Wambua v Kimii (Civil Appeal 60 of 2019)
[2024] KEHC 1865 (KLR) (26 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1865 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 60 OF 2019

MW MUIGAI, J

FEBRUARY 26, 2024

BETWEEN

FESTUS MUEMA WAMBUA .... APPELLANT

AND

KENNEDY KIVAA KIMII .... RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate A. Kibiru delivered on 27 th March,2019 in the Chief Magistrate Court at Machakos Civil Case No. 988 of 2006 (consolidated with civil cases Nos. 986 & 987 of 2006)

JUDGMENT

Background - Proceedings In The Trial Court

The Plaint

1. By Plaint dated 6th October,2006 and filed in the Trial Court on 27th November,2006 against the Defendant/ Appellant in which the Plaintiff/Respondent claimed that at all material times of the suit, the Defendant/Appellant was the sole registered owner of motor vehicle registration number KAE 573 F.

2. On or about the 12th day of June, 2006, the Plaintiff/Respondent was lawfully travelling as an authorized passenger in motor vehicle Registration number KAE 573 F along Kaloleni- Mua Road the Defendant/Appellant herein either by himself, authorized servant and/or agent so negligently drove, controlled, and/or managed the said motor vehicle and allowed it to lose control, veer off the road and rolled several times on the ground thereby occasioning severe and extensive injuries to Plaintiff/ Respondent.

3. It was averred that as a result of the said accident the Plaintiff/Respondent sustained severe bodily injuries and suffered loss, expenses and damages. Particulars of the injuries to plaintiff/Respondent were:

   a. Soft tissue injuries to the left side of the neck.

   b. Bruises on the right hand.

   c. Injuries to the right hip joint with contusion of muscles and haematoma formation.

   d. Bruises to the right knee.

4. The Plaintiff/Respondent pleaded particulars of special damages as follows:

   a. Medical report – Kshs. 3,000/=

   b. Filing P3 form - Kshs. 1,500/=

   c. Police abstract - Kshs. 200/=

   Total - Kshs 4,700/=

5. The Plaintiff/Respondent prayed for judgment to be entered against the Defendant/Appellant for: -

   a. Special damages in the sum of Kshs. 4,700/=

   b. General damages for pain, suffering and loss of amenities.

   c. Costs and interest of all the items pleaded.

The Defence

6. The Defendant/Appellant in his defense dated 18th December,2006 opposed the Plaintiff/Respondent's claims and denied that on 12th June,2006 or on any other day the Plaintiff/Respondent was lawfully travelling as an authorized passenger in the Defendant/Appellant's vehicle as stated in the plaint.

7. The Defendant/Appellant further denied all and singular the particulars set out and placed the Plaintiff/Respondent to strict proof thereof, contending that he does not operate passenger vehicles, save that the Defendant/Appellant's lorry Registration Number KAE 573 F overturned on 12th June,2006.

8. It was averred that without prejudice to the contents of the forgoing statement of defence the Defendant/Appellant will raise and rely on the defence of volenti non fit injuria.

9. The Defendant/Appellant denied in entirety the contents of the plaint including particulars of injuries and contended that the Plaintiff/Respondent did not suffer any actionable wrong through any act or omission of the Defendant/Appellant. The jurisdiction the Honorable Court was admitted. The Defendant/Appellant prayed that the Plaintiff/Respondent's suit against him be dismissed with costs.

Hearing In The Trial Court

The Plaintiff's Case

10. PW1 was Kenneth Kivaa Kamii; a mason, testified in Civil Suit No. 986 of 2006 that he was in a lorry registration No. KAE 573 F which was carrying building stones to a neighboring cite. He told Trial Court that just before Mua Girls at Mua about 1:30 pm, there was a sisal plant lying on the road and

the driver was over speeding. It was his testimony that the driver swerved lost control and the vehicle tipped over and rolled over about times. He stated that he was injured on the neck, hip and right leg. Testifying, that he arrived at the hospital at about 4 pm and upon treatment he reported to the police who later issued him with a P3 Form (PEXH 2) and Police Abstract (PMFI 3). PW1 blamed the driver of the vehicle for speeding and veering off the road, stating that the driver was not careful.

11. He told Trial Court that later he was seen by Dr. Kuria who prepared report PMFI 4 and that his advocate did a search and he paid Ksh. 1,500/- for P3 Form, Ksh. 200/- for 2 receipts 1,700/-. He told Trial Court that his neck was still paining yet it had healed. PW1 prayed that he be compensated in costs and damages as he could not work after the road accident for quite some time and he was earning Ksh 800/- a day.

12. In cross-examination, it was his testimony that he is a trained mason having grade 1 certificate from Masii Polytechnic. He did not have the certificate in court. He testified that he was a passenger in the said vehicle, with authority to be carried and that he hired the vehicle and paid the driver. PW1 was in the vehicle. According to PW1, the vehicle was ferrying building stones, the crew told him to enter and show them direction. He claimed that the 2 conductors were inside and the driver insisted he enter the vehicle to show him the way and that he was not an excess passenger. Further PW1 told Trial Court that the spare tyre fell off, the driver was not concentrating on the road and he hit a ditch and the vehicle then rolled. He testified that he was injured on the neck, right hand, hip and knee and that he was checked at Machakos Genera Hospital. He told Trial Court that P3 was correct as it was filled on 25/3/2006

13. In re-examination, PW1 testified that the medical report was prepared by doctor and so is the P3 Form and that if the doctor makes a mistake he is not to be blamed. He testified that his claims are correct as they include claim for the medical care.

14. PW2 was Onesmus Musyoki Mativo, a primary school teacher, He testified that on the material day and time he had sent the Plaintiff herein to go and buy him building blocks. The Plaintiff went along in Registration number KBE 372 F. They boarded the vehicle and on reaching Kwa Kiongwe village the vehicle was speeding; the driver saw a sisal stem that was about to touch side mirror and on avoiding the same the driver veered off the road entered a ditch and rolled severally. On the second time it rolled the Plaintiff was flung out and the third time PW2 was flung out he was injured too with his right hand sustaining a strain. He testified further that the Plaintiff injured his neck and hip and was limping. According to PW2 a Good Samaritan rushed them to Machakos General Hospital and later they reported to the police station who later issued them with P3. He claimed that the driver is to be blame for speeding and forcing to commute on the road but was looking on the rolling spare wheel then fell off.

15. In cross-examination, it was PW2's testimony that him and the Plaintiff were the first to enter the vehicle after the road traffic accident. He was a passenger as he was authorized. He did not read the warning on the door. He was in the vehicle at the time of the road traffic accident. He told trial court that the plaintiff went with the lorry and driver and he entered.

16. In re-examination, he opined that the building stones were his. He was authorized to enter vehicle as he had hired the vehicle.

17. PW3 was Dr. John Mutunga of Machakos Level 5 Hospital. He testified he had a medical report in respect to one Kennedy Kivaa aged 36 years who was involved in a road traffic accident along Mua Hills Road. He had the following injuries;Soft tissue injuries to the left side neck.Bruises on the right hand.Bruises in right hip joint with swelling.Bruises on right knee.

18. He was treated at Machakos Hospital, X-rays done. Testifying that the Plaintiff had complains of pain right hip joint and difficulties in turning the neck. According to PW3 injuries were soft tissue injuries and complete healing was expected with time. Testifying that the medical report was prepared on 25/8/2006. PW stated that he had a P3 form in respect to same patient filled at Machakos Level 5 hospital. Injuries are as captured in the medical report. P3 form was signed on 15/8/2006. He claimed that two documents were filled by Dr. Magdaline Kuria who has since left the station and country and was not available to produce the same. (PEX 4 and PEX 2).

19. In cross-examination, it was his testimony that he started working at Machakos Hospital in 1993 and that he did examine Plaintiff. He lamented that he had not produced treatment notes.

20. PW4 was No. 77247 P.C Robert Tomno of Machakos Police Station Traffic Department. He testified that he had Police Abstract in respect of one Kennedy Kuria who was involved in accident on 12/6/2006 along Kaloleni- Mua Road. He testified that motor vehicle was KAD 568 F Isuzu lorry. Further that Police Abstract was issued on 1/9/2006. He told Trial Court that nature of injury was harm. PW4 produced the police abstract (PEX 1) and that he was not investigating officer as it was one P.C Kirimi whom PW4 was not aware where he was.

21. In cross-examination, it was his testimony that investigating officer was P.C Kirimi. Stating that as per Police Abstract owner is listed as Justus Muema. He testified that he did not know the owner of motor vehicle. According to PW4 motor vehicle was a lorry and that a lorry has a seat for passenger. PW4 did not see the lorry. Lorries are used for ferrying goods. Testifying that according to Police Abstract, the driver was not indicated and that it was not able to trace Police file. It was for motor vehicle KAE 573 E and name of PC Kirimi. It was his testimony that copy of charge sheet has no rubber stamp to confirm the charges and Police Station. PW4 confirmed the statements of witnesses. PW4 was not aware if driver was acquitted and that charge sheet states that driver was carrying two passengers, he did not have sketch plans.

22. In re-examination, it was his testimony that the copy of charge sheet has no signature or stamp from Police Station. He was shown evidence of acquittal of the driver. That police abstract indicates owner of motor vehicle as Justus Mwema while Plaint refers to Festus Mwema. He claimed that a lorry can carry passenger and that no disclaimer had been shown and that plaintiff was a passenger.

The Defence Case

23. DW1 was Peter Mutinda. He testified that he is a driver in Machakos and is employed. He stated that he knew Festus Mwema whom he claimed was his employer from 2006 to 2010 as a driver of his lorry ferrying sand. It was motor vehicle KAE 573 F. It was his testimony that he knew his employer was sued. On 12/6/2006 he was in Kangundo ferrying stones to Mua Hills. DWI was given contact of the owner of stones, he was with two of his conductors, Peter and Kyuli. According to DW1 the owner of the lorry had engaged him to ferry sand.

24. Before reaching Mua Hills the road to the place he was to deliver stones, the road was very narrow and he asked his conductors to get out and check that he reverses. He testified that it had rained and the lorry rolled. Lamenting that there was sisal ahead that had blocked road and many people went to see what had happened. DW1 came out and called owner of lorry and informed him. He stated that he did not ferry any passengers unless they hung out on the vehicle, without his knowledge. He testified further that there was a disclaimer on the door that motor vehicle was not to ferry passengers. He did not ferry passengers. DW1 did not know Onesmus PW2 who alleged to have been owner of the stones as he had not paid to ferry the stones. DW1 was arrested and charged at Machakos Court as per charge sheet for ferrying uninsured passengers. It was Tr. 792/017 MFI 1 the charge sheet (DEX 1

(b)) the charge states he was carrying two passengers. DW1 was acquitted and that it is true he had two passengers. Peter and Kyule not the Plaintiffs. It was his position that the motor vehicle had provision for two passengers and driver. He was not charged in any other case. He claimed that he did not know Justus Mwema as per abstract and that he does not know why he is not sued in this case.

25. DW1 was recalled and in further evidence, he told Trial Court that he been charged with Traffic Case No. 792/07. He had copy of charge sheet (DEX 1). The offence was as set out. He was acquitted and had copy of register showing outcome (DEX 3). DW1 did not carry the Plaintiff in the motor vehicle.

26. In cross- examination, it was his testimony that on 12/6/2006, he was a driver ferrying sand to Nairobi. DW1 was employed to drive motor vehicle KAE 573 F owned by Festus Mwema Wambua. He was ferrying sand to Embakasi area. Later he took stones to Mua Hills and that on his way back from Nairobi. He was called by a customer he did not know. According to DW1 it is normal to get a customer you do not know and that they were two in the motor vehicle heading to Mua Hills, Peter Mutinda Kyalo and another called Peter. He did not know Kennedy Kivaa. It indicates accident was on 12/6/2006 and persons injured were Kennedy Kivaa the Plaintiff. There was no name of Peter in the abstract. DW1 stated that the owner of motor vehicle gave instructions on what to do. DW1 did not inform owner of motor vehicle. DW1 was heading to Mua Hills. He would inform him of his movements at end of the day. It was his testimony he had told court he used a narrow path where motor vehicle could not pass. He claimed that he was a driver of over 25 years. The lorry rolled due to the load. It had rained. He did not have motor vehicle assessment prior to or after the accident. He was to call customer after passing Mua Girls Secondary School. He did not meet the customers and he had not met him since he did not know Onesmus. That motor vehicle had a caveat on the door that no passengers were to be ferried. He did not have that evidence. He was not paid for the stones. He was charged for carrying passengers for hire without insurance. DW1 was charged with overturning motor vehicle not ferrying passengers without insurance. He was acquitted for the offence of causing accident motor vehicle to roll. He did not know if Onesmus is employed by Kennedy Kivaa.

27. In re-examination, it was his testimony that he did not recall having ferried un-insured passengers. It was true that charges are that he ferried uninsured passengers. As per DW1 the register confirms he was acquitted. He had not denied the records he had produced. The owner gave him instructions to ferry sand. He then got a call to ferry blocks and on his way back to Mua Hills. He opined that owner of motor vehicle did not authorize him. He had not been sued. Motor vehicle is of Festus Wambua. It was not a PSV. It was inscribed on the door that no passengers. He stated that he did not know Onesmus Musya. He did not carry him. DW1was with turnboy Peter. He did not know why plaintiff was following him. Police abstract wrote that Kennedy Kivaa was in the motor vehicle. The road was okay only that it had rained and motor vehicle rolled while stationary he could not avoid.

28. DW2 was Festus Wambua. He testified that he owns motor vehicle KAE 573 M. It was involved in an accident on 12/6/2006 while under DW1. He testified that motor vehicle was for transport of sand. It was not for passengers. He claimed that on that day DW1 was to make two trips of ferrying sand to Nairobi. He did one trip. He had not given instructions to ferry stones. He was not aware motor vehicle was ferrying stones at time of accident. According to DW2 motor vehicle was not carrying uninsured passengers and DW1 was acquitted in Machakos Traffic Case 792/2006 under Section 210CPC. He opined that the motor vehicle has a disclaimer on the door that no passengers was allowed. That previously he owned a PSV motor vehicle which was involved in accident with former president. He also came to know Onesmus who lives one homestead away from scene. He only came to know Abednego after accident. He found the two plaintiffs at scene and the following day they helped them push motor vehicle back on the road from where it had rolled.

29. In cross-examination, it was his testimony that insurance Company had not charged him over same motor vehicle KAE 573 M he was charged at Milimani court. He cannot recall the insurance company. He testified that DW1 was his driver. They had a pre- arranged plan for two trips of sand to Nairobi daily. Driver was to ensure he made at least two trips a day. Driver would keep records of the days' work. He would confirm as owner. That the other accident involved a different motor vehicle but same driver. The driver was charged with careless driving. He found Kennedy Kivaa at scene of accident together with Onesmus Musyoki. Onesmus homestead was near the scene. On date of accident motor vehicle had no one as driver had alighted to check. As he was told. No one would blame for the accident as motor vehicle was stationary. Disclaimer was on both sides of motor vehicle. He had not produced the evidence of the disclaimer. He visited scene and motor vehicle could not proceed due to nature of road.

30. In re-examination, he testified that motor vehicle was for commercial use. Driver had no authority to carry passengers or ferry stones. He was not aware motor vehicle was ferrying stones. He had not been sued by insurance in Nairobi nor charged and driver is not to blame.

Judgment Of The Court

31. The Trial Court judgment dated 27th March,2019 judgment was entered for the Plaintiff against Defendant in terms of:

    a. General damages - Kshs. 120,000/-

    b. Special damages – Kshs. 1,500/-

    Total - Kshs. 121, 500

32. The Plaintiff was also awarded costs of the suit plus interest.

The Appeal

33. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 11th April,2019 filed in court on 18th April,2019, wherein the Defendant/Appellant sought the grounds that:

    a. The Appeal be allowed.

    b. The judgment and orders of the said Magistrate be set aside and be substituted with an order dismissing the plaintiff's suit.

    c. The costs of this Appeal and those of the court below be awarded to the Appellant.

    d. Any further or other relief as justice of the case may require to be granted in the circumstances.

34. The appeal is premised on the grounds namely: -

    That the learned Magistrate erred in law and fact and misdirected himself by making findings which were not supported by the evidence on record; by apportioning 100% liability against the Defendant/ Appellant, had established a claim against the Defendant/Appellant and ordering that the Defendant/ Appellant was liable, making an award of damages without seeking out the reasons for the finding, failing to consider the Defendant/Appellant's submissions and finding the Defendant/Appellant was liable against the weight of evidence, Plaintiff/Respondent was not authorized to board the vehicle as the motor vehicle registration number KAE 573 F operates as a carrier of goods and no way can it accommodate the Plaintiff/Respondent as a fare paying passenger as alluded in this case, a prohibited passenger and any act done by the driver who was not a party to this suit was an act outside the scope of his authority, had not proved liability on a balance of probabilities as the driver who was not a party to

this suit and whom caused the said accident was acquitted in Traffic Case No. 792 of 2007 in the Chief Magistrate's Court at Machakos where the trial court found him not guilty for carrying uninsured passengers, among them the Plaintiff/Respondent.

35. The Appeal was canvassed by written submissions.

Submissions

The Appellant's Submissions

36. The Appellant in his submissions dated 22nd June,2023 and filed in court on 23rd June,2023, wherein the Appellant through his counsel submitted sequentially on the grounds as enumerated in the Memorandum of Appeal.

37. It was the position of the Appellant that these evidence was not considered by the trial court when it reached to the finding that DW1 Defendant was 100% liable.

38. As to the second ground that trial Magistrate erred in law and fact and misdirected himself by apportioning 100% liability against the Defendant/Appellant, it was argued that the 1st Defendant who was found liable by the court is not a party. His name was not disclosed; therefore, the issue of liability was not correctly determined. It was submitted that the negligent acts of the servant or driver was clearly done outside the course of his employment and thus the actions cannot bind the master that is the Appellant in this suit. There is no authority that besides transporting goods the driver herein was allowed to carry fare paying passengers. As the driver was employed to drive and carry goods this cannot be attributed to the Appellant as the owner of the vehicle and thus the driver was seen doing something outside his scope of his employment which he admitted in the court but added he was never joined as a Defendant in this suit.

39. It was submitted that the Appellant testified at page 53 of the record of Appeal that he was not aware that the vehicle was carrying stones at the time of the accident. His vehicle was not carrying passengers and DW1 the driver was not charged for carrying uninsured passengers but was acquitted under Section 210 of the CPC in traffic case 792 of 2006. Submitting that he admitted his vehicle had a disclaimer that no passengers were allowed and he testified the claim before the court is a false claim. Therefore, there was no reason why he was found liable.

40. Reliance was placed on the case of Margaret Mumba Mbithi Vs A.S. K Sanghan and Another Civil Appeal No. 31. of 2015 at the Court of Kenya at Kajiado, to bolster his position on the scope of liability.

41. Further, credence was placed on the case of Muwonge V A.G of Uganda (1967) EA to cement the point that the master is exempted only when the servant was on his own business. Counsel further cited the following cases in support of his submission: Selkfe & Another Vs Associated Motor Boats Co. Ltd (1968) EA 123, Joseph Cosmas K. Vs Gigi & Co. Ltd & Another Civil Appeal 199 of 1986 eKLR and Kaburi Okelo & Partners Vs Stella Karimi Kobia & 2 Others (2012) eKLR.

42. On grounds 3, 6 and 7 it was submitted that the evidence and testimonies given during trial was in essence that none of the injured parties herein more so the plaintiffs on the Material day were authorized passengers on board motor vehicle registration number KAE 573 F as the said motor vehicle operated as a carrier of goods and in no way could it accommodate the plaintiffs as fare paying passengers as alluded in their testimonies. Contending that trial court erred in failing to find that the plaintiff Respondent was not authorized to board the vehicle as the motor vehicle KAE 573 F operates as a carrier of goods and no way can it accommodate the Plaintiff/Respondent as a fare paying passenger as alluded in this case.

43. It was submitted that it is not in dispute that the plaintiffs were involved in an accident but there is no evidence showing that the motor vehicle registration number KAE 573 F was a public service vehicle for fare paying passengers.

44. Reliance was placed on Section 107 and 109 of the *Evidence Act* Reliance was further placed on the case Veronica Kanorio Sabari Legal Repsentative of Chabar, Mngeraini Vs Chinese Technical team for Keya National Sports & 2 Others HCC No. 376 of 1989, Henry Mwobobia Vs Muthaura Karauri & Another HCC No. 104 of 1991, and submitted that the Respondents did not prove liability on a balance of possibility. According to counsel the Plaintiff failed to prove negligence against the Defendant/Appellant and that the driver had admitted during the trial that he was using the vehicle for his own use and has never been sued and as such there is nobody to blame.

45. As regards ground four of the Memorandum of Appeal it was submitted that there was no sufficient reason supporting the award of damages as pleaded and the same ought to set aside the award of 121,500/=.

46. As to the fifth ground, counsel opined that there is nowhere the trial court considered the Appellant's submissions.

47. As to the sixth ground, counsel contended that the plaintiffs failed to enjoin the driver as a Defendant in the lower court suit and in a futile attempt by the plaintiff to file an application to join the Defendant after the defense case was closed and after a period of 13 years from 12th June 2006 when the accident occurred was time barred and afterthought and prejudicial to the Defendant and an admission that the Plaintiffs had failed to enjoin the driver intentionally and the application was not allowed by the trial court. Counsel prayed that the appeal be allowed and cost of the appeal.

Respondent's Submissions

48. Respondent in his submissions dated and filed in court on 26th June, 2023, wherein counsel for Respondent submitted sequentially on the grounds of Appeal raised by the Appellants.

49. On the first ground, it was submitted that the findings of the Trial Court were anchored in evidence presented to the Court. Contending that this Honorable Court being a court of first appeal has a duty to evaluate the evidence on record with view to reaching its own conclusions in the matter. To support the above position Counsel relied on the case Peter M. Kariuki Vs Attorney General [2014] eKLR.

50. Further counsel quoted Section 109 and 112 and submitted that he sufficiently discharged the burden of proof to the required standards. Contending that the evidence placed on the record by the Respondent proved the Appellant's driver was negligent in that the Appellant's driver testified that the road he passed through was narrow thereby causing the motor vehicle to roll over. Reliance was placed on the case of Palace Investment Ltd Vs Geoffrey Kariuki Mwenda & Another [2015] eKLR, to bolster his position.

51. On ground 2 and 3 it was submitted that the Respondent's evidence as contained in his pleadings was inter alia that the Appellant's motor vehicle was being driven without due care and attention; that its driver failed to maintain proper and effective control of motor vehicle KAE 573 F. submitting that the Appellant did not adduce any evidence to rebut or controvert the Respondent's evidence.

52. It was opined that the Respondent was a passenger in motor vehicle registration KAE 573 F and for that reason, he was not in control of the vehicle and therefore he could not have caused or contributed to the occurrence of the accident. Opining that the Appellant's argument that his driver was not to blame for the accident had no basis either before the trial court or in this appeal. To buttress the position on

liability, Counsel relied on the case of William Kabogo Gitau Vs George Thuo & 2 Others [2010] 1 KLE 526 and Stephen Obure Onkanga Vs Njuca Consolidated Limited [2013] eKLR.

53. As to fourth ground, counsel opined that Dr. Mutunga produced a medical report which outlined the injuries the Respondent suffered. Contending that the injuries indicated on the medical report were consistent with those indicated on the treatment notes issued to the Respondent at the hospital.

54. It was submitted that the trial court in making the award conformed to the cardinal principle that comparable injuries should be compensated by comparable awards. Thus the Respondent having proved he suffered multiple soft tissue injuries the court was right in awarding the damages hence according to counsel the injuries quoted by the trial Magistrate were injuries comparable to the injuries suffered by the Respondent and therefore the award was justified based on decided cases. Counsel placed his reliance on the case of Maraga Vs Musila [1984] 1 KLR 251 to bolster his argument.

55. On the fifth ground, counsel contended that it can be discerned from the reading of the judgment that the submissions were duly considered. Contending that the Appellant did not satisfy the issues raised therein in their submissions does not directly imply that the court did not look into the said submissions. Counsel opined that the trial magistrate in awarding damages noted that the Respondent did not make any proposals on quantum. Reliance was placed on the case of North End Tradgn Company Limited (carrying on the Business under the Registered name of) Kenya Refuse Handlers Limited Vs City Council of Nairobi [2019] eKLR.

56. On the sixth ground, it was submitted that the Appellant testified at the lower court that there was a limitation notice on the motor vehicle indicating "no authorized passengers allowed" contending that DW1 testified that he did not have the evidence of notice. Opining that under Sections 107, 108 and 109 of the *Evidence Act*, the Appellant failed to discharge the burden proof. Counsel submitted that there was lack of evidence to uphold the principle of volenti non fit injuria and that notwithstanding the Appellant had further failed to prove that the Respondent despite knowing the risk, no evidence that he had voluntarily undertaken to run the risk of injury. To substantiate this position counsel relied on the case of United Millers Limited & Another Vs John Mangoro Njogu [2016] eKLR.

57. On the eighth ground it was submitted that DW1 having been acquitted of the traffic charge was therefore not liable for the accident. It submitted it was a far- fetched interpretation of the law. It was the submission of the counsel that the standards of proof in Criminal cases is totally different from that in civil cases. In any event, it was the Appellant's driver who exercised control over motor vehicle KAE 573 F, thus it is only through his act or omission that could have caused the accident. Reliance was placed on the case of Andrew Kamau Waweru Vs Guchu Muruguri to support his position.

58. Similarly, reliance was placed on the case of Masembe Vs Sugar Corporation and Another [2002] 2 EA 434, and submitted that an acquittal does not automatically exonerate the person charged in Civil Proceedings. Counsel invited the court to find that said ground of appeal falls flat on its face and it is ripe for dismissal.

Determination/analysis

59. The Court considered the Memorandum of Appeal, the Trial Court record and the submissions of the parties in this Appeal.

60. This is a 1st appellate court and as aptly stated in the case of Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 this court should evaluate and/or assess the evidence on record as follows: -

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

61. The burden of proof in civil cases lies with the Plaintiff. The Court of Appeal while dealing with this question in the case of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] e KLR observed that;

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift" to the party who would fail without further evidence?"

Liability

62. The Appellant appealed against finding on liability at 100% against the Defendant Festus Muema Wambua against the Defendant/Appellant. Further, that the Trial Court erred in finding that the Plaintiff/Respondent had established a claim against the Defendant/Appellant.

63. PW1 Kennedy Kivaa & PW2 Onesmus Musyoki confirmed through evidence that on 12/6/2006 they travelled in motor vehicle Reg. KAE 573F carrying building stones to a building site. At 1.30 pm just before Mua Girls', the driver of the vehicle, on seeing sisal plant on the road suddenly, and he was speeding; veered off the road, swerved and the vehicle tipped and they were injured as was confirmed by the Doctors who examined them.

64. DW1 Peter Mutinda & DW2 Festus Wambua owner of motor vehicle Reg KAE 573F testified that on 12/6/20026; the said motor vehicle was ferrying building stones and DW1 had 2 turnboys Peter and Kyuli and he did not know and/or carry PW1 & PW2.Secondly, the Lorry had a notice that it was not to carry unauthorized passengers.

65. PW3 confirmed that an accident occurred on 12/6/2006 along Kaloleni Mua Road of Motor vehicle Reg KAD 568 F Isuzu Lorry in a self- involving accident and the matter was pending investigations (PUI).

66. The Court of Appeal in the case of Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another,(2010) eKLR held as follows:-

> " Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-

examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"

67. In the instant case, the ownership of the Lorry Reg KAD 568 F was contested; that the Police Abstract indicated the owner as Justus Muema but the Copy of Records produced dated 11/10/2006 indicated Festus Muema Wambua as registered owner of the said lorry.

68. The Police Abstract confirmed an accident occurred and PW1 & PW2 were injured as a result of the said accident. The Appellant raised 3 issues namely;

   a. PW1 & PW2 were not carried in the motor vehicle Reg KAD 568 F

   b. PW1 & PW2 were not authorized passengers in the Lorry Reg KAD 568F

   c. The particulars of negligence were not proved to the required standard of proof.

69. The driver of the said vehicle DW1 does not deny that on 12/6/2006 he drove Lorry Reg. KAD 568F and transported building stones, he does not deny he was involved in an accident but only denies that PW1 & PW2 were in the said Lorry. This denial is not backed by evidence or proof; Section 107-112 *Evidence Act* in summary points to the maxim; he who alleges must prove. If he was with 2 turn boys and not PW1 & PW2 how come not even 1 of the turn boys testified? Secondly, DW1 owner of the lorry who came to the scene testified that he saw PW1 & PW2 at the scene is it coincidence that they were at the scene and had been involved in an accident but not carried in the said Lorry? It is far- fetched. DW1's denial is not proof to the required standard.

70. Thirdly, DW1 stated that he was charged and acquitted for the offence of carrying uninsured passengers. A copy of the charge sheet was produced but the charge sheet by and of itself is not proof of plea-taking and/or trial leading to the alleged acquittal.

71. Whether PW1& PW2 were authorized passengers or not, the alleged sign on the vehicle was not produced, the Driver DW1 was not joined as Co Defendant so as to be held directly liable if DW2 is not held vicariously liable. With respect, the totality of the evidence by DW1 & DW2 amounts to mere denial and spirited attempts to avoid liability and not proof especially in light of evidence of PW3, the doctor & PW4 Police Officer who produced the Police Abstract who are independent and formal witnesses.

72. On whether, the Plaintiff /Respondent proved the particulars of negligence, the evidence of PW1 & PW2 is that DW1 was driving lorry Reg KAD 568F and therefore was in control and management of the vehicle. PW1 & PW2 were not hanging on the vehicle at least no such evidence was adduced, they were in the vehicle to give direction where the stones were to be taken. As passengers they had no role to play in controlling the lorry.

73. In the case of Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, where court 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 that will permit his court 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 is 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..."

74. In the case of Isabella Wanjiru Karanja vs Washington Malele Nbi Civil appeal No 50 of 1981 Hon. Chesoni J. observed;

> " What I find makes the 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 lookout for other road users."

Vicarious Liability

75. On the issue whether the Defendant is held vicariously liable for the actions of his driver DW1 who drove lorry Reg KAD 568F on the fateful day 12/6/2006 if by carrying PW1 & PW2 he went outside the scope of instructions/duty or not that is a matter between him and his driver, more so that DW1 was joined as Co- Defendant in these proceedings.

76. In Galaxy Paints Company Limited v. Falcon Guards Limited; Court of Appeal Case Number 219 OF 1998, the Court of Appeal stated that:

> " issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination."

77. Suffice is that the injuries occasioned on PW1 & PW2 were as a result of a self -involving accident of/by Lorry Reg. KAD 568F belonging to the Defendant Registered Owner of the Lorry who also admitted DW1 was his driver and DW1 the driver admitted that on 12/6/2006 he was involved in an accident but denied PW1 & PW2 were passengers in the said Lorry but not fare-paying passengers.

78. In the case of Rentco East Africa Limited v Dominic Mutua Ngonzi [2021] Eklr Odunga J observed that;

> "
>
> " 61. As regards the issue of vicarious liability, it was held in Kansa vs. Solanki [1969] EA 318 that;
>
> "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."
>
> "62. In this case the vehicle was registered in the name of the appellant. Though it had a GK registration plate, it is submitted that the vehicle was leased to the Government. That evidence was however not brought out at the hearing. No evidence was led to explain the circumstances under which a privately owned vehicle was being driven by a government agent. Evidence cannot be adduced by way of submissions. In light of the above authority, there is no basis upon

which the finding of vicarious liability by the learned trial magistrate can be faulted."

The Defendant is liable for the actions/omissions of his agent DW1.

Quantum

79. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> “ It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the Trial Court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

80. In the case of Stanley Maore v Geoffrey Mwenda [2004] eKLR the Court of Appeal stated: -

> “ ……Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

81. The evidence of PW3 Dr. Mutunga who produced the medical report by Dr. Kuria confirmed that the Plaintiff/Respondent sustained soft tissue injuries. The Trial Court considered the injuries sustained vis a vis a recent case of similar assessment and came to the figure of Ksh. 120,000/- as general damages. It is not excessive considering how long the matter has been in Court since 2006 to date and the inflationary trends. This Court finds no legal basis to disturb the assessment of damages.

Disposition

82. The Appeal is dismissed on liability and quantum and judgment delivered by Trial Court on 27/3/2019 is hereby upheld.

JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 26TH FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In the presence of:

No appearance - for The Appellant

Mr. Muema - for The Respondent

Geoffrey/patrick - Court Assistant(s)