53(2)(b)** of the Traffic Act. With that conviction – **section 47(a)** of the Evidence Act came into play. Thus there was conclusive evidence of the carelessness on the part of the respondent's driver in so far as this accident was concerned. In support of this contention, counsel relied on the cases of ***Chemwolo & Another v Kubende [1986] KLR 492*** and ***Robinson v Oluoch [1971] E.A. 376***. Counsel further submitted that **section 53** of the Traffic Act provides that a motor vehicle left on the road must be removed as soon as possible. This was not done in the circumstances of this case. Counsel went on to submit that the superior court held that the appellant was 100% to blame for the accident which was an awkward position since the lower court had by convicting **Kibiriti** confirmed that he was to blame for the accident. In the premises, counsel urged us to re-visit the issue of liability. With regard to whether the appellant was driving under the influence of alcohol as held by the learned Judge, counsel submitted that nothing was found in his motor vehicle that would have remotely suggested that he was driving under the influence of alcohol. No witness was called from Kigotho's bar and restaurant to confirm that the appellant was tipsy when he left the bar. Under **section 44** of the Traffic Act, driving under the influence of alcohol is a traffic offence. **Mr Kibiriti** did not say that the appellant appeared drunk, nor did the police who came to the scene. Indeed had the appellant been drunk he would have been charged with a traffic offence. Counsel further submitted that the court appeared to have been biased against the appellant going by the strong language employed to castigate the conduct of the appellant. In conclusion, counsel submitted that if we agreed with him, the issue that will be left outstanding will then be assessment of damages. As this Court would not have a chance to see the appellant, counsel prayed that the case be remitted to the superior court with direction as to liability and assessment of damages thereof.

In opposing the appeal, **Mr. Shikely** submitted that failure to assess damages even after dismissing the appellant's case was not a legal requirement. On the issue of obstruction, counsel submitted that the motor vehicle was not parked on the road but partly leaving ample space for the other vehicles to drive along. The stretch of the road where the accident occurred was straight. The motor vehicle had four chevrons and reflective plate numbers so that if the appellant was driving with his lights on, he would have been able to see the lorry. Counsel further submitted that the appellant must have been driving at a high speed and not 50 kph as he had claimed in his evidence. There were no brake marks. Further, it was evident that the appellant had been drinking until morning. He could not even recall how many drinks he had taken. To counsel, the learned Judge analysed all the evidence placed before her and came to the right conclusion that the appellant was solely to blame for the accident. In the premises he prayed that the appeal be dismissed.

This being a first appeal, we are duty bound to re-evaluate the evidence, assess it and make out our own conclusions remembering that we neither saw nor heard the witnesses and due allowance must be made for that, see ***Selle v Associated Motor Boat Company Limited [1968] E.A. 123*** and ***Williamson Diamonds Ltd v Brown [1970] E.A. 1***.

We shall first deal with the question as to whether the learned Judge was in error in failing to assess damages she would have otherwise awarded the appellant had she found in his favour. It is normal practice which has almost acquired the force of law that even if a court dismisses a suit for damages, it is desirable that the court should assess the damages that it could have otherwise awarded such plaintiff, the dismissal of his suit notwithstanding. As way back as 1968 in the case of ***Selle (supra) Sir Clement De Lestang, V.P.*** expressed himself thus on the subject:-

***“... It is however unfortunate that the learned Judge did not assess the damages as the case will now have to go back for that to be done. It is always advisable for a Judge of first instance to decide all the issues raised in the case before him so that further expenses to the parties and further delay may be avoided in the event of the Court of Appeal having to adopt the course which we must adopt in the present case. Had this been done it would not have been necessary to send the case back to the High Court for damages to be assessed thus increasing the large costs which the parties have already incurred ...”***

In the same case *Law, J.A.* expressed himself thus on the issue;

**“... It is always desirable, in a suit for damages, for the trial Judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. Much time and expenses can be avoided if this course is followed ...”**

On the basis of the foregoing, we are satisfied that the learned Judge grossly misdirected herself in failing to assess damages she would have been inclined to award the appellant in the event that he had succeeded. Such course of action is intended to assist the appellate court in the event that it disagrees with the trial court's findings on the issue of liability and overturns it, to have regard as to the trial court's perception of the damages payable since the appellate court has no chance or opportunity to observe and see the appellant testify as to be able to gauge his injuries and the appropriate damages awardable.

Turning to liability, it is common ground that an accident occurred involving the car and the lorry. The appellant crushed into the rear of the lorry unlawfully parked on a portion of the road. According to the appellant, he was on 29<sup>th</sup> October, 202 driving along Mombasa-Malindi road past 5 a.m. headed home and nearing Whitesands Hotel when he came across a stationary lorry occupying part of the road. As he tried to overtake it, there was oncoming vehicle. He immediately but unsuccessful applied emergency brakes but ended up driving under the lorry. He was driving at a slow speed as one could not drive at a speed as there were many lorries on the road. The appellant takes the view that a stationary vehicle ought not to have been on the road at that hour. There were no lifesaver signs and no leave branches on the road to warn the road traffic of its presence. That the lorry was parked on the road and not by the side.

According to PW5, *Pc. John Wachira*, the accident occurred at 5 a.m. The lorry, it emerged had developed a mechanical problem on the road at about 10 a.m. and *Kibiriti* parked it off the road. He informed the respondent who sent mechanics to fix the lorry to no avail. *Kibiriti* then put branches on the road to warn oncoming vehicles as he did not have the triangle reflectors. However sketch plan showed part of the lorry was on the road and in particular the trailer.

Though *Kibiriti* did not testify, nonetheless his statement to the police with regard to the accident was tendered in evidence. He stated that on the material day he was headed to Gongoni area in Malindi to collect salt. He stopped the lorry when it developed a mechanical problem as gears failed to engage. He stopped the lorry whilst occupying one lane of the road. He decided to put tree branches on the road to alert the road traffic of the danger. He did not have the traffic triangle reflectors. At about 4 a.m. it started raining and he entered the lorry and slept. At about 5 a.m. he heard a loud bang from the rear and on checking, he found that a Toyota saloon car had rammed into the rear of the lorry. The car had only one passenger and he was removed from the wreck and rushed to hospital. He then panicked and disappeared from the scene.

It is not in dispute that as a result of this accident, *Kibiriti* was subsequently arrested, charged and convicted on his own plea of guilty for the traffic offence of causing an accident by obstruction contrary to *section 53(1)* as read together with *section 53(2)(a)* and *(b)* of the Traffic Act. Upon conviction he was discharged under *section 35(1)* of the Penal Code on account of his illness.

In summary, this was the evidence laid before the learned Judge by the appellant on the question of liability without rebuttal from the respondent upon which she returned a verdict, that the appellant was wholly and solely to blame for the accident. Based on the evidence can such holding be sustained? We do not think so!

Of course under our legal system, he who alleges must prove his averment on balance of probabilities. In our view, the appellant by his evidence was able to show that *Kibiriti* substantially contributed to the accident by causing the lorry to remain stationary in one lane of the road, failed to erect or install laminated signs or warnings on the road and in the premises failed to warn other motorists of the danger that the stationary lorry was posing to them. He also failed to cause the lorry to be removed

from the road. These were some of the particulars of negligence that the appellant had pleaded in his plaint which he attributed to the respondent's driver, **Kibiriti**. On the other hand the respondent though it admitted the occurrence of the accident nonetheless denied that the accident occurred in the manner prescribed in the plaint and attributed it solely to the appellant. In the alternative, it pleaded that the accident was caused by the appellant's negligence and proceeded to give particulars of such negligence to wit, driving in an aggressive manner and or an excessive speed whilst under influence of alcohol, failed to keep a proper lookout, drove without due care and attention and without regard to his own safety, failed to heed the presence of the lorry parked alongside the road and failing to exercise reasonable care and skill in the driving and management of his car. As already stated, the respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability. It was thus substantially to blame for the accident. We say so because of the driver's own admission in his statement to the police that, he had parked the lorry in one lane of the road. He did not say in his statement that he had parked the lorry off the road as the learned Judge stated in her judgment. The same submission was made before us though. However with the driver's clear and unambiguous admission, we cannot buy such argument. If that be case, then it is obvious that the motor vehicle was parked dangerously and negligently and no amount of sophistry can change that fact. Even the fair sketch plan shows that a big portion of the lorry was on the road. We therefore do not see the basis of the Judge's finding that the lorry left sufficient space for the appellant to drive on unscathed.

**Mr Kibiriti** also admitted that he did not have traffic triangle reflectors. What he instead did was to allegedly put tree branches on the road to warn the traffic of his stalled lorry. However we entertain some doubts as to whether this was indeed the case. **Sgt. J. Kimani** in his statement does not refer to any tree branches on the road nor is such information captured in his sketch-map and yet he was the first police officer at the scene. Even PW5 **Pc. John Wachira** did not allude to such evidence. Parking a lorry whilst in such a dangerous manner and with no traffic triangle reflectors obviously exposed other road users to risk. The accident occurred at night and even if there had been tree branches as claimed, considering that the lorry remained stationary, at the scene from 10 a.m. to 5 a.m., those tree branches could as well have been destroyed going by the traffic on the road which the appellant and the respondent all agreed was heavy. It is also instructive that it had rained that night. Indeed it is possible that it was still raining as at the time of the accident and that is why the lorry driver entered the lorry shortly before the accident. That being the case and depending on how heavy the rain was, it could have obscured the visibility making it improbable that the appellant would see such tree branches. The learned Judge addressed the issue of four chevrons at the rear of the lorry. The purpose of such chevrons is to illuminate the rear of the vehicle and to provide ample warning of its presence on the road. Added to this the Judge was also of the view that at the scene of the accident the road was well lit and straight. Accordingly the lorry ought to have been very visible to any driver on the road. However, the learned Judge failed to appreciate the impact of the rain on visibility of the road user. Secondly, nowhere in the evidence of the called witnesses has any one of them testified or made any reference to the place of the accident being well lit. It would appear that this was the Judge's own theory with no supporting evidence at all. The appellant did however testify that there were no street lights at the scene. He went on further to testify under cross-examination that there was Whitesands Hotel and other hotels nearby. However Whitesands Hotel had no gate lights. With this emphatic testimony, we cannot appreciate where the Judge came up with the theory that there were street lights at the scene. It is better for judicial officers to let the evidence speak for itself rather than advance unsupported and uncollected theories. Given these circumstances, we doubt whether the chevrons if at all had the desired impact.

The learned Judge also took issue with the absence of skid marks at the scene as being suggestive of the appellant's recklessness in his driving, hence ramming into the rear of the lorry. We have already stated that it had rained or was raining at the scene of the accident. Even if there had been skid marks, it may well be that the rain water had interfered with the same. From all the foregoing we are unable to

agree with the learned Judge's finding that:

***“... It is clear that the driver did all he possibly could to warn other road users of the presence of this broken down trailer on the road. Indeed the evidence is that trailers had been on that spot, a busy road for several hours and no other motorist had rammed into it ...”***

The mere fact that there had been no accident involving other motorists does not necessarily make the respondent less culpable. From **Kibiriti's** statement, it is obvious that he was fully aware of its vehicle's obstructive position from as early as 10 a.m. yet he failed to remove it from that dangerous position for the long time that lapsed between when the lorry broke down and the accident. After the respondent mechanics failed to repair it, it was only logical that it be towed from that dangerous position.

**Section 53(2)(a) & (b)** of the Traffic Act is emphatic that:

***“... the driver of any vehicle shall, in case of a breakdown, remove such vehicle from the road as soon as possible and, until so removed the vehicle shall be placed as close to the side of the road as possible. If the vehicle remains on the road between the hours of 6.45 p.m. and 6.15 a.m., its position shall be clearly indicated by a light or lights visible to drivers of vehicles approaching from either direction ...”***

Whereas **section 53(3)** provides *inter alia*;

***“If any part of the vehicle remains on or near the road in a position so as to obstruct or likely to obstruct or cause danger to other traffic using the road, the driver shall place on the road not less than fifty meters from the vehicle two red triangles of such construction and dimension as may be prescribed, one a head and one behind it so that each is clearly visible to drivers approaching from ahead or behind, as the case may be ...”***

It is very clear from the evidence that **Kibiriti** contravened these mandatory provisions of the law and by so doing he was reckless and endangered other road users among them the appellant.

The Judge also blamed the accident on the appellant on account of his drunkenness. She stated that for a man to have been drinking in a bar from 8 p.m. to 5 a.m. and then get behind a wheel to drive home was in her view reckless in the extreme. She further held there could be no doubt at all that the appellant was to a great degree inebriated, such as would affect his judgment on the road. The Judge went on to say that there can be no doubt that due to poor reflexes the appellant in his state was unable to see the lorry on the road in good time to avoid the collision. The Judge pointed out that the appellant driving at an excessive speed in an inebriated state clearly failed to adhere to the rule that any driver coming up from behind is required to exercise due care and keep safe distance from the vehicle ahead. The Judge then concluded that the appellant had been in a bar taking alcoholic drinks from 9 p.m. to 5 a.m. a period of six hours. There could be no doubt that he was inebriated to such a degree that would diminish his capacity to act in event of any emergency situation like avoiding an obstacle on the road. That the appellant of his own volition got into his vehicle and drove off after nearly six hours of imbibing alcoholic drinks, had no one to blame for the consequences of this short-sighted action other than himself.

As can be readily seen the Judge has employed fairly strong language against the appellant disapproving of his alleged conduct. The appellant's complaint on this score cannot be faulted. It is quite evident that the Judge does not sit well with those who partake alcohol. She seems to abhor the practice. However as a Judge, personal prejudices must be set aside for the sake of justice so that it does not cloud one's judgment. In the circumstances of this case, such emotive language was highly unnecessary. The appellant must have left the court believing that he had been condemned because of his drinking habits if at all. This was a court of law and not a religious or ecclesiastical court. As we understand it, the law does not punish the drinking of alcohol. What the law punishes is driving under the influence of alcohol.

It is a scientific question whether one is driving under the influence of alcohol. It cannot be left to conjecture as was the case here. The appellant could as well have been in the Kigotho's bar and restaurant for that long and not be inebriated. What we are saying is that there was no evidence upon which the learned Judge would have drawn the conclusion that the appellant was driving whilst drunk. There was no scientific evidence led in that regard nor was any witness called from Kigotho's bar and restaurant to testify on that aspect of the matter. It is the appellant who quite candidly disclosed to the Court that he had driven from Kigotho bar where he had, had some drinks. If indeed the appellant was driving under the influence of alcohol, **Kibiriti** would have noticed and recorded so in his statement. Further the police who came to the scene would have noted that and taken appropriate steps of charging him with an appropriate offence under the Traffic Act. We note that much as driving under the influence of alcohol was pleaded in the respondent's defence, it was never proved as we have already stated.

The appellant called evidence to show that **Kibiriti** was subsequent to the accident, arrested, tried, convicted on his own plea of guilty and sentenced for the traffic offence of causing an accident by obstruction. The plea of guilty was in our view an admission of all the facts and particulars contained in the charge sheet and specifically, that he caused the accident by obstruction. The driver cannot therefore be heard now to say that he had not parked the lorry in the middle of the road and that as a result he had not caused the accident.

Again under **section 47(A)** of the Evidence Act it is provided that

***“a final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence, shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest be taken as a conclusive evidence that the person so convicted was guilty of that offence as charged ...”***

Had the learned Judge invoked and applied this provision of the law, the irresistible conclusion she would have come to was that **Kibiriti** wholly or substantially caused the accident by obstruction. However the Judge took the view that the cause of the accident was not the presence of the lorry on the road but rather the negligence of the appellant in driving recklessly and disregarding its presence on the road. In support of this proposition, the learned Judge relied on the cases of **Vyas Industries v Diocese of Nyeri, Civil Appeal No. 23 of 1976 (UR)**, **Dorine Mkanjala v United Touring Company & 3 Others, Civil Suit No. 624 of 1983 (UR)** and **Hamisi Gunga Baya v Salt Manufacturers Ltd & Others, H.C.C.C. No. 651 of 1993 (UR)**. All these cases address what a prudent driver should do, that is travel at such speed and distance as to avoid colliding with a vehicle ahead of him. However all those authorities are distinguishable from the situation that obtained in this case. In those cases none of the drivers had subsequent to the accident been charged with a traffic offence, tried, convicted and sentenced as was the case here.

But we must hasten to add that it was held in the case of **Chemwolo** (*supra*) that:-

***“... In a civil case different aspects of evidence emerge which may not disturb a previous criminal conviction of a party to it. Although in the civil proceedings the first appellant's conviction was conclusive evidence that he was guilty of carelessness, that finding did not preclude the appellant's as the civil case could find that the respondent was also guilty of carelessness”***

In other words, a conviction **per se** of a traffic offence does not preclude the convictee from leading evidence of contributory negligence in a subsequent running down suit. Such convictee is at liberty to lead evidence as to the contributory negligence of the plaintiff which might impact on the twin issues of liability and quantum. This is the situation we are confronted with here.

There is no doubt at all that the appellant was somehow to blame for the accident as well. It is quite apparent that going by the accident damage to his car, he was driving pretty fast. The car was a total write-off. The assessor from his insurance company noted extensive damage to the front of his

vehicle and engine due to crashing into a solid object while driving at a high speed. The appellant admitted to this under cross-examination by **Shikely** during the trial. Yet the conditions were not quite conducive to support such misadventure of driving fast. It had rained. By his own admission, he was at Kigotho's bar and restaurant from 9 p.m. to 5 a.m. He was now driving home. He had had few drinks as he claimed in his evidence or a lot more. However our concern is that having been out there, that long, it is probable that he was exhausted which act could as well have impaired his judgment somewhat. Taking all these into account we find the respondent liable for the accident to the extent of 70% and the appellant guilty of contributing negligence to the account of 30%.

The appellant wished that in the event that we find in his favour in this appeal and apportion liability, we should remit the case to the superior court with a directive that the superior court assess damages payable to him. On account of **Selle** (supra) we accede to the request.

Accordingly, the appeal is allowed. The order dismissing the appellant's case in the superior court is set aside. In substitution there will be judgment in favour of the appellant as against the respondent on liability in the ratio of **30%/70%**. Special damages are as agreed of-course less 30%. We shall remit the case back to the superior court to assess damages on that basis. The respondent shall pay the appellant **70%** of the costs of this appeal and the suit in the superior court.

***Dated and delivered at Malindi this 3rd day of July, 2013***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**I certify that this is a  
true copy of the original.**

**DEPUTY REGISTRAR**