Muindu v Kinyanjui & another (Civil Appeal E032 of 2022)
[2024] KEHC 1794 (KLR) (28 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E032 OF 2022

TM MATHEKA, J

FEBRUARY 28, 2024

BETWEEN

MUSENDU KASOO MUINDU ..... APPELLANT

AND

CHARLES MBUTHI KINYANJUI ..... 1ST RESPONDENT

STEPHEN MUTHOKA KAVOO ..... 2ND RESPONDENT

(Appeal from the Judgment of Hon. F. Makoyo (PM) in the Principal Magistrate's Court at Kilungu, Civil Case No.5A of 2020, delivered on 18th May 2022)

JUDGMENT

1. Musendu Kasoo Muindu filed a suit in the lower Court seeking general damages for personal injuries sustained from a road accident on 14/11/2017 at Timboni along the Salama-Nunguni road. He also prayed for special damages, costs of the suit and interest. His claim was that he was a pedestrian along the said road when motor vehicle registration No. KBN 869Z registered in the name of Charles Mbuthi KinyanjuI the 1st respondent was driven so negligently by Stephen Muthoka Kavoo the 2nd Respondent that it lost control, veered off the road and knocked him.

2. The respondents filed a joint statement of defence denying all allegations in the plaint and put the appellant to strict proof thereof. They averred that if the accident occurred as alleged, it was solely caused by or substantially contributed to the appellant's negligence.

3. The appellant in response to the defence joined issues with the respondents and reiterated the contents of his plaint save where admissions had been made.

4. After the preliminaries, the matter proceeded to trial, the appellant testified a PW2, the Police officer from Salama Police station as PW1 and his friend as PW3. The 2nd Defendant testifies a DW1. He

called DW2 his passenger and a police officer from Kilungu Police Station as DW3. The trial magistrate found that the appellant had not proved his case to the required standard and dismissed it with costs.

5. Aggrieved by the decision, the appellant filed this appeal on the following grounds;

   a. That the learned magistrate erred in law and fact by dismissing the entire claim with costs.

   b. That the learned magistrate erred in law and fact by disregarding the weight of the evidence in favor of the appellant.

   c. That the learned magistrate erred in law and fact by holding that the plaintiff did not prove his case on the balance of probability.

   d. That the learned magistrate erred in law and fact by failing to consider the doctrine of contributive negligence by both parties.

   e. That the learned magistrate erred in law and fact by applying selective evidence to arrive at a wrong judgment.

6. The parties elected to canvass the appeal through written submissions and appropriate directions were given. Accordingly, the parties complied and filed their respective submissions.

Appellant's Submissions

7. On liability, the appellant submitted that DW1 agreed that he (appellant) was hit by the left side of the car and landed on the windscreen. That due to the impact of the damage on the vehicle, the speed cannot have been 20km as per DW1's evidence. He contended that the respondent drove the vehicle recklessly at a high speed and failed to look out for other road users. That he also failed to maintain effective control of the vehicle and caused the accident.

8. The appellant submitted that the police officers who gave evidence on both sides were not direct witnesses hence could not testify on the circumstances of the accident. That the respondent did not controvert the existence of the pothole on the road and that indeed, he swerved to the appellant's path and hit him accidentally. That he also did not controvert the fact that the appellant was hit from behind. He submitted that the evidence of his two friends was that they ran away to avoid being hit by the vehicle which was speeding towards their direction. That they equally confirmed that the appellant was not on the road and was hit because he did not manage to run away.

9. Further, he submitted that the abstract issued by the Investigating Officer (IO) does not blame him and the one produced by the defendants was issued a day after the accident and its purpose was to facilitate repair of the vehicle.

10. He submitted that an appellate court is not bound necessarily to follow the trial court's findings of fact if it appears either that the court has clearly failed on some point to take account of particular circumstances or probabilities material to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. He relied on Khambi & Anor –vs- Mahithi & Anor (1968) EA 70 where it was held that;

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

11. The appellant submitted that if indeed he was on the road as per the respondents' evidence, then the impact would be on the front part of the car and not on the left wing. He asked the court to note the evidence of DW1 and 2 who testified that the impact was on the left side of the road and the windscreen, left wing and left side mirror were damaged. That DW1 also admitted that he swerved the vehicle to the right. He contended that the swerving was not from the other lane but from the left in order to avoid hitting the appellant who was walking on the pedestrian path. He relied on Masembe –vs- Sugar Corporation & Anor (2002) 2EA 434 where it was held that;

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment and he is bound not to go faster at any time to avoid anything he sees after he has seen it...a reasonable person driving a motor vehicle on a highway with due care and attention does not hit every stationary object on his way merely because the object was wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object...whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.

12. He also relied on Isabella Wanjiru Karanja–vs- Washington Malele Nbi Civil Appeal No 50 of 1981 where the court observed;

> " What I find makes a distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine when Washington had none and all things being equal, she was under an obligation to keep greater look out for other road users."

13. It was also his submission that the fact that the respondent was not charged with a criminal offence does not mean that he has no case to answer in civil proceedings. He urged this court to find the respondents 100% liable.

14. With regard to quantum, he relied on his submissions before the trial court whereby he cited several cases to propose an award of Ksh 1,200,000/= as general damages. Some of the cases are;

    a. Yobesh Makori –vs- Elmerick Mobisa Bota (2021) eKLR where the plaintiff was awarded Ksh 2,000,000/= for; head injury, deep laceration on the scalp, Left clavicle fracture, bruises on the upper limbs, crushed left leg, dislocation of the right tarsal bone and cut wound on the right leg.

    b. Moiz Motors Ltd & Anor –vs Harun Ngethe Wanjiru [2021] eKLR where the High Court reviewed the award of Ksh 700,000/= to Ksh 500,000/=. The plaintiff's injuries were; multiple facial lacerations, a depressed skull frontal bone, soft tissue injury right upper chest, multiple bruises both hands dorsal aspect, multiple bruises both hips, swollen toes right leg and bruises of both knees.

    c. Kyoga Hauliers (K) & Anor –vs Philip Mahiu Nyingi (2017) eKLR where the plaintiff was awarded Ksh 1,000,000/= for; comminuted depressed fracture of the skull at the occipital bone, intracelebral haematoma right occipital area, deep cut wound on the right occipital region, soft tissue injuries right ankle joint and severe soft tissue right side of chest.

2nd Respondent's Submissions

15. The respondent submitted that as the actual owner and driver of motor vehicle KBN 869Z, he did not admit any of the allegations of negligence and as such, the appellant had a duty to prove his case on a balance of probabilities. He relied inter alia on Palace Investments Ltd –v Geoffrey Kariuki Mwenda & Anor (2015) eKLR where the Court of Appeal stated;

> " Proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

16. He submitted that the abstract produced by the appellant was completely silent on who was to blame and contended that the reason for the silence was so as not to implicate the appellant as he was solely responsible for the accident. He submitted that the abstract produced by him (2nd respondent) was confirmed by both police officers to be genuine. That according to DW3, a subsequent police abstract should not contradict an earlier abstract which has already concluded who was to blame. He relied on the Mulwa Kavuo –vs- Davison Nthenge (2018) eKLR where the court stated;

> " 7...Even though the appellant claimed that he was not to blame for the accident, I am convinced that the police officers who visited the scene and prepared the police abstract had concluded that the appellant was to blame for the accident.

17. He submitted that PW1 read an entry in the occurrence book which concluded that the accident occurred as a result of the appellant pedestrian suddenly emerging on the main road and was hit by the vehicle which was on its proper lane. That according to PW1, the abstract produced by the respondent represented the correct position on the circumstances of the accident.

18. He submitted that the police officers concurred with the testimony of the two defence witnesses that the vehicle did not veer off the main road as alleged by the appellant. That despite one of the police officers being a witness for the appellant, he stood by the truth. He contended that the overwhelming evidence tendered at trial obliterate the appellant's allegation that the vehicle veered off the road and hit him while he was walking on the left side of the road.

19. He submitted that the appellant had a duty to verify the particulars of negligence in the plaint and failure to do so left his claim without feet to stand on. He relied on the case of David Ogol Alwar –vs- Mary Atieno Adwera & Anor (2021) eKLR where the court stated;

> " 24. It is noteworthy that the burden of proof always lie with he who alleges and therefore in this case, the burden of proof lay with the appellant/plaintiff to prove any of the acts of negligence attributed to the respondents/defendants. One can only prove that another is liable by adducing evidence to that effect or unless the defendant admits liability or the pleaded acts of negligence. The fact of an accident having occurred is not in itself proof of liability."

20. He submitted that the appellant's witnesses gave inconsistent and contradictory statements that leave no doubt that they were making up stories as they went along in order to aid the plaintiff obtain unjust and unwarranted enrichment. That in his original statement, the appellant did not mention being in the company of his friends but in his subsequent statements, he appeared to have had an epiphany to

recall scenarios that were not in the original statement. He contended that the subsequent statement was signed more than a year after the original statement and as such, the original should be considered as the most accurate on the issue that the appellant was walking and not standing when the accident happened.

21. He submitted that he rebutted the presumption of negligence arising from the doctrine of res ipsa loquitur and contended that the same is not applicable in the circumstances of this case. That it would have been relevant if the accident was self-involving and the appellant was a passenger on board the vehicle. He submitted that the appellant was the author of his own misfortune and simply because an accident happened or that the appellant pedestrian was hit by an insured motor vehicle does not translate to the appellant being awarded damages at all costs. He relied on Peters –vs Sunday Post Ltd (1958) EA 424 where the court stated;

> "It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. The appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

22. As regards the awardable damages, he noted that in the memorandum of appeal, the appellant appeals against the whole judgment but none of the grounds address the issue of quantum. Nevertheless, he referred this court to his submissions on quantum before the trial court.

23. In the said submissions, he submitted that the pleaded injuries have been spread out to create an impression of being multiple and severe than they are in reality. That during the trial, the plaintiff claimed that the police did not interview him until after he had healed. He submitted that the plaintiff's own admission is that he has healed and fully recovered. He contended that the plaintiff did not tender any evidence to show that he was still undergoing treatment for an injury resulting from the accident.

24. He urged the court to be guided by the medical reports of Dr. Bosire/ Dr. Daniel dated 04/11/2017 which conclude that the proved injuries were non displaced/non-depressed fractures involving occipital bone, right zygomatic arch, right orbital wall and right maxillary sinus walls which can be summarized as skull fractures with no degree of permanent disability. He submitted that an award of Ksh 200,000/= is sufficient as general damages and relied on Telkom Orange Kenya Limited –vs- I S O minor suing through his next friend and mother J N [2018] eKLR where the court reduced an award of Ksh 950,000/= to Ksh 500,000/=. The court stated;

> "4. The injuries sustained by the child were particularized in the plaint as follows; head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg. The main evidence by on the child's injuries was given by Dr Ogonda Zoga (PW 2) who produced the report and P3 form prepared by Dr Maurice Raute who had examined the child and confirmed that the child sustained the injuries that I have outlined above. At the time of examining the child, Dr Raute noted that the child was complaining of chronic headaches especially on the left side requiring treatment by use of analgesics. The child also had occasional blurring of vision with occipital headache. He concluded that the child sustained serious head injuries which put him at risk of developing

seizures as a long term complication together with disfiguration resulting from the scalp and leg scars."

25. The respondent contended that the injuries in the above case were more severe than the ones sustained by the appellant. That the victim in the cited case sustained a depressed skull fracture while the appellant sustained a non-depressed skull fracture. Further, he submitted that the victim had lifelong complications resulting from the injuries but the appellant did not tender any evidence to suggest that he has life long complications from the injuries sustained.

26. He submitted that the cited authority was also relied on by the appellant and urged the court to disregard the rest of the cases cited by the appellant as they refer to more severe injuries with substantial permanent disabilities.

27. With regard to special damages, he submitted that the same should be strictly proved by way of authentic receipts bearing the requisite stamp in accordance with section 19(1)(b) of the *Stamp Duty Act*. He submitted that the appellant pleaded for special damages of Ksh 2,950/= but failed to tender any receipts in support. That the prayer for special damages of Ksh 3,550/= in the appellant's submissions was neither pleaded nor proved and as such, no special damages can be awarded.

28. In conclusion, he urged the court to dismiss the appeal with costs.

29. The respondent reminded the court of its duty as a first appellate court relying on James Ithale Akothe vs Abdiwele Ali Abdi& Another [2020] eKLR which cited Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123. That duty to analyze and re-evaluate, and reexamine afresh the evidence on record in order to reach my own conclusions while alive to the fact that I neither saw nor heard the witnesses testify and that my perception of their credibility is limited to what is recorded in the proceeding. bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

30. Having looked at the grounds of appeal, the rival submissions and entire record, the issues for determination are;

    a. Whether the trial court erred by dismissing the suit.

    b. What quantum of damages is payable (if any)?

31. PW1 was Corporal Daniel Longiro of Salama Police Station. produced an abstract (P.Ex 1) which was filled on 19/08/2019 and issued to the appellant. He testified that the accident was a slight injury which occurred on 4/11/2017 along Nunguni-Salama at around 10:45am along Timboni area. It involved motor vehicle registration KBN 869Z make Subaru and was being driven by Stephen Muthoka Kavoo who was coming from Salama to Nunguni area.

32. On cross-examination, he agreed that he was not the I.O and said that the I.O had been transferred from Salama Police station. He testified that the accident occurred on 4/11/2017 and the abstract was issued on 17/8/2019 to the plaintiff. He agreed that the police abstract represents the extracts of the OB and should not contradict the OB. He agreed that the IO is the one who fills the OB after investigations. He agreed that two abstracts which are contradictory should not be issued. He said that the pedestrian was to blame and the entry was entered on 4/11/2017 by Corporal Mutini and PC Beko. He said that the pedestrian was walking and emerged on the main road. That the blame to be shouldered by the driver was not indicated and he was never charged for the accident. That the accident occurred when the driver was on his rightful lane. He said that he had not carried the investigations file and the police abstract dated 5/11/2017 indicated OB No. 3/4/11/2017 and was issued on 5/11/2017. He said that the police abstract came from the station and was genuine. That it referred to the same accident as per the OB. That the pedestrian was to blame for the accident and the information corresponded with the

police record. That the abstract dated 17/8/2019 does not blame either the driver or the pedestrian and the one dated 5/11/2017 reflects the true position. He agreed that the pedestrian was walking along the road.

33. In re-examination, he agreed that the police abstract dated 5/11/2017 was issued for the repair of the motor vehicle. He said that the motor vehicle might have been moving at a high speed going by the damages. That the police abstract was issued on 19/8/2019. He agreed that a statement is recorded prior to issuance of a police abstract and agreed that the plaintiff had not recorded his statement prior to issuance of police abstract on 5/7/2017

34. PW2 was the Appellant and he testified that he was a casual laborer. He adopted his statements dated 14/01/2020 and17/08/2021 as his evidence in chief. He stated that on 4/11/2017 he was headed for a funeral with Joseph Mwema and Muthenya. That they were along the road headed to Nunguni from Salama. He asked them to wait for him as he purchased something from the shop. As he left the shop, he found that they had moved a bit to the place where they were to divert. He went between them and then saw Muthenya run before he(PW2) was hit by the car. They were outside the road and the driver swerved to avoid a pothole. The vehicle left the road section. He was still in the hospital when the abstract was issued and they had not recorded his statement. After leaving the hospital, he recorded a statement and was issued with a police abstract which was not blaming him. He blamed the driver for driving at a high speed.

35. On cross-examination, he agreed that he was the one who recorded the statement dated 14/1/2020 and had read and understood it. That it was the same statement he had recorded with police. That he was walking at the left side with two people who he had not mentioned in his statement. He agreed that the vehicle was coming from behind and was on its left lane. He agreed that the abstract is not signed in the police issuing it. That he just saw the vehicle prior to being hit and there was a pot hole on the road. He agreed that he did not mention seeing the vehicle prior to being hit. That he just saw his colleague run away before hit. He agreed that it was his colleague who chased the car with stones and that he was informed about it after leaving the hospital. He agreed that he wrote the further statement after seeing that the police were blaming him.

36. He said that the statement which he had tendered was not the one recorded with police. That he was informed by his friends that the police visited the scene and took measurements but he did not see them. He was not aware that the police had not blamed the driver but said that the motor vehicle was to blame. He did not know whether the owner of the vehicle was charged in a traffic case. He said that the right side of the road is bushy with no path hence the use of the left side by pedestrians.

37. In re-examination, he said that he was on the left side as the right side is bushy. That they were at the diversion to the place where they were headed for burial. At the police station, he found PC Beko who issued him with the police abstract. That he was not blamed for the accident and had not been interviewed prior to the initial abstract being issued. That the vehicle was speeding thus not able to stop immediately. That he was never asked to avail Muthenya or Joseph Muema to the police station and was never shown sketches of the scene by the police. That he tried jumping away but was still hit.

38. PW3 was Joseph Muema Mulinge. He testified that on 14/11/2017 at around 10.45am, he was headed to a funeral at Timboni in the company of Musendu Kasoo and Muthenya. That they were on the left side of the road from Salama headed to Nunguni when a speeding vehicle hit a pothole and swerved towards them. They tried escaping but Musendo was knocked down. They started screaming and the driver stopped before rushing him to hospital. He agreed that there were people in that vehicle.

39. On cross examination, he said that they saw Muthenya run away before Musendo Kasoo was hit. That he saw the vehicle hit Musendo as initially, they had seen it speeding. He could not tell why Muthenya

had not appeared before court. He agreed that there were many people but could not tell why they did not attend. He agreed that he hurled stones at the car but it was not hit. That he beckoned a motor cyclist to bar the car from escaping but did not mention that in his statement. That the police station was about 50 meters away on the right side. He agreed that the police went to the scene but did not find the driver at the scene. That the police found him (PW3) at the scene and did not take measurements. That the police just ordered the driver to take the victim to the hospital. That they informed the police what had happened and the police saw the place of the accident but were not taking notes as they talked.

40. Further, he stated that he went to the police station with Musendo after his discharge but the police did not record their statements and just asked them to go home. That he was not present when Musendo was issued with a police abstract. That the right side of the road did not have people as there is no passable route. That the road has only a tarmac with no passable route for pedestrians. That the right side is infested with a bush. He did not know whether police had blamed Musendo for the accident.

41. In re-examination, he said that Muthenya was escaping upon seeing the vehicle headed towards them. That he saw the vehicle hit the plaintiff and he hurled stones at it but did not hit it. That they screamed and the vehicle was forced by the motor cyclist. That he never recorded a statement with the police and it was the driver who caused the accident as he was speeding.

42. The plaintiff's case was closed at that juncture.

43. DW1 was Stephen Muthoka Kavondo, the 2nd respondent. He adopted his statement dated 28/07/2021 as his statement in chief in which he stated that; on or about 04/11/2017 at around 10:45 hours, he was driving his motor vehicle registration No. KBN 869Z to Upete for a family function. That he was driving at a speed of between 20-30kph and just a few meters from the Salama junction along the Salama-Nunguni road, a man who was in the company of two others walking on the side of the road suddenly jumped onto the road and on the way of his motor vehicle. That he tried to avoid the accident but due to the suddenness of the pedestrian entering the road and the short distance, the accident occurred within his lawful lane.

44. Further, he stated that the police investigated the accident and even took measurements of the scene. That they blamed the pedestrian for the accident and indicated as such in the police abstract dated 05/11/2017. He stated that the accident happened within his lawful lane and he did not veer off the main road. That the allegations of negligence against him are unfounded.

45. In his evidence in court, he testified that he did not attempt to flee the scene and was not pelted with stones. That the damage to the car was only from the impact of the accident and he stopped a few footsteps from the point of impact.

46. On cross examination, he stated that he was issued with the abstract on 05/11/2017 and the accident occurred on 04/11/2017. That the abstract was issued to confirm that he had been involved in an accident and someone was hit. That it was to assist in having the motor vehicle repaired as his windscreen was damaged. That the pedestrian was with two people and he entered the road suddenly. That he was hit by the left side of the car and he landed on the windscreen. That he tried to avoid the accident but hit him accidentally. That he was driving at between 20-30kph and had been driving for 15 years.

47. He said that he applied brakes as would have been expected, swerved to the right and then back to his lane. That the road is narrow but that was not the cause of the accident. That the accident took place on the left side of the road and the plaintiff was with two other men who were walking with him towards the same direction as the vehicle. The police requested him to take the plaintiff to the hospital and the two men accompanied him. He was not sure as to whether the two men had made their statements to

the police before he was issued with the abstract. That there is no marked pathway for the pedestrians but people have a place to walk. That the point of impact was on the road and not on the walkway.

48. He agreed that he did not produce the sketch maps and said that he was the owner of the vehicle as he had purchased it from the 1st defendant. That the crowd did not gather because of a bang as there was no bang. That the windscreen was not extensively damaged because of his slow speed.

49. In re-examination, he said that he returned to the left lane because he had moved slightly to the right lane and not outside the road. That he never veered off the road completely at any time. That it was the pedestrian's sudden action of getting onto the road that caused the accident and not the narrowness of the road. Further, he said that he is not the custodian of the sketch maps.

50. DW2 was Pauline Wanjiru Muthii and she adopted her statement dated 17/11/2021 in which she reiterated the evidence of DW1. She added that on the material day and time, she was travelling in motor vehicle KBN 869Z which was being driven by DW1 and upon the accident occurring, they got out to assist the injured person. That only the plaintiff was injured as he was the one who got into the way of the motor vehicle.

51. That the police arrived and asked them to take the victim to the nearby clinic and then proceed to the police station for inspection of the vehicle. That the victim was treated and discharged the same day and they saw him walking around the shopping centre the next day.

52. On cross examination, she said that the accident occurred on the Salama-Nunguni road just a few meters from the Salama junction. That they were driving at 20 KPH because they had first turned off. That being a driver herself, a car at the speed of 20kph is unlikely to injure someone unless something else is contributing. That at 20kph, she would stop immediately without the car moving forward. She agreed that the plaintiff was hit by the car and the windscreen broke and there was damage on the left side of the vehicle on the wing. That the damage was because of the plaintiff's weight and not the speed. That they picked the abstract the next day after the accident and she didn't know whether the plaintiff had reported to police by that time. She said that she was sited behind the driver.

53. DW3 was PC Evans Kipkemboi of Kilungu Sub-County head quarters performing traffic duties. He produced the abstract issued to the 2nd defendant on 05/11/2017 (D.Ex 1) and stated that the accident was along the Salama-Nunguni road involving KBN 869Z Subaru Forrester and a pedestrian. That Corporal Mutini and PC Beko were the investigating officers and had sent him to produce the abstract. That according to OB03/04/17, the pedestrian was to blame for the accident and the matter was referred to insurance. That the official position is that the plaintiff is to blame. That there should not be any alteration on the subsequent abstract since the person to blame is usually determined. That any subsequent and different abstract would be erroneous. That no blame was apportioned to the driver. That at the scene, there is enough space on both sides of the road for pedestrians.

54. On cross-examination, he agreed that he was not the investigating officer and did not issue the abstract in question. That it was issued by Cpl Mutini and PC Beko. He said that someone involved in an accident is entitled to an abstract and it is lawful for the plaintiff to acquire one. He didn't know when the plaintiff got his abstract and knew nothing about it. He did not have the police file in court. He said that the 2nd defendant got an abstract to facilitate repair of his vehicle. That the windscreen and left side mirror were damaged and that showed that the impact was high. That the sketch maps were in the police file which was not in court. He said that investigations are expected to include the statements of the people involved. That the investigating officer determined the person to blame from the scene of accident.

55. In re-examination, he said that impact can be high but not necessarily because of speed. That the plaintiff landed on the side mirror and damaged it. That it is not a must for everyone to record statements before concluding on who is to blame. That, officers at the scene can immediately determine who is to blame.

56. The defendants case was closed.

Analysis & Determination

57. The appellant pleaded that on the material day, he was walking along the Salama- Nunguni road (the road) when he was hit from behind by motor vehicle registration No. KBN 869Z. He blamed the vehicle's driver for inter alia, driving fast, carelessly and negligently, failing to keep any sufficient look out and to take necessary precautions for the safety of other road users.

58. From the evidence, it is not in dispute that an accident occurred at Timboni area along the Salama-Nunguni road between motor vehicle registration No. KBN 869Z and the appellant who was a pedestrian. The fact of the accident is therefore not in dispute. It is also clear that both the appellant and the vehicle were headed towards the same direction. Further, it is clear that the 2nd respondent was the owner and driver of the vehicle as he had purchased it from the 1st respondent but had not effected transfer.

59. The appellant's version is that he was hit while on the side of the road because the vehicle had swerved to avoid a pothole. The respondent's version is that the appellant entered the road suddenly and he swerved to the right but still hit the appellant accidentally. Both police officers, PW1 and DW3, blamed the appellant and testified as much in court. First of all, the evidence shows that the two police officers were not at the scene and were not the investigating officers (IO). The supposed IO's went to the scene after the fact and it is therefore safe to conclude that none of them were eye witnesses. The two officers were basing their evidence on the abstracts which they produced and which they said were extracts from the Occurrence Book (OB).

60. Two abstracts were issued in this case. P.Ex 1 was issued to the appellant on 17/08/2019 and it does not indicate which party was to blame for the accident. On the other hand, D.Ex 1 was issued to the respondent on 05/11/2017 and at paragraph 7 which requires results of investigations or prosecutions (if known), the abstract indicates "case referred to insurance blaming pedestrian". It is clear that the abstract produced by the respondent was issued the day after the accident and he openly admitted that he needed it in order to pursue compensation from the insurance. Secondly, the fact that the appellant was in the company of two men was confirmed by the respondent himself. The appellant and his witness (PW2) were eye witnesses and they testified that they had not recorded any statements with the police prior to issuance of the abstract dated 05/11/2017. Even their other friend Muthenya had not recorded a statement as per the appellant's evidence. PW2 said that the police who went to the scene just listened to them and did not take any notes but there is nothing in evidence to show that the police who listened were the I. O's and were the ones who made the OB entry. The irresistible conclusion therefore is that the OB entry dated 05/11/2017 was made without a balanced investigation. To further buttress this view, no investigation diary, sketch maps or OB extract were availed for the benefit of this court and considering that two conflicting abstracts were produced, one cannot ascertain whether or not the abstract dated 05/11/2017 is the genuine one.

    Thirdly, the evidence is clear that the vehicle was damaged on the left side and in view of the fact that the vehicle and appellant were moving towards the same direction, it is on record that the collision happened on that side of the road, either by the appellant jumping into the road or the respondent swerving onto the side of the road and hitting the appellant.

61. Further, the respondent testified that the windscreen was damaged; DW1 said that the windscreen broke and there was damage on the left side of the vehicle and DW3 said the windscreen and left side mirror were damaged. On the other hand, the medical evidence shows that the appellant sustained various injuries including fractures. This kind of vehicle damage and injuries to victim cannot be caused by a vehicle moving at a speed of 20kph. A vehicle moving at that speed is easily stopped by braking and there would be no need to swerve at the sight of a sudden object or person on the road. In fact, DW3 agreed that the damage on the vehicle showed that the impact was high. The appellant's weight was not availed but it was simply incredible for DW1 to insinuate that the damage was caused by the appellant's weight and not speed. In the circumstances therefore, the higher probability is that the respondent was speeding, veered off the road and hit the appellant who was on the footpath on the side of the road..

62. On the flipside, even if this court was to believe that the appellant was on the road while he was hit, it is my view that the respondent would not have totally escaped liability. I am in agreement with the case of Masembe –vs- Sugar Corporation & Anor (supra) that; 'a reasonable person driving a motor vehicle on a highway with due care and attention does not hit every stationary object on his way merely because the object was wrongfully there.' Herein the evidence shows that the road was narrow and there were bushes on the road side with a footpath hence greater caution was expected from drivers.

63. Looking at the judgment by the trial court, it appears like the appellant was disadvantaged simply because the trial magistrate did not take his evidence and that of his witness. He expressed himself as follows;

> " He denies being negligent and he called DW2 an eye witness to corroborate his assertion. Indeed, these two witnesses' testimonies were consistent in every material element and withstood the test of rigorous cross-examination. They both struck me as truthful and their accounts of events was not only supported by the testimony of DW3 but interestingly, also by PW1's testimony. It is also worth noting that I did not have the benefit of taking the plaintiff or his eyewitness's testimony thus I cannot speak to their respective demeanors."

64. It also appears that the trial magistrate ignored the two contradictory abstracts or did not notice them because he did not make reference to them anywhere. Had he applied his mind to the evidence on record, it is my view that he would have arrived at a different verdict.

65. It is my view that on a balance of probabilities the appellant established that the respondent drove carelessly and negligently in the circumstances. That he drove at a speed and failed to keep sufficient lookout for other road users especially the appellant.

66. Having said that, it is also true that a pedestrian has a duty to take care of his own safety while crossing or walking on a road. In the Patrick Mutie Kamau & Another –vs- Judy Wambui Ndurumo [1997] eKLR the Court of Appeal held that pedestrians too owe a duty of care to other road users to move with due care and follow the Highway Code.

67. Both the appellant and the respondent have given evidence that demonstrates that the other person was not as careful a road user as is required. All were moving towards the same direction. The appellant's friend ran off and avoided the accident. The appellant may have jumped into the road in the attempt to run after his friends, and the respondent in that situation swerved dangerously and in the process hit the appellant 70% liability and the appellant should bear 30%.

Quantum of Damages

68. There is an obligation on the trial court to make a determination on quantum even in cases where it dismisses the claim. In our case, the trial court did not assess damages and to that extent it erred.

69. The injuries sustained were pleaded as follows;

    a. Loss of consciousness

    b. Soft tissue injury on the head

    c. Cut on the face

    d. Multiple non displaced bone fractures of;

    -right occipital bone

    -right zygomatic arch

    right orbital wall

    -right maxillary jaw

    -cerebral edema

    -right maxillary hemosinus

    e. Tenderness and pain of the right shoulder

70. The respondent produced a medical report by Dr. Esther Nzomo (P.Ex 7a) which particularized the injuries as above. It indicates that at the time of examination on 03/03/2020, the appellant's complaints were; numbness on the right side of the scalp, inability to chew hard food due to pain on the right temporal area, headaches on and off, poor memory, pain on the right knee on flexion, inability to stand for long and pain on the right shoulder. Upon physically examining the appellant on the same day, the doctor indicated her findings as; Crepitus in the right knee joint and inability to rotate fully the right shoulder. Her prognosis was that the appellant had not fully recovered from the injuries and most likely would continue to use medication for a long time. That he had also developed poor memory which may never fully recover and that amounts to permanent incapacity.

71. The appellant also produced a Head CT scan report and X-Rays [P. Ex 4(a) &(b)] as well as a p3 report (P. Ex 5). The injuries in those documents were captured in the medical report.

72. On the other hand, the respondent produced a medical report by Dr. Maina Ruga (D.Ex 2) dated 16/10/2020. At the time of examination, the doctor indicated that the appellant had numbness on the right side scalp and noises on the right knee joint during movement. His examination findings were that the appellant was in a good general condition. His opinion was;

> "This man suffered severe harm. That he sustained head and facial injuries with fractures of right occipital bone, right zygomatic arch, right orbital wall and right maxillary sinus. He also sustained blunt injury to right knee with effusion and soft tissue injuries on right shoulder. He recovered from the head injury and the skull and facial bone fractures are presumed to have healed. He has crepitus in right knee joint which may be due to osteoarthritis. I would assess his level of permanent incapacity at 15% (fifteen percent)."

73. I did not see a medical report by Dr. Bosire/Dr. Daniel as indicated in the respondent's submissions.

74. As indicated elsewhere above, the appellant proposed an award of Ksh 1,200,000/= while the respondent proposed an award of Ksh 200,000/= Having keenly studied the respective medical reports, it is evident that the appellant's injuries were not as trivial as the respondent wants this court to believe. The medical report by his own witness placed the appellant's permanent incapacity at 15%. In fact, there was concurrence on the aspect of permanent incapacity by both doctors only that the appellant's doctor did not put a percentage. It is therefore my considered view that the respondent's proposal of Ksh 200,000/= is inordinately low and does not assist the court in doing justice to the matter.

75. No two cases can be completely similar but there is a well settled principle in assessment of damages that comparable injuries should as much as possible attract comparable awards.

76. Among the many cases cited by the parties, Telkom Orange Kenya Limited –vs- I S O minor suing through his next friend and mother J N [2018] eKLR and Kyoga Hauliers (K) & Anor –vs Philip Mahiu Nyingi appear relevant. The awards there were Ksh 1 million and Ksh 500K respectively.

77. The first thing is that the main injury was the head injury which was the fracture of the skull. He also sustained a degree of permanent disability.

78. I would consider an award of Ksh 750,000 general damages as sufficient.

79. As for special damages, the appellant pleaded an amount of kshs 2,950/= and produced a receipt for the medical report (Ksh 2,000/=) and a motor vehicle search for KBN 869Z. He did not produce a receipt for the search but it is common knowledge that e-Citizen cannot generate the search without payment of Ksh 550/=. This court should therefore allow special damages of Ksh 2,550/=.

80. The final order; the appeal succeeds. Judgment of the subordinate court is set aside and substituted with the following:

    General damages.....Ksh 750,000,

    Special damages..... Ksh 2,550/=

    Total Ksh 752,550/=

    Less 30% Ksh 225,765

    Net Award Ksh 526,785

80. The appellant will have the costs of this appeal and interest at court rates.

DATED AND SIGNED THIS 23RD FEBRUARY 2024

.....

MUMBUA T MATHEKA

JUDGE

DELIVERED VIA EMAIL THIS 23RD DAY OF FEBRUARY 2024

CA Nelima

Appellant's Advocates- Wasolo & Co. Advocates

Respondent's Advocates- Kinyanjui Njuguna & Co. Advocates