



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 3 OF 2018**

**BETWEEN**

**PATRICK WAMBUA MATIA.....APPELLANT**

**AND**

**NATHAN KIVAVA.....1<sup>ST</sup> RESPONDENT**

**KAVINYA NATHAN.....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the Judgment delivered on 14<sup>th</sup> December 2017 by Honourable I.M Kahuya (S.R.M) in Machakos CMCC No. 445 of 2016)**

**IN**

**PATRICK WAMBUA MATIA.....PLAINTIFF**

**VERSUS**

**NATHAN KIVAVA.....1<sup>ST</sup> DEFENDANT**

**KAVINYA NATHAN.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The appellant herein, by way of a plaint dated 6<sup>th</sup> July, 2016 filed in court on 8<sup>th</sup> July, 2016, claimed general and special damages as well as interests and costs of the suit against the Respondents herein arising from an accident that allegedly occurred on 8<sup>th</sup> July, 2015.

2. According to the plaint, on that day, the Appellant was alighting from the Respondents' motor vehicle registration no. registration no. KCB 538K, Isuzu Bus at Katangi along Machakos-Kitui Road, when, as a result of the negligence on the part of the Respondents' driver, agent and/or servant, the plaintiff fell down while alighting from the said motor vehicle thereby sustaining severe bodily injuries, an accident which the Appellant held the Respondents vicariously liable for. He pleaded the particulars of negligence and relied on the doctrine of *res ipsa loquitur*. He also particularised the injuries as well as the special damages in the sum of total of Kshs 8,915.00.

3. In their joint statement of defence, the Respondents denied the ownership of the suit vehicle and further denied that the Appellant was a passenger in the said vehicle. They also denied the occurrence of the accident and the particulars of negligence as pleaded. In the alternative they pleaded that if there was such accident, it was caused by the sole and/or substantially contributed to by then negligence of the Appellant particulars whereof they pleaded. It was pleaded further and in the alternative that the said accident was due to an inevitable accident. The Respondents challenged the particulars of injuries and special damages pleaded and denied that the doctrine of *res ipsa loquitur* was applicable. They prayed that the suit be dismissed with costs.

4. The Appellant replied to the said defence by denying the allegations made in the Defence and reiterated the contents of the plaint.

5. In his evidence, the Appellant who testified as PW2, relied on his statement in which he stated that on 8<sup>th</sup> July, 2015, he boarded the said vehicle at Katangi on his way to Masii and was informed by the tout that the bus fare would be Kshs 50/-. When the bus took off he sought to confirm from the conductor who was not available at the time of his boarding the bus whether the said amount was the correct fare but the conductor informed him that the fare was Kshs 70/-. He then requested to be allowed to alight but the conductor demanded that he pays Kshs 20/- before being permitted to alight despite the fact that the bus had covered a distance of 50 metres. Despite his pleas, the conductor stood his ground forcing the other passengers to intervene and demand that he be allowed to alight without making any payment whatsoever. The bus then slowed down and stopped. However, while lowering one of his legs the bus started off and as a result he lost balance, twisted his leg and fell on the ground. Due to severe pain on his right knee, he was unable to lift himself from the ground.
6. In the meantime, the bus continued with its journey but after about 100 metres, it started reversing back to where he was lying. The area sub-chief on receiving the information from a nearby business lady, arrived at the scene and ordered the bus crew to report the accident at Wamunyu Police Post and to take him to Machakos Level 5 Hospital, which they did and he was admitted and diagnosed with a fracture of the right tibia near the knee joint. He also sustained soft tissue injuries on the same leg. He was eventually discharged on 17<sup>th</sup> July, 2015 on clutches until the pain subsided. According to him, he had not fully healed. He revealed that he incurred medical expenses in excess of Kshs 3,800/-.
7. It was his case that he reported the matter at Machakos Police Station and was issued with a P3 form which was duly filled in at the cost of Kshs 1,5550/- and on returning the same to the police, he was issued with a police abstract. He also saw Dr Kimuyu who prepared a medical report for him at the cost of Kshs 3,000/- and conducted a search in respect of the said vehicle at a cost of Kshs 550/- through which he discovered that the said vehicle was registered in the names of the Respondents.
8. It was his contention that the driver of the said vehicle was to blame for failure to give him a reasonable opportunity to alight safely and sought compensation for the damage and loss suffered.
9. In his oral evidence, he stated that he also sustained blunt injuries and produced the discharge summary, P3 form, medical Report, receipt, copy of the search and its receipt, demand letter and bundle of receipts for medical expenses incurred worth Kshs 3, 815/-. He reiterated that the driver was to blame for failing to completely stop when he wanted to alight and admitted that the driver and the conductor took him to the hospital and paid his initial hospital bill.
10. In cross-examination, he stated that the accident occurred on 8<sup>th</sup> July, 2015 and that he boarded the vehicle after the conductor agreed on 50/- but hiked the hire once he was inside. He then demanded to be allowed to alight but while in the process of doing so the bus moved. He could not recall whether the conductor signalled the driver before he completely alighted but saw the conductor signalling when he was already on the ground. He denied that he was drunk and jumped off the moving vehicle but could not recall how far the vehicle had moved between the time he boarded the vehicle to when he alighted though it had not accelerated much.
11. PW3, **Dr Kimuya Judith** examined the Appellant on 15<sup>th</sup> April, 2016 and captured her findings in her report which was exhibited. In cross-examination, she confirmed that the injuries were soft tissue in nature and that complete healing was anticipated.
12. PW1, **PC Tomley**, stationed at Machakos Traffic Base on 8<sup>th</sup> July, 2015 received a report of an accident at Katangi Area involving motor vehicle reg. no. KCD 535K Isuzu Bus and a passenger. The accident was reported by the driver of the said bus who was informed by some passengers that one of them had fallen off the said bus. He stopped and reversed back to where the passenger lay on the road. He reported the matter at Wamunyu Patrol Base before escorting the passenger to Machakos Level 5 Hospital for treatment. According to him, the victim recorded his statement upon recovery and he exhibited police abstract. According to him, the driver confirmed that the Appellant was a passenger in the said vehicle. He however admitted that he was not the investigating officer and had no police file but only had the OB. He could therefore not testify on the conclusion of the investigations though in his opinion, based on his experience as a traffic officer, the conductor was to blame for not closing the door before the vehicle started moving. He however disclosed that neither the bus driver nor the conductor was not charged in court. He explained that the initial statement was made by the driver who did not even know what had happened until the other passengers informed him of the accident.
13. On the part of the Respondents, they called **Mathew Mwemba**, the driver who testified as DW1. According to him, the accident occurred on 8<sup>th</sup> July, 2018 at about 10.00 am at Katangi Area when he was heading towards Machakos. On reaching Katangi Stage, he stopped to pick passengers then started off again. Approximately one and half kilometres he was alerted by members of public who shouted and he stopped the bus. Upon checking the side mirror, he saw a man lying beside the road. He then got him into the bus while he was complaining of his leg. He reported the incident to Wamunyu Police Post and then proceeded to Machakos Hospital where he was attended to and admitted after which he proceeded to Machakos Police Station together with the conductor and reported the same. The police visited the injured person in the Hospital and recorded his statement.
14. According to him, he was unaware how the passenger got out of the vehicle as he had not indicated that he was alighting and they had just left the bus stop. He stated that he was never charged with a traffic offence.
15. In cross-examination, he stated his conductor that day was **Peter Mutuku**, whom he had known for 3 years while he had driven the accident motor vehicle for less than 1 year. He reiterated that the accident occurred at Katangi after leaving the stage as they were in the process of going through the bumps. In his evidence, he was driving at around 30 Km/h. When other passengers raised an alarm, he checked in his side mirror and spotted the plaintiff on the ground. It was his belief that the door was locked after he picked up passengers from Katangi stage. According to him, the motor vehicle had no music and he had to rely on the conductor for any instructions. He could however not tell how the plaintiff found himself outside as he did not use his rear view mirror to check out on the happening at the passenger side/cabin.
16. It was his evidence that he never heard any alert for a passenger alighting.

17. **Peter Mutuku**, DW2, testified that he was the conductor of motor vehicle KCB 538K. On 8<sup>th</sup> July, 2015 they were driving from Kitui - Machakos direction. At Katangi stage they stopped where people alighted and other boarded and they proceeded with their journey and he started collecting fare. Before long he heard a commotion at the door between the passenger and a turn boy and suddenly, the passenger jumped out and in the process injured himself. So DW 1 turned back and they took him to Wamunyu Police Station to report the incident before taking him to hospital. While at Machakos they reported the accident at Machakos Police Station. He stated that they were never charged with a traffic offence and he blamed the passenger for jumping off a moving motor vehicle. He confirmed that the passenger was not in agreement with the fare. According to him, the driver was at low speed at that point otherwise the injuries would have been worse.

18. In cross-examination, DW2 stated that he had worked inside KCB 538K for over a year and was certain it had a rear view mirror. He disclosed that the turn boy was an employee of the motor vehicle and that his work is to load and off-load passengers. He confirmed that the Plaintiff who was a passenger sat on the 1<sup>st</sup> seat next to the door and got injured on that day. He confirmed that the turn boy was in charge of stopping the motor vehicle by ringing the bell. However, he could not recall him ringing the bell for the plaintiff to alight. By the time the motor vehicle stopped, plaintiff had already alighted. In his evidence, they had not locked the door as required since the motor vehicle had barely moved for 1Km and the accident occurred after the bumps. He admitted that the police officer was not at fault by stating that he was responsible for the accident.

19. In re-examination, DW2 stated that before picking fare he had ensured that all passengers were seated. He reiterated that he had never been charged by the police for a traffic offence and that they were not speeding. He stated that it was not his role to ring the bell but that of the turn boy. In his view, the plaintiff overpowered the turn boy and jumped outside.

20. In her judgement the learned trial magistrate found that the evidence of the Plaintiff was not corroborated by that of the police officer who was not the investigating officer. The plaintiff's evidence, she found was contradicted by that of DW1 and DW2 who stated that the Plaintiff jumped off the slowly moving bus after disagreement with the turn boy. According to the learned trial magistrate, if the plaintiff's evidence is to be believed, then it was likely that as he was alighting when the bus stopped. She found that the Plaintiff had not affirmatively established that the Defendants were negligent for causing his injuries except for his word. On the other hand, the court found that the Defendants corroborated their evidence how the accident occurred. She however faulted the Defendants for their admission that the door was not locked after the passengers boarded which posed a danger to the plaintiff and other passengers. Accordingly, she apportioned liability at 50:50.

21. On quantum, she found that the Appellant sustained soft tissue injuries and assessed general damages at Kshs 220,000/- and also awarded special damages in the sum of Kshs 8,090/- and awarded the Appellant costs of the suit as well.

22. It is this decision that aggrieved the Appellant herein and in this appeal, he has raised the following grounds:

**1) That the learned trial magistrate erred in law and in fact in making an award for general damages for pain and suffering which was inordinately low.**

**2) That the learned trial magistrate erred in law and in fact in failing to appreciate the nature and extent of the Appellant's injuries and thereby made an award for pain and suffering which was inordinately low in the circumstances.**

**3) That the learned trial magistrate erred in law and in fact in finding that the Appellant was 50% liable and in failing to find that the Respondents were 100% liable or substantially to blame for the accident.**

**4) That the learned trial magistrate erred in law and in fact in failing to appreciate the Appellant's submissions and case law attached thereto and thus reached a wrong finding on both liability and quantum.**

**5) That the learned trial magistrate erred in law and in failing to award costs of the suit to the Appellant, having regard to the partial success by the Appellant.**

23. On behalf of the Appellant, it was submitted that the Appellant, in summary, challenges the learned trial magistrate's finding on liability and the award on general damages. The Appellant also challenges the award on costs. It is the Appellant's contention that the award on general damages was inordinately low in view of the nature and extent of the injuries he sustained. On liability, the Appellant maintains that the finding that he was 50% liable is erroneous and that the Respondents ought to have been held 100% liable or substantially to blame for the accident. On the issue of costs of the suit the Appellant faults the trial court for failing to award the same to the Appellant having regard to the partial success by the Appellant.

24. It was submitted that the learned trial magistrate clearly misdirected herself by when she failed to appreciate the fact that the appellant testified that the said bus had actually stopped (according to the learned trial magistrate the Appellant alighted when the said bus was slowing down). In the premises the learned trial magistrate reached a wrong conclusion on liability. It was further submitted that contrary to the finding by the learned trial magistrate, there was no purpose of corroboration of the Appellant's evidence and the police officer (PW1) did not contradict the Appellant. It was further submitted that the Appellant's testimony was very clear and was not shaken at all on cross examination. According to the Appellant, the learned magistrate erred in finding that the evidence of the Defendants/Respondents was "corroborated" or "reasonable" for the in view of the contradictions in the evidence of DW1 and DW2. It was the Appellant's position that the learned trial magistrate should have clearly stated the reasons as to why he found that the Appellant's evidence had not affirmatively established that the Respondents were negligent. According to the Appellant, he proved to the required standard that the Respondents were fully to blame for the accident in light of the admission on the part of DW 2 that the bus door had not been locked. Under Rule 63 (b) of the Traffic Rules, it was submitted that it is the responsibility of the driver and conductor to take reasonable precautions to ensure the safety of passengers in or on, or entering or alighting from, the omnibus or matatu. Further, under Rule 86A (7) of the **Traffic Rules**, public service vehicles should have their doors closed at all times when the vehicle is in motion. DW 2, as above stated, admitted that the door had not been locked while the said bus was in motion. DW 1 did not state that he ensured that the door was locked before leaving Katangi stage.

25. Since the evidence for the defence contradicted the pleadings, it was submitted that this was yet another ground for finding the Respondents' evidence incredible. In the Appellant's view, DW 1 ought to have checked and ascertained from the rear and side mirrors that the Appellant had safely alighted before starting off. Further DW 1, DW 2 and the turn boy ought to have ensured that the bus door was locked before setting the bus in motion.

26. It was therefore submitted that the learned trial magistrate erred in finding that the Appellant was 50% liable and the court was urged to set aside the learned trial magistrate's finding on liability and substitute the same with a finding that the Respondents were 100% liable.

27. As regards the quantum, it was submitted that the appellant pleaded and testified that he sustained a fracture of the right tibia and soft tissue injuries on the right leg. He also called a doctor (PW 3) who confirmed the said injuries and produced a medical report. As at the time of the examination by PW 3, the Appellant had not healed. The said medical report was clear (under the title "*Physical Examination and Opinion*") that the Appellant suffered the said bone (tibia) and STI (soft tissue injury) secondary to RTA (road traffic accident). The Respondents did not counter the evidence on the injuries sustained by the Appellant by way of a second medical report. The said fracture is also captured in the Discharge Summary and P3 Form. In the said P3 Form and police abstract the Appellant's injury was classified as grievous harm (grievous harm is defined in the P.3 Form).

28. It was submitted that the general principle regarding assessment of damages is that the award must be considered in light of the injuries sustained and that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct levels of awards in similar cases. Before disturbing the quantum of damages awarded by a trial court, an appellate court must be satisfied that the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that the amount is inordinately high or low. The Appellant contended that the case of Samuel Maina Kabago –vs- John Apanja Ondiek & 3 Others (2015) eKLR cited by the Appellant was most appropriate/applicable since in that case the Appellant sustained a compound fracture of the left tibia and fibula, he did not lose consciousness and was admitted in hospital for an aggregate period of six days (unlike the Appellant herein who was admitted in hospital from 8/7/2015 to 17/7/2015 –see the discharge summary at page 56 of the Record of Appeal). The court (Hon D.S Majanja on 17.4.2015) upheld the learned trial magistrate's assessment of general damages at Kshs. 600,000/=.

29. It was therefore urged this court to find that the learned trial magistrate award on general damages was inordinately low and that the same ought to be set aside and be substituted with award in the sum of Kshs. 600,000/=. would be fair compensation for pain and suffering. In support of these submissions, the Appellant relied on Nyeri HCCA No. 9 of 2012, Zachariah Mwangi Njeru vs. Joseph Wachira Kanoga [2014] eKLR and Machakos HCCA No. 106 of 2003, Charles Mwanja & Another –vs- Batty Hassa (2008) eKLR.

30. As regards the costs, it was submitted that the Appellant was denied costs without any reasons being given for such finding. Since generally costs follow the event, it was submitted that the learned trial magistrate, having found that the Plaintiff/Appellant was 50% successful, should have equally have awarded the Appellant 50% of costs of the suit. It was submitted that the learned trial magistrate therefore ought not to have deprived the Plaintiff/Appellant of the entire costs of the suit without assigning any reasons for so doing, and should have in the least awarded the Plaintiff 50% of the costs of the suit.

31. Consequently, this Court was urged to find merit in this Appeal and allow the same as prayed and to award the Appellant general damages for pain and suffering in the sum of Kshs. 600,000/=. costs of this Appeal and of the suit in the lower court and interest.

32. No submissions were filed on behalf of the Respondents.

33. Consequently, the Appellant submitted that the Plaintiff/Respondent should have been held at least 50% liable for causing the accident and they relied the case of Joyce Wambui Burugu vs. Kenya Bus Services Limited [2004] eKLR, where the court held as follows:

**“Having examined the record of the proceedings, I am fully satisfied that the trial court based its decision on the evidence before it. The Appellant clearly admitted in evidence that she knew it was dangerous to disembark using the rear door; that there were notices to that effect in the bus; that she was an experienced traveler; that she fell down because she missed a step; and that she did not see anyone else fall down. These admissions are clear. Secondly, the Respondent's witnesses produced an inspection report from the Police prepared immediately after the accident to show that there were no defects in the bus. I concur with the trial court that according to the evidence before it the Appellant simply missed the step and fell off the bus, and got injured. The Respondent was not negligent in any manner. Accordingly, I find no need to interfere with the decision of the lower court, and hereby dismiss this appeal with costs to the Respondent.”**

#### Determination

34. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in Selle vs. Associated Motor Boat Co. [1968] EA 123 that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

35. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

36. However, in Peters vs. Sunday Post Limited [1958] EA 424, it was held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

37. It was therefore held by the Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

38. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants to prove their case is not in doubt. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

39. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

40. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

41. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondents even if the Respondents chose to remain silent.

42. In this case the Appellant testified that on 8<sup>th</sup> July, 2015, he boarded the said vehicle at Katangi on his way to Masii. At the time of

boarding, he was informed by the tout that the bus fare would be Kshs 50/-. When the bus took off he sought to confirm from the conductor who was not available at the time of his boarding the bus, whether the said amount was the correct fare but the conductor informed him that the fare was Kshs 70/-. He then requested to be allowed to alight but the conductor demanded that he pays Kshs 20/- before being permitted to alight despite the fact that the bus had covered a distance of 50 metres. Despite his pleas, the conductor stood his ground forcing the other passengers to intervene and demand that he be allowed to alight without making any payment whatsoever. The bus then slowed down and stopped. However, while lowering one of his legs the bus started off and as a result he lost balance, twisted his leg and fell on the ground. Due to severe pain on his right knee, he was unable to lift himself from the ground. In the meantime, the bus continued with its journey but after about 100 metres, it started reversing back to where he was lying.

43. Although the defence called two witnesses, DW1 and DW2, DW1, the driver was clear in his evidence that he did not know how the plaintiff/appellant found himself outside as he did not use his rear view mirror to check out on the happening at the passenger side/cabin and he was not alerted that any passenger was alighting.

44. DW2, on the other hand testified that at Katangi stage they stopped where people alighted and others boarded and they proceeded with their journey and he started collecting fare. Before long he heard a commotion at the door between the passenger and a turn boy and suddenly, the passenger jumped out and in the process injured himself. He confirmed that the passenger was not in agreement with the fare. According to him, it was the duty of the turn-boy to load and off-load passengers and was in charge of stopping the vehicle by ringing the bell, though he could not recall him ringing the bell for the plaintiff to alight. He however, confirmed that the Plaintiff who was a passenger sat on the 1<sup>st</sup> seat next to the door and got injured on that day and that by the time the motor vehicle stopped, plaintiff had already alighted. In his evidence, they had not locked the door as required since the motor vehicle had barely moved for 1Km and the accident occurred after the bumps. He admitted that the police officer was not at fault by stating that he was responsible for the accident.

45. From the foregoing evidence, what comes out is that the said vehicle stopped at Katangi stage and that some passengers boarded the vehicle. It is admitted that the Appellant was actually a passenger in the said vehicle. It is also admitted that there was an exchange arising from the disagreement on the fare. However, while the Appellant stated that the vehicle stopped for him to alight, DW2 stated that the vehicle never stopped and that the door of the vehicle was never closed. He however seemed to have agreed with the evidence of PW1 that he was to blame for the accident.

46. In her judgement the learned trial magistrate did not make any finding as to when exactly the accident occurred whether it was at the time when the vehicle stopped or when it was in motion. She however found that if the Appellant was to be believed then it was likely that as he was alighting when the bus stopped. It would seem that the only reasons why she did not believe the Appellant's evidence was due to lack of corroboration by the evidence of the police officer who was not the investigating officer and the contradictions between the evidence of the Appellant and that the evidence given by DW1 and DW2. As regards corroboration, there was no requirement that the Appellant's evidence be corroborated before it could be relied upon. As for the evidence of DW1, it did not contradict the Appellant's evidence because he did not know how the accident occurred. As for DW2, it would seem that he was not at the place where the commotion was taking place and only speculated that the Appellant overpowered the turnboy.

47. In my view, the basis upon which the learned trial magistrate disbelieved the Appellant's narration of the events of the day were not supported by the evidence or the law. Had the learned trial magistrate properly addressed herself to the law and the fact, she would have believed the Appellant in which event, as she rightly appreciated, she would have found that the accident occurred after the vehicle stopped. The Appellant testified that before he could completely alight, the vehicle was started and that was how he sustained his injuries. DW1, the driver, never looked through the rear window to find out if all was well and neither DW2 nor the turnboy alerted him that the Appellant was alighting. In any case the vehicle was put on motion before its door was locked contrary to Rule 86A (7) of the *Traffic Rules*.

48. I associate myself with the decision of **Wambilyangah, J** in **Mgao vs. Wokabi & Another Mombasa HCCC No. 165 of 1990 [1993] EA 685** in which he expressed himself as hereunder:

**“The scenario of getting into a moving bus or matatu by a passenger is very common in this country. A prudent driver of a public vehicle should easily foresee that some passengers may be hampered by all sorts of factors, whether personal or otherwise from speedily jumping into the vehicle; and so it behoves him to be patient and allow them enough time to safely get into the vehicle. He should ensure that all his passengers are safely aboard or have safely alighted before he drives from that stage...I find as a fact that the driver in the present case failed to observe those fundamental rules. Instead he hastily and negligently drove off from the stage without checking that more passengers were still struggling to get in: and that is how or why the plaintiff was injured. So the 1<sup>st</sup> defendant's liability is assessed at 100%; and the 2<sup>nd</sup> defendant as his employer is vicariously liable.”**

49. That decision applies with equal force to a driver who hastily moves off from the stage without ascertaining that all the passengers have alighted from the vehicle. I also agree with the position adopted by **Aburili, J** in **Mary Njeri Murigi vs. Peter Macharia & Another [2016] KLR** that:

**“A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof.”**

50. Based on the evidence on record, I find that there was a misdirection on the part of the learned trial magistrate as regards the findings on liability. In my view, based on the evidence adduced, the Respondents were wholly liable for the accident and ought to have been found 100% liable since the only witness who could have positively challenged the Appellant's evidence on the manner in which the accident occurred, the turn-boy, was, for some reason, not called to testify by the defence.

51. As regards the quantum, it is clear that the injuries were soft tissue injuries and the assessment of damages cannot be assailed.

52. In the premises, I set aside the apportionment of liability and substitute therefor a finding that the Respondents were 100% liable for the accident. In the premises the appeal succeeds to that extent. There will be judgement for the Appellant against the Respondent in the sum of Kshs 220,000/- general damages and special damages in the sum of Kshs 8,090/-. The general damages will accrue interest at court rates from the date of the judgement in the lower court till payment in full while special damages will accrue interest at the same rate from the date of filing suit till payment in full. The costs, both of the trial court and this appeal are awarded to the Appellant.

53. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 21<sup>st</sup> day of July, 2021.**

**G V ODUNGA**

**JUDGE**

**Mr Wambua for the Appellant**

**CA Geoffrey**