IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 285 OF 2005

MICHAEL HUBERT KLOSS

BAYER EAST AFRICA LIMITED……..……..……APPELLANTS

AND

DAVID SERONEY

PERIS CHEPKOECH

CHRISTINE CHEPKORIR SERONEY

FLORENCE CHEPCHIRCHIR

ZIPORAH JEBICHI SERONEY

ROSE JEMUTAI SERONEY……..…….RESPONDENTS

***(Appeal from the judgment and decree of the High Court of Kenya at Eldoret (Nambuye, J.) dated 2nd March, 2004* in H.C.C.C. NO. R.6 OF 2000 consolidated with R. 69 of 2000)**

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JUDGMENT OF THE COURT

This is yet another amazing story of two motor vehicles, each on its correct side of a straight road, moving at a slow speed or stationary and parallel to each other on opposite sides of the road, on a clear, sunny day, but still manage a head-on collision!

Overview:

Eleven years ago on 22nd August, 1998 at about 5 a.m., six young members of the *Seroney* family and two of their cousins, boarded a blue Mitsubishi Pajero vehicle (blue Pajero) in Eldoret headed for an engagement party of their relative and friend in Narok. For the next four hours, their trip was uneventful as they drove through the Nandi Hills, Kericho and Mulot where they stopped briefly for tea. At about 9 a.m., at a point on the Mulot – Narok road, some 5 kilometers from Narok town, they violently collided with a white Mitstubishi Pajero (white Pajero). The white Pajero had two occupants

and had left Nairobi at 7 a.m. headed for a safari weekend in Masai Mara. The Seroney family car rolled after the collision and two of the youngsters died while the others received various injuries and were treated in Narok and Kijabe Hospitals. The two occupants of the white Pajero received shock and other insignificant bruises as their car remained stationary and they had their seat belts on. The driver of the white Pajero was subsequently charged in **Narok Traffic Court Case No. 120/98** on two counts of causing death by dangerous driving contrary to ***section 46*** of the Traffic Act. In a considered judgment delivered by the trial magistrate on 8th February, 2000, the driver was acquitted of those counts. In the same month the Seroneys filed suit in the superior court against the driver and owner of the white Pajero and the legal representatives of the two deceased also filed another suit. Both suits were consolidated and heard together before Nambuye, J. sitting in Nakuru, who, in a lengthy judgment of 80 typed pages and delivered on 2nd March, 2004 found, on liability, that there was contributory negligence from the drivers of both vehicles, and apportioned it at 80% against the white Pajero and 20% against the blue Pajero. The learned Judge also assessed both general and special damages for each of the plaintiffs. Aggrieved by the findings of the superior court on liability and assessment of damages, the owner and driver of the white Pajero now appeal before this Court.

The parties:

The blue Pajero had foreign registration number **L09499 3006494** and was the family car owned by ***Zipporah Jebichi Seroney*** (Zipporah) (5th respondent). Her children who were in the car were:

1. David Kipkemboy Seroney (David) (1st respondent)
2. Christine Chepkoech Seroney (Christine) (3rd respondent)
3. Florence Chepchirchir Seroney (Florence) (4th respondent)
4. Rose Chemutai Seroney (Rose) (6th respondent)
5. Elizabeth Chebet Seroney (Elizabeth) (deceased)
6. Lamayian.

Their two cousins, the children of Zipporah's sister, ***Mary Chemaiyo Cherop*** (Mary) were:

7. Peris Chepkoech (Peris) (2nd respondent)
8. Wilfred Kipkoech Cherop (Wilfred). (deceased)

At the time of the accident the blue Pajero was driven by David, a 24 year old university student in India who had been licensed to drive four years earlier, in 1994. ***Elizabeth*** and ***Wilfred*** died in the accident and their respective estates were represented by Zipporah and Mary in **HCCC R69** of 2000 (R69/00). Those who were injured and filed **HCCC R.6 of 2000** (R6/00) were ***David***, ***Peris***, ***Christine***, ***Florence*** and ***Rose***. Zipporah also sued for the loss of her motor vehicle in the same suit.

The driver of the white Pajero Reg. No. **KAK 869M** was ***Michael Hubert Kloss*** (Kloss) (1st appellant) , a German national, employed at the time as the Division Manager with M/S. Bayer East Africa Ltd (Bayer (2nd appellant)) the registered owner of the motor vehicle. His passenger friend, on her first trip to Masai Mara, was ***Sabine Grusshke Tullius***, a consultant for a German Foundation. Kloss had been a driver for 15 years, four of which were in Kenya after obtaining his Kenyan driving licence in 1994.

The pleadings on liability

The six Seroneys in R6/00 pleaded in their amended plaint that it was Kloss who negligently and recklessly managed or controlled the white Pajero and allowed it to violently collide with the blue Pajero. The particulars of negligence were stated as follows:

"*a) Driving the 2nd defendants motor vehicle at an extremely excessive speed in the circumstances.*

b) Failing to break swerve slow or in any other manner drive manage and or control the said motor vehicle so as to avoid the accident.

c) Failing to keep to his side of the road and swerving towards the 5th plaintiff's vehicle causing the accident.

d) *Driving the said vehicle without due care and attention and without regard for the safety of other road users especially the* plaintiffs."

Zipporah and Mary repeated the same particulars in their plaint in R 69/00. In both cases, the doctrine of *Res Ipsa Loquitor* was also pleaded.

Kloss denied the particulars of negligence in both cases and asserted that it was David, the driver of the blue Pajero, who was negligent and reckless in his driving. The particulars of the negligence of David were stated as follows:

"*(i) Driving at an excessive speed in the circumstances;*

(ii) Failing to keep to his side of the road;

(iii) Driving the said vehicle without due care and regard for other road users more specifically the 1st defendant;

(iv) Failing to break, swerve, slow down or in any other sufficient way manage and/or control the said vehicle so as to avoid colliding with the defendant's motor vehicle.

(v) Driving the said motor vehicle on a public road when he was not qualified or competent to do so."

In R 69/00 he added two more particulars: *that the blue Pajero was overloaded and that it was unroadworthy*. Kloss also pleaded the doctrines of *Res Ipsa Loquitor, Equity, Volenti non fit injuria* and the *Traffic Act*. On the basis of those pleadings, both Kloss and Bayer counterclaimed for judgment against David and Zipporah. The counterclaim was denied and therefore issues were joined on liability.

The Traffic case

We stated earlier that Kloss was prosecuted for causing death by dangerous driving before Narok Senior Resident Magistrate. In that case, the prosecution called 13 witnesses including David (PW6), Peris (PW5), Christine (PW4), Florence (PW2) and Rose (PW1). The police officers who visited the scene of the accident also testified and produced sketch plans of the scene. The deaths of Elizabeth and Wilfred were also proved through medical evidence. In his defence, Kloss testified and called two eye-witnesses to the accident including his passenger, ***Sabine*** (DW2) and ***Richard Michael Borrissow***, (DW4)who was driving another Mitsubishi Pajero behind Kloss at a distance of 250 meters or so when the accident occurred. He was the first to arrive at the scene. Another witness, ***Michael Laplace – Toulouse*** (DW3) also arrived at the scene shortly after the accident on his way to Masai Mara and took photographs which were produced in evidence.

After reviewing and assessing all the evidence on record, the learned Senior Resident Magistrate (T.O. Ouma) believed Kloss and the eye-witness evidence called by him and held that he was not to blame for the accident and therefore acquitted him of the two traffic offences charged. The learned

magistrate stated in part:

"*The P.W.1, P.W.2, P.W.3, P.W.4, P.W.5, P.W.6 have all stated that they were on their correct side of the road – the left side of the road as one faces Narok Town direction. On the other hand the DW1, DW2, DW3 and DW4 state that the accused was on its correct side of the lane – the left side of the road as one faces Maasai Mara direction.*

So both the prosecution and the defence have each claimed they were in their correct side of the road. Consequently, I am of the view that the outcome of this case will depend on whether the circumstances surrounding it support or negate either of the versions offered.

I have examined the photographs produced by the prosecution. They all show that some part of the accused's motor vehicle was on the left side of the road after the accident – which was its correct side of the road. On the other hand according to the measurement of P.W.8 the motor vehicle in which the deceased went and stopped about 31.3 meters away from the point of impact before it started rolling. This seems to suggest to me that this motor vehicle was moving in a very high speed. This is to be contrasted with the evidence available regarding the position of the accused's motor vehicle after the accident. This motor vehicle never moved far from what is perceived to be the point of impact. This could be possibly attributed to the fact that the accused braked before the accident. On the other hand there is no evidence suggesting that the driver of the other motor vehicle braked.

Further, I have considered the nature of damages suffered by both motor vehicles. I believe such evidence is helpful in determining how fault may be attributed in a situation like this. The wheel of the other motor vehicle came off on impact and flew up in the air according to the evidence of DW4. This seems to me to justify my belief that the other motor vehicle was being driven so fact. I find this supported by the fact that it proceeded to scratch the ground for a considerable long distance – 18 meters after losing the front wheel before rolling and then landing.

I have noted that the damage on the accused's motor vehicle started from somewhere around the middle of the front part and proceeded to the other front parts of the driver's side. On the other hand the damage was extensive on the driver's side. To my mind this suggests that the version of the accused that the driver of this motor vehicle just before the accident turned around his steering wheel to go back to his correct side of the road and hit his on the middle front and moved back to his side and started rolling could be truthful. It would seem that this accident occurred somewhere near the middle of the road. At the time of the accident there was no yellow line showing where the middle of the road lay. The PW8 has talked of yellow dots but the photographs taken before the yellow line was made do not show the yellow dots along the accident area. May be therefore at the time of the accident it could be difficult to tell whether the driver could tell clearly where the centre of the road was. This road the court has been told can be classified as a narrow road. The PW8 has said that the skid marks of the motor vehicle KAK from the left side of the road ended up at 0.3 of a meter from the centre of the road and onto the right hand side of the road as one faces Narok town. I have considered this piece of evidence. It appears to me that considering the rest of the evidence available it is too negligible to anchor fault upon.

From the evidence of PW8, it seems the driver of the other motor vehicle never braked at all. He says he never saw any skid marks which could help in indicating whether he braked or not. This evidence supports that of the accused who stated that the other motor vehicle never braked at all, now, why would this driver of the other motor vehicle not brake whereas he claims that the accused's motor vehicle on the side of the road as one faces Narok town? What could have been going on the mind of its driver at that moment? I see nothing indicating that the driver of the other motor vehicle did anything to avert the accident. He bore its brunt fully, why were both drivers of these motor vehicles not subjected to alcohol test?"

The acquittal of Kloss in the traffic case would, of course not be binding on a civil court subsequently considering the issue of negligence on a standard of proof which is lower than "*proof beyond reasonable doubt*". As this Court stated in **Robinson v Oluoch [1971] EA 376**:

"**It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."**

The converse is also true where there is an acquittal.

But an acquittal is certainly relevant and significant especially so in this case because Kloss and his passenger, Sabine, were not available to testify in the superior court, and the proceedings before Traffic court were produced as an exhibit with the consent of the parties. Indeed an application was made on behalf of those witnesses who had returned to their countries in Europe and were unable to travel back, partly due to medical reasons and a ruling was apparently delivered on the application on 8th April, 2002. We say "apparently" because although there is an order made in the record before us for delivery of such ruling, the ruling was not included in the record. Nothing however turns on that issue since none of the parties raised objections and in any event the superior court relied on the record of the traffic case to analyse the evidence of the two witnesses in relation to the accident at the invitation of the parties.

The evidence on liability before the superior court:

The most crucial evidence on both sides of the case is that of David and Kloss, the respective drivers of the motor vehicles involved in the accident. They both agree that they were driving on opposite sides of the Mulot – Narok road; that the section along which the collision took place was straight although it was gently ascending from the direction of Narok and gently descending towards Narok; that the weather was sunny, clear and dry; that David did no apply any brakes at all; that Kloss applied emergency brakes; that after the collision, the right front wheel for the blue Pajero flew off as the vehicle veered left and rolled to a distance of 31 m off the road facing Narok; and that two of the passengers in David's car died. And there the similarity in their evidence ends.

The night before the accident, David had slept between 10 p.m. and 1 a.m. and woke up at 3.30 a.m. to prepare for the trip which started at 5 a.m. The engagement party for their friend in Narok was at 11 a.m., hence the reason for leaving Eldoret early since they would be returning home after the party the same day. He sat with one passenger in front while the middle seat was occupied by four passengers and the rear seat by two. He drove carefully all the way until after Mulot where the road had a smooth corner which he took without braking at a speed of 80 – 90 Kmph. He then took a straight stretch of the road and was keeping his left lane of the road when he saw a white Pajero at a distance, also on its correct lane of the road. About 20 meters before they met however, the other vehicle braked suddenly and came to his side of the road. Before David could swerve to avoid the accident, the other vehicle hit him and he lost control. He had no time to apply the brakes because the other vehicle came into his path suddenly. The front tyre and wheel were ripped off by the impact. When it was suggested that he had drunk the previous evening and that he was sleepy on the wheel after sleeping late, David denied it. It was also suggested that he was engaged in a conversation with his passengers and therefore lost concentration before driving on the path of the oncoming white Pajero, but again David denied it stating that if he was driving on the right, the other driver ought to have been seeing him from the corner which is 300 – 400 meters away and flashed his lights or swerved further to his left where the road was still smooth and straight. There was no ditch preventing such evasive action.

On the other hand, Kloss testified that he was also driving at about 80 – 90 Kmph and was on the correct lane of the road. All of a sudden he saw a car coming towards him on his side of the road. He thought the other vehicle would slow down but did not. So he braked heavily still on his side of the road and held his steering wheel firmly. Just before his car came to a stand still, the other car was turned sharply to return to its lane but it hit the white Pajero on the front middle left and started rolling as it moved to its left side. His car did not move significantly after the impact. The skid marks made by his braking were on his side of the road and were about 28 meters long.

The other witnesses said nothing to substantially change the evidence of those two drivers. Peris (PW2), a university student in India at the time, who was seated in the middle of the vehicle suddenly saw

the white Pajero shortly before impact and closed her eyes. Christine (PW3) another student who was seated near her said the accident was sudden and she cannot tell who was to blame. Florence (PW4) also a student seated in the middle saw the white Pajero braking suddenly then hit their car's driver's door and front right tyre. It was Rose (PW5) who was seated at the rear of the blue Pajero who said she suddenly saw the white Pajero and shouted "*Nani huyu mushenzi mzungu ako kama laini ya gari,*" then there was a collision before she could finish. David however says none of the passengers spoke to him as he drove.

On the other hand there was eye witness account of the accident from Michael Richard Borrisow (DW1), an Engineer who was driving behind the white Pajero, accompanied by his wife and child. He says he was only 150 – 200 meters behind the white Pajero when the accident occurred. He saw the sudden braking of the white Pajero ahead of him but could not see the reason why. He thought there were sheep or cattle. Suddenly from the front of the white Pajero, another vehicle shot out and immediately appeared at an angle of the white Pajero. It went across the road to the opposite side of the road which was open. He also saw a wheel flying above the white Pajero. He had not seen the blue Pajero on its left lane before the collision and he was certain that the white Pajero braked and skidded along its correct lane until it stopped before the collision. According to this witness, the blue Pajero was traveling fast and it span 3 – 4 times before rolling 1 ½ times and landing on its side. He turned back to report the matter to the police at Narok. His conclusion was that the white Pajero was on its right side of the road but the blue Pajero had been on the wrong side then swerved to regain its side but impacted the white Pajero on the right hand front corner. Michael Laplace Toulouse (DW2) then arrived on the scene and took photographs which are exhibited showing the skid marks. He is a tour operator and a senior professional photographer. The braking skid marks of the white Pajero are visible on the photographs and according to the witness, "*the skid marks go from the bottom left towards the middle of the road. It came to a halt before crossing the middle line."*

Assessment of evidence and findings by the superior court:

The learned Judge of the superior court in her lengthy judgment analysed not only the evidence of those witnesses and the submissions of counsel but also the evidence of other witnesses in the Traffic court case. The Judge particularly referred to the evidence of the police officer (PW8) who took the sketch plan of the accident and found "*skid marks that came from the left side of the road from Narok and ended up at a point next to the yellow line as one faces Narok town."* It is the same witness who said the skid marks stretched for 28 meters and "*were in a straight line."* The learned Judge also analysed the evidence of Kloss in that case, as well the evidence of Sabine and Richard Borissow. The Judge appreciated, correctly in our view, that she was not sitting on appeal against the decision of the Traffic court and that she had to consider the evidence placed on record before her on a balance of probability. In the end the learned Judge made the following 9 findings of fact:

1. There is no doubt that the said accident occurred.

2. There is no doubt that each side claims to have been on its correct lane and blame the other for the accident

3. There is no doubt that there was no yellow line either contrary or dotted as at the time of the accident marking the center of the road and so there is a possibility of driver thus judging the center of the road and straying into the other drivers side unknowingly.

4. Indeed PW1 who was driving the 5th plaintiff's vehicle said that he did not brake that he saw the first defendants vehicle in its correct lane. He did not anticipate it would come to him. His witnesses say he tried to swerve to his side. He himself says that he does not recall doing anything to avert the accident and before doing anything he was hit because it was so sudden. It is on record from the evidence of the 1st defendant in the traffic proceedings that he said that the other driver was driving in his lane and then turned the steering to go back to his correct lane but it was too late and the accident happened. The fact of turning the steering wheel and making an attempt to go back to the correct lane is an attempt to avert the accident on the part of PW1.

5. Great reliance was placed on the evidence of DW4 who was found as an independent and truthful witness by the lower court. He Richard Michael Barisow. He also gave evidence in these proceedings as DW1. .....Indeed this witness was an independent witness as he said he was in his own vehicle. He also confirms that the accident was about the middle of the road in the path of the defendants vehicle. He agrees there was no yellow line either continuous or dotted and as observed else where in this judgment this could lead to miscalculation on either driver as to the end of his lane so that he keeps to the same in as much as this evidence tends to show that the on coming vehicle of PW1 was driving into the lane of the outgoing vehicle. The same thing applies to the defendant's vehicle that it was being driven in the middle of the road shielding the view of DW1 and that is why he did not see the oncoming vehicle.

6. Issue was raised about alcohol test for both drivers. This would have assisted as both drivers claimed having been under the influence of alcohol at the time of the accident. As for fatigue and lack of sleep on the part of PW1 he PW1 satisfactorily answered that he was fully awake he was not distracted and he had been by passing many vehicles on the road for a long time. This court finds nothing on the record to suggest that PW1 was fatigued, sleepy or distracted. If that had been the case he would not have seen the other vehicle approach.

7. Issue was raised about PW1 not slowing after appearing from a bend. PW1 and his witness said that the bend was far off behind and were not on a straight road the photograph show that the bend is behind and the accident occurred on a straight road. Both sides agree the road was straight and clear and so it is the finding of this court that the bend did not contribute to the occurrence of the accident.

8. There was evidence of the skid marks made by the 1st defendant vehicle starting from the extreme left heading towards the corner and ending 0.3 meters from the center of the road. The learned trial magistrate dismissed this evidence saying that it was negligible and it did not show blame on the part of the first defendant. This court has a contrary view and makes a finding that this is the crucial evidence on the record and it is the one which shows why the accident happened and it should not have been ignored by the learned magistrate. This court is not going to ignore it, it was conceded by DW2 and it is also shown by the photographs that the first defendant started applying brakes from the extreme left towards the center. The first defendant did not explain why he skidded from the extreme left towards the center when asked as to why he could not swerve to his left he said he feared a ditch when put to him that a visit to the scene showed no ditch he said he feared a slope. The photographs of the scene do not show any slope. In fact there are vehicles stopped on the side of the road. The view of the scene from the photographs show that the road was straight and the area is flat. It is therefore the finding of this court that the first defendant could have comfortably gone to his left to avoid the accident. It is also the finding of this court that had he not skidded to the center of the road there would have been no accident. DW1 talked of an accident having occurred at an uphill but as observed from the photographs exhibit DW2 there is no uphill. The road is straight and the view is clear from both sides to a long distance a head of each side. It therefore follows that although the 1st defendant did not wholly cause the accident he contributed to its causation. Turning to PW1 it is clear that indeed the road was not marked but that should not have exonerated him from keeping to his extreme left especially when the middle of the road was not clearly marked. Indeed he had by passed many other motor vehicles on the road safely but he should not have assumed that all drivers would be the same. He says he had driven for 4 years before the accident. His driving licence got lost during the accident. He was not preasurerised(sic) to produce a duplicate having been a driver for 4 on the road he must have been aware of the risks involved. He must have been ware of reckless drivers and not to assume that it is the other drivers who were under a duty to drive carefully and be on the look out for reckless and imprudent drivers. *That duty fell on him also. Had he done so he would have kept to his extreme left more so when the centre of the road was not clearly marked. Had he done so there would have been no accident. The photographs produced also show that the road edges on his side was not steep. He could have safely gone off the road to avoid the on coming vehicle. Turning to the first defendant he had driven for 15 years or so five(5) of which were on Kenyan roads. The edge of the road on his side was not sloppy as he had put it in his evidence before the lower court. He too could easily have gone off the road.*

9. There was issue about speed. Both drivers said that they were going at 80-90 KPH and they were

therefore speeding as per the findings of the learned trial Magistrate PW1 was going up hill the first defendant was descending as he said the road was sloppy. That is why they failed to control their vehicles effectively and failed to bring them to a safe stop to avoid the accident. There was no reason for the learned Magistrate to nullify one and leave out the other.

The foregoing assessment shows that both drivers are to blame for the causation of the accident. The first defendant takes the greater blame because he did not explain why he skidded from the extreme left to the center of the road in the wake of an oncoming vehicle which to him was being driven in his lane. He should have skidded straight upon the extreme left and then out of the road. He had a chance and room to go off the road on the left but he did not do so and so he takes 80% blame. He was in the course of duty. He had authority from the 2nd defendant to drive the vehicle and so he vicariously binds the 2nd defendant.

PW1 the first plaintiff takes 20% blame for not being on the look out for any emergency and for not moving to his extreme left. In the wake of an oncoming vehicle. He knew the center of the road was not clearly marked and yet he kept to the centre. He PW1 was driving the 5th plaintiff's motor vehicle. He had authority to drive the same and so he binds the 5th plaintiff in his action. The 5th plaintiff is variously liable for his foots (sic) to the extend 20%."

It is those findings on liability which provoked the appeal before us and we shall first consider the grounds relating to that part of the case.

The appeal:

The gist of the contentions by learned counsel for the appellants Mr. Wasonga, was that the learned judge's findings were contrary to the evidence on record; that some of the conclusions made were not supported by any evidence; that all relevant evidence supported the finding that David was substantially, if not wholly, responsible for the accident; and that the learned Judge misapplied the evidence in the Traffic case and ignored eyewitness account which established that Kloss was not to blame for the accident which took place on his side of the road.

On the other hand, Mr. Kwengu for the respondents supported the decision of the superior court on the basis that the Judge was best placed to consider the credibility of the witnesses and the appellate court cannot interfere with the findings of fact based on credibility.

Several authorities were cited on both sides of the case and we have considered them.

The law and findings:

This is a first appeal and the court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusions in the matter. We nevertheless appreciate that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. – see **Mwanasokoni v Kenya Bus Service Ltd [1985] KLR 931.**

Where in particular there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court will hardly interfere with the conclusions made by the trial Judge after weighing the credibility of the witnesses – see **Hahn v Singh [1985] KLR 716.**

The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in **Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663** at p. 681 as follows:

"**To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it……**

"**The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."**

We have carefully examined the evidence on record in relation to liability and it is clear to us that there was a sufficiently high degree of probability, that, but for the acts of omission and commission by the respective drivers of the two vehicles the accident would have been prevented. To that extent, the learned Judge was right in apportioning contributory negligence to each of them. The only issue is whether the apportionment was appropriate in the circumstances of this case.

As stated above, there were specific acts of negligence pleaded by both parties in their pleading and the onus was on them to prove those allegations on a balance of probabilities. There is no reference in the judgment of the superior court to the said pleadings and the joinder of issues in the pleadings and there was therefore an error of principle in ignoring the pleadings. The case largely turns on assessment on recorded evidence since the issue of credibility of two crucial witnesses did not arise. As stated earlier, Kloss and Sabine were not before the superior court and therefore their demeanour could not be assessed. There was evidence that both drivers were driving at speeds of 80-90 Kmph shortly before the collision. Neither side suggests that the speed was excessive in the circumstances. There is evidence that Kloss applied emergency brakes and was stationary at impact while David, on his own admission, made no effort to slow down or brake. There is evidence that the road was straight, clear and dry although it was narrow and unmarked. There was evidence that both sides of the road were similarly clear and there was reason therefore for either of the drivers to swerve away from each other before it was too late, if they were exercising due care and attention. In failing to do so, both drivers must share the blame equally. We find no valid basis for apportioning higher liability against Kloss in the circumstances of this case. To his credit, he applied brakes to slow down on sensing danger, though he took no evasive action when it was open for him to do so, if his evidence is to be believed that he saw the offending vehicle at a considerable distance on his side of the road. The nearest other vehicle on that road was more than 200m away. We would accordingly interfere with the apportionment of liability and set aside the apportionment of 80% and 20% against Kloss and David respectively and substitute therefor 50% and 50% respectively for both drivers.

Quantum of Damages:

There are three grounds of appeal relating to damages as follows:-

"*4. The trial Judge erred in law and fact in awarding special damages to the 1st plaintiff when there were no receipts to prove the same;*

5. The trial Judge erred in law and fact in failing to appreciate that cost of future medical expenses was in the nature of special damages for which the plaintiff had failed to prove;

6. The trial Judge erred in law and fact in awarding damages which were manifestly excessive and punitive."

There is thus a challenge to the general damages awarded to David, Peris, Christine, Florence and Rose as well as special damages awarded to each of them and Zipporah. The Memorandum of Appeal and the Record of Appeal prepared by the appellant says nothing about awards made to the estate of Wilfred through Mary Cherop and we shall not concern ourselves with that award. Indeed, in his submissions before us, learned counsel for the appellants, Mr. Wasonga, was particularly concerned with some of the awards made for special damages when no proof was offered, awards for future medical treatment, and the dismissal of the appellant's counterclaim.

The general damages for pain, suffering and loss of amenities were assessed on the basis of pleadings which particularized the injuries suffered by each plaintiff and the supporting evidence adduced through medical reports which were admitted in evidence by consent of the parties. As this Court has severally stated, the assessment of quantum of damages is a matter for the discretion of the individual judge so long as it is exercised judicially and with regard to the general conditions prevailing in the country generally, and to previous comparable and relevant decisions. In order for an appellate court to interfere, therefore, it has to be demonstrated that the award was so inordinately high as to represent an entirely erroneous estimate of the compensation to which the respondent was entitled. See, for example, **Southern Engineering Company Ltd v. Mutia [1985] KLR 730.**

We have carefully examined the record on the general damages awarded to each of the respondents and we find no basis for interfering with any of the awards.

As for special damages, Mr. Wasonga, submitted, and correctly so, that they should not only be specifically pleaded but also strictly proved. That is the general law and authorities on it are legion. We are also guided by the decision of this Court in **Jacob Ayiga Maruja & Another v Simeon Obayo** *(suing as the administrator of the estate of Thomas Ndaya Obayo)*. **Civil Appeal No. 167/02 (UR)** where the court stated:-

"**We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."**

The courts have also awarded reasonable and legitimate funeral expenses when claimed even in the absence of proof. It is only where a large sum is claimed for such expenses that strict proof ought to be established.

Each of the respondents particularized the special damages they claimed and offered tangible and acceptable evidence in many of them. We have no reason to interfere with those items where proof was offered and accepted by the trial court. But Mr. Wasonga attacks specific items and it is those we now turn to.

The first is an award of Shs.1,500/= for a medical report where no payment receipt was produced but the learned judge still awarded the sum on the basis that the report itself was produced. We think Mr. Wasonga is right that there was no proof of that pleading and the sum of Shs.1,500 was erroneously awarded to David. We set it aside. The same complaint goes for the award of Shs.1,500 to Rose which award we also set aside. The major complaint by Mr. Wasonga was on the claim by Zipporah for funeral expenses of Elizabeth (the deceased) at Shs.121,000. It was a special claim which was not strictly proved and the learned Judge so appreciated. In the end the Judge reduced the amount to Shs.64,000 stating that it was a reasonable assessment. As stated earlier, only reasonable and legitimate funeral expenses may be compensated in the absence of strict proof. The larger part of the claim was on "Burial and food expenses Shs.60,000" and the learned Judge reduced it to Shs.25,000 stating: *"Mourners must have been fed"*. There were other claims relating to mortuary fees, coffin, doctors fees, transport and miscellaneous expenses which could easily be established by production of supporting documents but were not. In the circumstances it was not open to the learned Judge to pick a large figure from the air, as it were, and award it against the appellants. We accordingly interfere with that award, set it aside and substitute a figure of Shs.30,000 which is reasonable in the circumstances of this case but not for general application in all cases on unproved funeral expenses.

The final complaint raised by Mr. Wasonga was that awards were made for costs of future medical treatment, which were in the nature of special damages, but there was no proof. Such was the award made to David at Shs.45,000; Christine at Shs.25,000, and Florence at Shs. 15,000. Those awards were made on the basis that the medical reports in respect of those respondents specifically made estimates of

the required amounts for future treatment. Logically no receipts could be produced for services which were yet to be rendered. However, as stated in **McGregor on Damages, 16 Edition at page 1654** in relation to medical expenses:

"**Both expenses already incurred at the time of the trial and prospective expenses are recoverable and while the rules of procedure require that the expenses already incurred and paid be pleaded as special damage and the prospective expenses as general damage, the division which depends purely on the accident of the time the case comes on for hearing, implies no substantive differences."**

We think the cost of future treatment, where pleaded and reasonably estimated, ought to be awarded and in this case, the doctors' reports were produced with the consent of the parties and without challenge on the reasonableness of their estimates for future medical treatment costs in respect of the three respondents. We reject the complaint made in that regard.

Finally, Mr. Wasonga submitted that the appellants' counterclaim was erroneously dismissed although it was specifically pleaded and strictly proved. It is indeed so that the amended defence and counterclaim particularized special damages to the tune of Shs.1,854,288 and the supporting documents in respect of costs of repair were produced unchallenged by consent of the parties. The breakdown was as follows:

a) Motor vehicle assessor's fee - Kshs. 6,980.00

b) Cost of repairs on motor vehicle

Registration No. KAK 869M - Kshs.1,247,308.00

c) Loss of use (hiring fees) from

22nd August, 1998 to

26th March, 1999 - Kshs. 6000,000

Kshs.1,854,288.00

Only the assessors fee was awarded. The claim for Shs.600,000 was rejected on account of absence of supporting documents, and we think, correctly so. The repair charges were dealt with as follows: -

"**Turning to the defendants counterclaim it is clear that they rely on the documents produced by consent as forming the basis for their claim. As submitted by the plaintiffs counsel all the exhibits produced in a bundle as exhibit D2 shows that repairs were paid for by the Jubilee Insurance company Ltd. They were repair charges to the 2nd defendants, motor vehicle. The payment tallies with what was set out in the assessors report. The repair charges amount to Kshs.1,247,308/=. In order to succeed on this claim the defendants have to show that the insurance company has demanded this money from them. In the absence of any demand from the insurance company allowing the claim for cost of repairs would amount to a double payment which cannot be allowed. This claim is disallowed. If the insurance company will not amount (sic) to pursue it they can file a fresh suit against the 1st and 5th plaintiffs."**

With respect, we think that reasoning is erroneous in law and it is instructive that the respondents' counsel said nothing to contest the issue. The insurance contract was between the 2nd respondent and his insurance company and there is no privity of contract between the two and any of the respondents, save for application of the doctrine of subrogation. The insurer is entitled to recoup its loss from the tortfeasor and can only do so through its insured, in this case the 2nd appellant. There is no debate about the pleading and strict proof of the claim and there is no reason why it was rejected. Accordingly we reverse the findings and allow the claim for repair charges in the sum of 1,247,308=.

The upshot is that the appellant's appeal has had mixed blessings. It is both dismissed and allowed to the extent stated in this judgment. As the appellants have succeeded substantially in their counterclaim we order that each party shall bear its own costs of the appeal and the costs of the superior court.

Dated and delivered at Nairobi this 9th day of October, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR