REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E340 OF 2020

JOHN MWANGI MAINA.....APPELLANT

-VERSUS-

EVANSON NJOROGE MAINA.....1ST RESPONDENT

OSWAL WHOLESALERS (KENYA) LIMITED.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Honourable Ms.E.Wanjala (Senior Principal Magistrate) delivered on 19th November, 2020 in Milimani CMCC no. 432 of 2016)

JUDGMENT

1. At the onset, the appellant herein lodged a suit against the 1st and 2nd respondents vide the Amended plaint dated 29th March, 2018 and prayed for reliefs in the nature of general and special damages in the sum of Kshs.3,500/= together with costs of the suit and interest on the same.

2. In his plaint the appellant pleaded that on or about June 17, 2015, he was lawfully walking along Forest Road when the 1st defendant, with the authority and in the course of employment to the 2nd defendant, carelessly drove managed motor vehicle KAS 501D, causing it to lose control, veer off the road onto the pedestrian walk, and knock down the appellant.

3. The appellant attributed his injuries to negligence on the part of the respondents by setting out their particulars under paragraph 4 of the plaint.

4. The respondents filed their Amended statement of defence on 24th April, 2018 to deny the appellant's claim.

5. At the hearing of the suit, the appellant testified and summoned two (2) other witnesses while the respondents summoned one witness.

6. Upon close of submissions, the trial court dismissed the appellant's suit with costs to the respondents.

7. Being aggrieved, the appellant preferred this appeal and put forward the following grounds of appeal:

> ***i. THAT the learned Magistrate erred in Law and misdirected herself both in Law and Fact in dismissing the plaintiff's suit against the weight of evidence.***
>
> ***ii. THAT the learned Magistrate erred in Law and in fact by failing to take into account relevant matters raised at the trial and consequently arriving at the wrong conclusion.***
>
> ***iii. THAT the learned Magistrate erred in Law and in fact in awarding General Damages that were too low considering the gravity of injuries suffered by the plaintiff/appellant.***
>
> ***iv. THAT the learned Magistrate erred in Law and in fact in wrongly interpreting the Doctrine of Res Ipsa Loquitor in the circumstances of the plaintiff's case.***
>
> ***v. THAT the learned Magistrate erred in Law and in fact in basing her decision on matters that did not go into the root of the plaintiff's case.***

vi. THAT the learned Magistrate erred in Law and in fact in basing her decision on irrelevant matters.

vii. THAT the learned Magistrate erred in Law and in fact in failing to appreciate the Decree of proof required in Civil Cases/Litigation.

viii. ***Other grounds and reasons to be adduced at the hearing***.

8. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. The appellant vide its submissions dated 20th December 2021 submitted that the learned magistrate erred in dismissing the suit based on no evidence when she stated that the accident occurred on Forest Road, which has high pavements, and confirmed that a vehicle cannot drive on a pavement, and that the plaintiff's confirmation of the same is a classic case of her own assumptions.

9. On this the appellant relied on the case of **Kenya Breweries Limited & Another v Alex Ephraim Induswe –Court of Appeal Civil Appeal No.215 of 1997** where it was held that

"A judge should only act on evidence adduced before him and not on assumptions or experience."

10. The appellant submitted that the learned magistrate gave a lot of weight to a police abstract given by PW2, in which she claimed that she was not the investigating officer, that she didn't have the police file or the O.B., and that she couldn't determine what informed the pedestrian who was to blame. She went on to say that the evidence attempted to be adduced through the police abstract was clearly doubtful and suspicious, and that the trial magistrate should not have given it any weight.

11. On this argument the appellant relied on the case of **NK Brothers Building and Contractors Limited v Kamau (2001) 1 E.A at Pg 170** the holding of the Court was in part as follows:-

"……..the evidence contained in the report was dubious and no probative as, inter-alia, witness did not himself inspect the police file. The judge thus erred in placing any weight in it……..."

12. The appellant contends that he and his eye witness testified that the accident occurred off the road, whereas the defendant testified that it occurred in the middle of the road, and that based on the record, the appellant's evidence on how the accident occurred was corroborated by the evidence of PW3, the eye witness, whereas the evidence of DW1 was uncorroborated, and thus his evidence should be taken with a pinch of salt.

13. The appellant further contends that the finding of the trial court that the plaintiff was 100% liable for the accident was flawed because from the record of appeal PW2 and DW1 clearly indicated that there was no police officer at the scene of the accident and apart from the statement of DW1 nowhere in the proceedings did he state that the appellant suddenly jumped on the road.

14. It is the appellant's submissions that the trial court did not go to the accident scene to determine the height of the stated pavements, and so did not examine that evidence to the legal level, rendering it speculative and manifestly assumptive.

15. The appellant pointed out that the trial magistrate made her entire decision while believing/being persuaded by the evidence of DW1 but did not indicate why she did not believe the appellant and his eye witness PW3. On this the appellant relied on the case of **Ndiritu v Ropkoi & Another (2005)1 E.A Pg 334** where the Court of Appeal stated that:

"whereas a judge is entitled to belief the evidence on one of the witnesses as opposed to the other he should state why he could not believe the other eye witness……..."

16. On quantum of damages, the appellant submitted that the trial court totally failed to consider the authority referred to by the plaintiff in support of his prayer in award of general damages. Further the appellant in his quest for an award of general damages relied on the case of **Bernard Wambua v Sawleh Hashii Civil Case No. 28 of 2016** In that case the plaintiff suffered injuries and permanent incapacity at 80%.He was awarded 6,500,000 in General damages for pain and suffering and loss of amenities.

17. The appellant contends that if the trial magistrate had considered this authority she certainly could have arrived at an award in excess of Kshs.700,000/= considering the severity of the injuries suffered by the appellant in this case which award was inordinately low.

18. The appellant therefore prays that the judgment of the lower court be set aside and substituted with an order that the appellant (original plaintiff) did prove liability in the accident subject matter on a balance of probability as required in law and further that the award of Kshs.700,000/= be revised upwards to Kshs.3,000,000/= .

19. In retort, on ground 1,2,5,6 and 7 the respondents submitted that the trial court in reaching to dismiss the appellant suit took into account the testimony of all the witnesses and noted that the appellant had not proved his case to the required standard.

20. The respondents pointed out that the court noted the evidence by PW1 and that of DW1 as to the issue of pavements corroborates making the appellants allegation that he was hit while off the road unlikely and the 2nd respondent averments that the accident occurred in the middle of the road and subsequent evidence adduced by the police wholly blaming the appellant more logical.

21. The respondent contends that the court while dismissing the appellants' suit notes that all evidence adduced blamed the appellant while

none was adduced to show any contributory negligence on the part of the 2nd respondent. On this the respondent relied on the case of **Stat pack Industries v James Mbithi Munyao Civil Appeal No. 152 of 2003** Justice Visram stated that an injury is not sufficient to hold someone liable for the same.

22. On ground 4, the respondents relied on the case **Mary Ayo Wanyama & 2 Others v Nairobi City Council Civil Appeal No.252 of 1998** stated that:

> "***It is not right to describe res ipsa loquitor as a doctrine as it is no more than a common sense approach not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was prima facie evidence of negligence and the onus lay on the defendant to rebut that prima facie case. It means the plaintiff prima facie establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety…Res ipsa loquitor applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. This applies also to situations where no submission of no case is made…The plaintiff must prove facts which give rise to what may be called the res ipsa loquitor situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence.***"

23. The respondents contend that the appellant did not establish a prima facie case as against the respondents if anything the evidence adduced exonerates the 2nd respondent from negligence on his part culminating in the police blaming the appellant for the accident.

24. On ground three, the respondents submitted that the trial magistrate appropriately considered the evidence before him and made a just and fair quantum of damages finding. The respondents further submitted that there were two medical records by Dr. Musau and Dr. Mwangombe dated 16/10/2017 and 13/03/2018 respectively. That Dr. Mwangombes prognosis was that the appellant was in good general condition with stable vital signs was alert and well oriented.

25. The respondent submits that the evidence adduced in this court is indicative that the appellant did not suffer total permanent incapacitation and therefore the issue of loss of earning capacity does not arise and the same should therefore not be awarded.

26. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. I have also considered the record and the impugned judgment. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. The court should however bear in mind that it did not see the witnesses testifying and give due allowance for that.

27. In **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR,** the Court of Appeal stated that; ***[A]n appeal to this Court from a trial by the High 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 allowances in this respect.***

28. The appellant testified as PW1 adopting her witness statement dated 26th March, 2019 .She told the court that she the accident happened when the suit vehicle KAS 501D lost control veered off the road onto the pedestrian walkaway and violently knocked him, he sustained severe injuries. He was treated at Guru nanak Hospital where first aid was administered and later taken to Kenyatta Hospital where he was admitted and discharged. He sustained injuries on the forehead, 2 of his teeth broke, and his right hands got paralyzed since that time. She blamed the driver of KAS 501D for the accident. He produced the documents in her list of documents.

29. PW2, ***P C Alice Laban*** of Pangani police station testified and produced a police abstract to prove that the plaintiff was hit while he was a pedestrian along Forest road, vehicle KAS 501D hit him. She stated that the victim was blamed for the accident and produced the abstract as PEX5.she stated that she is not the investigating officer, she did not have the police file and occurrence book but the abstract was a summary of the two, investigations were concluded and the victim blamed for the accident.

30. DW1, the 1st defendant(1st respondent) testified that he saw the appellant walking along Thika Road and he jumped to the pavement and suddenly crossed Forest Road and was knocked while in the middle of the road and not off the road.

31. The trial court considered the evidence but was not satisfied that the appellant had proved her case on a balance of probabilities and dismissed the suit prompting this appeal. The appellant has faulted the trial magistrate for dismissing the suit on various grounds. From the grounds of appeal and submissions by parties, the issues that arise for determination are; whether the appellant proved that the respondent was to be blamed for the accident and depending on the answer to the first issue, whether she was entitled to compensation.

32. The appellant's evidence and submissions was that he and his eye witness testified that the accident occurred off the road, whereas the defendant testified that it occurred in the middle of the road, and that based on the record, the appellant's evidence on how the accident occurred was corroborated by the evidence of PW3, the eye witness, whereas the evidence of DW1 was uncorroborated.

33. The respondents contended that the court noted the evidence by PW1 and that of DW1 as to the issue of pavements corroborates making the appellants allegation that he was hit while off the road unlikely and the 2nd respondent averments that the accident occurred in the middle of the road and subsequent evidence adduced by the police wholly blaming the appellant more logical.

34. I do find that no evidence of how the appellant caused or contributed to the occurrence of the accident, the appellant was negligent when he suddenly jumped on road in the way of the suit vehicle without having regard to his own safety.

35. On the issue of quantum, it is clear from the doctor's prognosis was that the appellant was in good general condition with stable vital signs was alert and well oriented and that the evidence adduced in this court is indicative that the appellant did not suffer total permanent incapacitation and therefore the issue of loss of earning capacity does not arise and the same should therefore not be awarded.

36. I have perused the documents produced by the appellant as well as those attached to her list of documents filed together with her plaint before the trial court. A perusal of the police abstract, shows that the pedestrian is to be blamed for the accident.

37. In **Ephantus Mwangi v Duncan Mwangi Wambugu [1984] eKLR,** the Court of Appeal rendered itself thus:

A court of appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

38. Having considered this appeal, the evidence and the arguments as well as the decision of the trial court and reasons thereof, and having given due consideration to all the materials on record, I am unable to fault the trial court on its finding of fact.

39. This appeal lacks merit, it is dismissed. Each party will, however, bear their own costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 25th day of March, 2022.

…….…….

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent