REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 172 OF 2015

KERAI GHANSHYAM.....APPELLANT

-VERSUS-

JAMES WAMBUA MUENDO.....RESPONDENT

(Being an appeal from the Judgement of the Hon. E. K. Too SRM delivered on 8th October 2015

at the Principal Magistrate's Court at Mavoko in PMCC No. 964 of 2014)

BETWEEN

JAMES WAMBUA MUENDO.....PLAINTIFF

VERSUS

KERAI GHANSHYAM.....DEFENDANT

JUDGEMENT

1. The appeal herein arises from the judgement of Hon E Too (SRM) in **Mavoko PMCC No. 964 of 2014** dated 8.10.2015 in which he awarded the respondent general damages of Kshs 300,000/ plus Kshs 3,000/ as special damages and held the appellant 90% liable in damages to the respondent.

2. The Appellant was aggrieved by the said judgement and filed a memorandum of appeal dated 4.11.2015 where he raised the following grounds of appeal:

> **a. The learned magistrate misdirected himself in law and fact by failing to apply legal principles for proof of liability hence arriving at a wrong decision.**
>
> **b. The learned magistrate misdirected himself in law and fact by shifting the burden of proof on the issue of liability on the appellant thereby arriving at a wrong decision.**
>
> **c. The learned magistrate misdirected himself in law and fact by holding that the claim on liability had been proved whereas the evidence by the respondent and his witness was inconsistent and contradictory.**
>
> **d. The learned magistrate mis-directed himself in law and fact by making an excessive award on general damages in total disregard of existing decisions and appellant's submissions.**

3. The Appellant sought for an order that the judgement be set aside and order the respondent's suit dismissed with costs. In the alternative, liability be apportioned equally and that the general damages be reduced.

4. This being a first appeal, the role of this court is well cut out namely, to re-evaluate the evidence and subject it to a fresh analysis so as to come to an independent conclusion as to whether to uphold the decision of the trial court.

5. The Respondent testified as Pw1. According to his testimony tendered on 17.8.2015, he stated that on the material date he was heading to work when he alighted at Nation Media along Mombasa road on the service lane only to be hit by the appellant's motor vehicle registration number KBQ 684F which was being driven at high speed. He stated that he fell down and was injured on the hip, left leg and forehead as well as a fracture of the right hand. He was rushed to Shalom hospital and later lodged a report at Athi River police station. He produced the treatment notes, doctor's medical report, P3 form and receipt for Kshs 6,000/. He claimed that the respondent's driver for driving at high speed on the service lane. On cross examination, he admitted that he was crossing the service lane when he was hit by the vehicle. He also added that he was hit from the service lane when he wanted to cross and would have taken off had it not been for the fast speed of the vehicle. He also admitted that the driver was not charged.

6. No 65994 Pc Samson Obimo (Pw2) produced the police abstract as an exhibit and confirmed that nobody had been charged and that the driver who was still at large was to blame for the accident. On cross examination, he stated that no scene visit was done since the driver had interfered with it. He also stated that the accident was reported by the victim and that the driver is still at large. The respondent closed his case and likewise the Appellant. Parties thereafter filed submissions and that the learned trial magistrate gave judgement for the respondent against the appellant on liability at 90% to 10% and awarded general damages of Kshs 300,000/ plus special damages of Kshs 3,000/.

7. The appeal was canvassed by way of written submissions. It is only submissions by the appellant that are on record. Learned counsel submitted that the respondent did not prove his case to the required standard of proof and ought to have been dismissed. It was also submitted that if liability was to be attributed then the same should be shouldered equally by the parties. On quantum of damages, it was submitted that the sum of Kshs 100,000/ would be sufficient for the respondent and which should be subjected to the 50% contributory negligence.

8. I have given due consideration to the appeal as well as the record and submissions presented. I find the following issues necessary for determination:-

a. Whether the Respondent's case was proved beyond the requisite standard of proof.

c. **Whether the quantum of damages awarded is reasonable?**

d. What orders may the court make?

9. As regards the first issue, it was incumbent upon the respondent to prove the negligence against the appellant as provided for under sections 107, 108 and 109 of the Evidence Act. A perusal of the record of appeal reveals that the learned Magistrate held that the Respondent's testimony that he was hit by the Respondent's motor vehicle KBQ 684F was unchallenged hence the Appellant was substantially liable for Respondent's injuries at 90% liability but also the Respondent ought to have taken evasive measures to avoid being hit by the Appellant's motor vehicle hence 10% liable for his injuries. (*Judgment contained at page 51 of the Record of Appeal*). Again at page 41 of the Record of Appeal the respondent's evidence is captured as follows:-

"I alighted at Nation Media along Mombasa Nairobi Road. I was on the service lane. A vehicle KBQ 648F hit me on the right tipper. It was at speed. It came and hit me. I blame the driver for the accident……I was hit by KBQ 684F. The search shows the same to belong to Kerai Ghanshyam the Defendant. I produce the search as P Exhibit 5"

On cross-examination the Respondent's answers were as follows:-

" …..I only saw the vehicle that hit me. I had stopped to cross…….The driver was at a speed…I would have taken off if it was slow….I was hit from the service lane when I wanted to cross. The lorry driver took me to hospital…."

10. It is the Appellant's contention that the Respondent failed to discharge the burden of proof required in civil cases under section 107,108 and 109 of the Evidence Act, Cap 80. The burden imposed upon a party alleging a fact was succinctly put forth by Ringera J (as he then was) in the case of **Lucy Muthoni Munene Vs. Kenneth Muchange & Aother NBI HCC No. 858 of 1998** as follows:

"..it is an elementary principle of law that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In a personal injury claim that betokens that the plaintiff must make out that the defendant is negligent as alleged. The legal burden of proof is clearly on the plaintiff and he must show that the loss is to be attributed to the negligence of the defendant. If he does not discharge that burden by adducing evidence from which it can be inferred that on a balance of probability the defendant is negligent is negligent, then he cannot succeed even though the court may be welling with sympathy for him.''

11. After carefully assessing the evidence of the Respondent I find that the same was sufficient enough to prove the blame of the driver of motor vehicle KBQ 684F. The Respondent confirmed that he saw the Appellant's motor vehicle KBQ 684F that hit him along Nairobi Mombasa road. He stated clearly that the accident took place along the service lane and that the appellant's driver ought to have been careful by considering other road users. It is obvious that had the driver been driving at a slow speed, the accident could have been avoided. Even though the appellant did not tender evidence by giving his version of events, I find that the respondent also was expected to exercise caution for his safety while walking along the service lane. The respondent was expected to know that other motorists might be forced to resort to using the service lane due to certain circumstances. Iam satisfied that the respondent did contribute to the accident and which I apportion at 10% liability while the appellant shall shoulder the rest of responsibility.

12. Guided by the case of **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.

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 lose because the requisite standard will not have been attained."

13. Further **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."

14. I am alive to the Court of Appeal's position in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** that 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."

In the above case, the court held that submissions alone does not amount to evidence. The appellant in the lower court failed to tender evidence and hence the respondent's evidence remained uncontroverted.

15. Further, in the case of **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 Stanley 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."

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.

17. The Appellant assert that the police abstract (Exhibit 1) did not establish who was to blame for the accident and further that the police officer (PW2) was not the investigating officer neither did he visit the scene of accident or produce any occurrence book in connection with the accident hence his testimony was hearsay. The Appellant proposes that the Respondent ought to be held 50% liable. In my view this is not a case where parties should shoulder equal liability noting that the Respondent's testimony was unchallenged by the Appellant. Further the Learned Magistrate's finding that the Respondent should shoulder 10% liability is reasonable noting that the Respondent stated that the Appellant's motor vehicle was being driven at a speed hence the respondent could not have taken immediate evasive measures to avoid being hit. In fact, he stated that he would have escaped had it not been driven at a high speed. The apportionment of 10% contributory negligence on the respondent was reasonable in the circumstances. The appellant's driver was expected to be on a proper lookout for other road users as he drove along the service lane. The appellant opted not to tender evidence to give his side of the story and so the trial court had to rely on the available testimony of the respondent which in my view was not controverted in any way. In **Tart vs. Chitty and Co. (1931) ALL ER Pages 828 – 829 Rowlat, J** had this to say: **"It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be things and people and animals in the way at any moment and he is bound to go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it."**

18. From the foregoing observations, I am satisfied that the appellant's driver was negligent and substantially contributed to the accident. I apportion liability between the appellant and the respondent at 90% to 10% respectively. The judgement on liability by the trial court was proper and must be upheld.

19. As regards the second issue, it is the Appellants contention that the Learned Magistrate awarded excessive general damages of Kshs. 300,000. At page 4 of the Record of Appeal and in paragraph 4 of the Plaint, the Respondent had particularized injuries as follows:-

a. Bruises on the scalp.

b. soft tissue injuries to the right hip region.

c. Fractured right ulna bone distal aspect.

d. soft tissue injuries to the left ankle.

20. Dr. Ndeti's medical report produced as Exhibit No. 6 concluded that the Respondent suffered soft tissue injuries and a fractured Ulna bone. The said injuries were confirmed in the P3 Form Exhibit 3. I note the authority **Nairobi HCCC NO.467 of 2003 Thomas Kamau vs Target Guards Limited (Unreported)** relied on by the Appellant where the court awarded **Kshs.200,000** establish multiple fractures unlike the Respondent herein who sustained one fracture and soft tissue injuries. The said case was decided 14 years ago and the incidence of inflation cannot be gainsaid and must be factored into account. This court is guided by the long trodden route namely that an appellate court cannot interfere with the award of damages by a trial court unless the said court has taken into account an irrelevant factor or left out a relevant one or that the award is inordinately high or so low as to represent an erroneous estimate of damages (**Kemfro Africa Limited T/A Meru Express Services (1976) &Another Vs Lubia & Another (No.2) (1985) eKLR).**

21. The Respondent had proposed Kshs.350, 000 as adequate compensation by relying on the case of **Markiso Koko Nyandara vs John Nganga & Another HCCC No. 5152/1988 Nrb** that had been decided 23 year ago and in which the court awarded **Kshs.100,000**. The Learned Magistrate awarded Kshs.300, 000.Looking at all the issues I am of the view that **Kshs.300,000/-** is not inordinately high an award taking into account the inflation and authorities relied on by parties. In that regard, the decision of the trial court on award of damages was not in error and must be upheld.

22. In the result, it is my finding that the appeal lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 24th day of February, 2021.

D. K. Kemei

Judge