REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL No. 102 OF 2018

KYALO ELLY JOY...APPELLANT

-VERSUS-

SAMUEL GITAHI KANYERI..RESPONDENT

(Being an appeal against the judgement delvered by Hon Kassan (SPM)

on 30th May, 2018 in Mavoko PMCC 877 of 2015)

BETWEEN

SAMUEL GITAHI KANYERI...-PLAINTIFF

-VERSUS-

KYALO ELLY JOY...-DEFENDANT

JUDGEMENT

1. Vide plaint filed in Mavoko Principal Magistrate's Court in PMCC No. 877 of 2015 by the respondent, the respondent sought General Damages, Special Damages, Costs and Interests. According to the Plaint, on 11th August, 2015, the Respondent was lawfully standing near Soham Petrol Station along Nairobi-Mombasa Road when the defendant, his driver, agent and/or servant drove motor vehicle registration No. KAS 047F which was registered and beneficially owned by the defendant, so recklessly, negligently and/or carelessly that the said vehicle lost control, veered off and knocked the Respondent who was completely off the road causing him serious injuries. Both the special damages and negligence were particularized in the plaint.

2. In his defence, the appellant denied that he was the owner of the said vehicle, the accident and the loss and damages by the respondent. In the alternative, the Appellant averred that the said accident was caused and/or substantially contributed to by the negligence of the respondent whose particulars were itemised. He prayed that the suit be dismissed with costs.

3. In his reply to the defence, the Respondent reiterated the contents of the Plaint.

4. In his statement, the Respondent stated that on 11th August, 2015 at around 9.00 pm he was on his way from Isinya and upon reaching near Soham Petrol Station, he decided to buy some fuel on the opposite Petrol Station. While waiting to cross the road, he was knocked down by motor vehicle reg. no. KAS 047F and he fell off the tarmac road and was seriously injured. He therefore blamed the driver of the said vehicle for overspeeding.

5. In his oral evidence, he stated that on the said day, he was driving from Isinya heading to Jericho when at Mlolongo, his vehicle ran out of fuel and he parked it in order to refuel. He then crossed the main road and went to the service lane. As he stood and waited, he saw an oncoming vehicle which swerved and hit him on the pavement as he was preparing to cross. After the accident he was assisted by his wife but he did not see the person who hit him though he marked the registration number of the vehicle as KAS 047F. He then produced the documents annexed to his plaint as exhibits. It was his evidence that the accident changed his life as he could not walk for long. He testified that he spent Kshs 300,000.00 in his treatment and prayed for compensation.

6. In support of his case, the Respondent called as PW1, **Dr Ndeti** who examined the Respondent on 14th March, 2016 and prepared a report for him which he produced.

7. In cross-examination, he stated that he relied on the discharge summary in preparing the said report. He stated that the Respondent complained of pain which he confirmed. Though the Respondent was not under treatment, he had limitation of movement on the right knee joint and there was evidence of arthritis linked to the injury. Though he was managed for the same, he was not treated and was given pain killers. As a result, he was unable to flex his muscles. According to him, the Respondent could be assisted by physiotherapy which could improve his condition but he would not go back to normal. He estimated his disability at 10% and stated that the disability was permanent.

8. PW2, testified on behalf of the Base Commander. According to him, a report of an accident involving motor vehicle reg. no. KAS 047S along Mombasa Road was reported. According to him the pedestrian was trying to cross the road when he was hit by the said vehicle and sustained injuries which were classified as harm. It was his evidence that the case was pending under investigation and he exhibited he police abstract. According to him only the driver reported the accident.

9. In cross-examination, he stated that a P3 form was issued but the victim's report was not in the file. He was however unable to obtain the police file in which most of the information ought to have been. He however stated that the name of the owner of the vehicle was in the abstract.

10. In re-examination, he stated that the owner was the driver of the vehicle.

11. The defence did not adduce any evidence. After considering the evidence on record, the trial court found the Appellant 100% liable and assessed general damages in the sum of Kshs 750,000.00, special damages in the sum of Kshs 301,700/- and awarded costs as well.

12. In this appeal the Appellant challenges both liability and quantum. According to the Appellant, the learned trial magistrate disregarded the evidence adduced before it, the submissions and authorities. It was submitted that the said court overlooked the fact that the Respondent was clearly careless while crossing the road and that the police officer stated that no charges had been preferred against the Appellant as the case was still pending and no one was to blame. It was submitted that no sketch map was produced to indicate the point of impact and the circumstances under which the accident took place. Further the abstract was produced by a police officer who neither investigated the matter nor witnessed the accident. In this regard reliance was placed on **Margaret Wanjiru vs. Karanja & Another Nakuru HCCC No. 186 of 2002**.

13. On the award it was submitted that the award of Kshs 750,000.00 was exorbitant and the same ought to be reduced to Kshs 80,000.00 since the Respondent sustained soft tissue injuries and relied on **Mulwa Musyoka vs. Wadia Construction HCCC No. 1321 of 1997**.

14. On behalf of the Respondent, it was submitted that the trial Magistrate was correct and justified in finding the Appellant 100% liable since in arriving at the said finding, the Learned Magistrate relied on the evidence on record for both Pw2 and Pw3. As per the Respondent's version, he was standing off the road preparing to cross when he was knocked by the Appellant's motor vehicle registration No. KAS 047F while as per the version in the OB where the reportee was the Appellant himself, the Respondent is said to have been crossing when he was hit.

15. According to the Respondent, the Respondent's evidence on record remained unchallenged and uncontroverted as the Appellant opted not to call or avail any witness to rebut the Respondent's evidence or version. It was submitted that the only way the Appellant could have rebutted that evidence was by availing his witness to assert the same and failed to do so and should remain so for ever. It was therefore submitted that based on the evidence on record which was never rebutted, the Learned Magistrate was correct and justified to find the Appellant 100% liable.

16. On the award of damages, it was submitted that the said award was reasonable, sufficient and commensurate with injuries suffered by the Respondent as shown in the documents produced. According to the Respondent, the Learned Trial Magistrate's finding on General damages and award of Kshs. 750,000/= was correct and the same was based on the Law, facts, evidence and commensurate with the injuries sustained by the Respondent and the Learned Trial Magistrate therefore acted on correct principles in reaching his conclusion.

17. It was therefore submitted that the said award of Kshs. 750,000/= could not be alleged to be inordinately high or founded on wrong principles and the court was urged to dismiss the appeal with costs.

Determination

18. 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 form a trial by the High Court is by way of a retrial and the principles upon 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."**

19. In **Coghlan vs. Cumberland (1898) 1 Ch. 704**, the Court of Appeal (of England) stated as follows -

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

20. Therefore, this court is under a duty to revisit the facts as present 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.

21. 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 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 circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court 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, and 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 form 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 be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment 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 show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

22. It was therefore held by the Court of Appeal in **Ephantus Mwangi & 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."

23. In this appeal, it is clear that the determination of the appeal revolves around the question whether the appellant proved his case on the balance of probabilities and if so what ought to have been the quantum of damages. That the burden of proof was on the appellant to prove his case is in doubt. Section 107 (1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

24. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

25. The two provisions were dealt with in **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence

which is captured in Sections 109 and 112 of the Act."

26. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the respondents, the appellant in this appeal depending on the circumstances of the case.

27. In **Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

> **"As a general preposition 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 fi no evidence at all were given as either side."**

28. I agree that the Court of Appeal's position in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** espouses the correct legal position that:

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."**

29. 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 KLE 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 that 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."**

30. Similarly, **Lord Nicholls** of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

> **"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."**

31. 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.***
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> ***This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."***

32. However, where there is credible evidence from the Plaintiff, the failure to adduce any evidence by the defence may well mean that the plaintiff has attained the standard prescribed in civil proceedings. It was therefore held in **Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga through Stanely Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997** that:

> **"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."**

33. In this case, the only evidence on record was from the Respondent. According to him, he was hit by the Appellant's vehicle off the road. It was his evidence that the said vehicle swerved off the road and hit him when he was waiting to cross the road. That evidence was not rebutted.

34. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:-

"In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."

35. What are the consequences of a party failing to adduce evidence? In the case of **Motex Knitwear limited vs. Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002, Lessit, J** citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998** appreciated that:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

36. Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that itis trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

37. In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & another Nyeri HCCC No. 95 of 1988, Makhandia, J** (as he then was) held that:

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

38. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni J**. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."

39. Similarly, in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165 B of 2000, Mbaluto, J** held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted.

40. If one is still in doubt as to the legal position reference could be made to the case **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff.

41. In **Vyas Industries vs. Diocese of Meru [1976 – 1985] EA 596; [1982] KLR 114,** it was held that an appellate court will not interfere with apportionment of liability unless the Judge has come to a manifestly wrong decision or based his apportionment on wrong principles. In this case there was evidence upon which the learned trial magistrate could arrive at the decision he did and I find no justification for interfering therewith.

42. As regards quantum, in **Woodruff vs. Dupont [1964] EA 404** it was held by the East African court of appeal that:

"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

43. In this case, according to the medical report, the Respondent sustained bruises on the face, dislocation of the left knee joint, fractured left hand fibula, torn medial meniscus and torn collateral ligament. In his submissions, the Appellant has not given any justification for seeking a reduction of the award on general damages apart from a bare statement that the award is exorbitant. It is my view that the award made by the learned trial magistrate cannot be termed as having been manifestly excessive as to warrant interference.

44. Consequently, I find no merit in this appeal which I hereby dismiss with costs.

45. Judgement accordingly.

Read, signed and delivered in open court at Machakos this

25th day of February, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Langalanga for Mr Mulyuingi for the Appellant

CA Geoffrey