**IN THE COURT OF APPEAL**
**AT NAIROBI**

**(CORAM: SHAH, BOSIRE & O'KUBASU JJ.A)**

**CIVIL APPEAL NO.153 OF 2001**

BETWEEN

SEBASTIAN CABOT BWAMU ......................................... APPELLANT

AND

NOAH THUO GICHIA ...........................................IST RESPONDENT

CADBURY KENYA LIMITED ...............................2ND RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nairobi (The Hon. Lady Justice M. Ang'awa) dated 18th January 2001
in
H.C.C.C. NO.1177 OF 2000)
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## JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court given on 18th January, 2000, in Nairobi, in its Civil Case No.1177 of 2000. The superior court dismissed with costs, the said suit in which Sebastian Cabot Bwamu, the appellant, was the plaintiff. Following that dismissal the appellant brought this appeal.

The appellant's amended plaint alleged, inter alia, that he was run over by motor vehicle registration No. KAH 214W, on 18th December, 1999. As a result he broke his left leg which was thereafter amputated below the knee. The said motor vehicle was at the time owned by Cadbury Kenya Limited, the 2nd respondent, and was being driven by Noah Thuo Gichia, the first respondent, in the course of his employment with the 2nd respondent. The appellant's claim was for special and general damages. Particulars of the special damages were given. The appellant attributed the accident to the first respondent's negligence in driving the said vehicle.

In a written statement of defence both respondents, denied the accident as alleged in the amended plaint. They also denied that there was any negligence on the part of the first respondent in his management of the said vehicle.

The case was heard by Ang'awa, J. In her judgment she disbelieved the appellant, and held that the evidence before her was insufficient to support a finding that the second respondent's motor vehicle collided with the appellant.

The appeal before us is basically on an issue of fact, the issue being whether it was the second

respondent's vehicle which ran over the appellant's leg and crushed it. The appellant's evidence was that on 18th December, 1999, he was a resident of Lucky Summer Estate. At about 7 p.m. he was seated outside his residence which was next to a road, when the first respondent drove the aforesaid motor vehicle in such a manner and at a speed as to suddenly veer off the road. It went directly to where he was seated and ran over his left leg. The leg was crushed. Due to the impact and the pain, he lost consciousness. Thereafter he was taken to Ruaraka Police Post and later to hospital. His leg could not be saved so it was amputated. The Plaintiff did not call any other person to testify on how the accident occurred. The defence however called the driver of the aforesaid vehicle and some people he had in the vehicle as passengers.

In his evidence the first respondent testified that on the material day he indeed drove his said motor vehicle through Lucky Summer Estate. He did not see the appellant anywhere in that estate before the accident. He recalled that at 8.45 p.m. he arrived at the scene of the accident because he wanted to pick an employee of the second respondent who was resident there. Just before he stopped his vehicle some people who were standing off the road shouted that he had hit a person and that the said person was underneath his motor vehicle. He stopped and on checking he found the appellant under his vehicle. The people, he said "forced to remove the person from under the vehicle ... I took him plaintiff between the front and back wheel of the vehicle. He was underneath (sic)." John Ateko (DW2) and Eunice Awuor Okello (DW3) who were passengers in the said motor vehicle, testified to the same effect. Both the driver and the two witnesses were categorical that they did not know how the appellant came to be under the said motor vehicle. None of them suggested that he was slipped under the vehicle by those who were standing by the roadside. The driver did not see the appellant before the accident; and if he did not see anyone pushing the appellant under his motor vehicle after it had stopped, the rebuttable presumption of fact to be raised is that he ran over him.

In his defence the driver suggested that some other vehicle was responsible. But in the circumstances as outlined above, he was under a duty to explain on a balance of probabilities how the appellant landed beneath his motor vehicle. The appellant's explanation as we stated earlier was that the first respondent's motor vehicle ran over him. That is a plausible and believable explanation. The circumstances as narrated by the appellant, the driver DW2 and DW3 clearly show that the second respondent's vehicle was involved in the accident in which the appellant's left leg was crushed. On the face of the admission by the driver, DW2 and DW3 that as soon as the motor vehicle stopped they came out and found the appellant underneath their vehicle the aforesaid conclusion is inescapable. Consequently the finding by the trial Judge that no collision between the appellant and the second respondent's motor vehicle occurred is clearly unsupportable. She clearly erred.

In our view there was ample evidence to lead to the conclusion that the second respondent's vehicle ran over the appellant's leg. The driver having testified that he did not see the appellant negligence must be imputed to him. If he was careful as he said he was, he would have seen the appellant and possibly taken some avoiding action. He found the appellant under his motor vehicle and was unable to explain how he came to be there. That was a fact which in the ordinary course of things would be within his own knowledge and which under section 112 of the Evidence Act, Cap 80 Laws of Kenya, he would be dutybound to explain. Having not offered any explanation in that regard the presumption is that he, as the driver of the said vehicle was negligent in driving the vehicle and ran over the appellant.

We allow the appeal on the issue of liability, set aside the judgment of the trial court and substitute a judgment for the appellant with costs.

The trial Judge assessed general damages at Kshs.500,000/=, Kshs.3000,000/= for prosthesis, Kshs.172,800/= for loss of earnings, and Kshs.400,000/= for loss of earning capacity, bringing the total to Kshs.1,372,800/=. Although the award appears to us to be on the higher side we cannot interfere as there was no cross-appeal on quantum. It then follows that the appellant shall have judgment on damages as assessed by the trial court.

Dated and delivered at Nairobi this 14th day of February, 2003.

**A.B. SHAH**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**