REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CIVIL APPEAL NO. 156 OF 2017

WAMBUA KATITI.....APPELLANT

VERSUS

OBED MOSE NYAGAKA.....RESPONDENT

(Being an *Appeal against the Judgement of Hon. L. Kassan (S.P.M) at Mavoko Senior Principal Magistrate's Court in Civil Case No. 355 of 2017 delivered on 31st October, 2017*)

BETWEEN

OBED MOSE NYAGAKA.....PLAINTIFF

VERSUS

WAMBUA KATITI & ANOR.....DEFENDANT

JUDGEMENT

1. The Appeal herein arises from the Judgement of Senior Principal Magistrate **Hon. L. Kassan** delivered on 31st October, 2017 in **Mavoko P.M.C.C.NO.355 of 2017** wherein the learned magistrate apportioned liability at 100% on the Appellant and awarded the sum of Kenya Shillings 400,000/= being the value of the respondent's damaged vehicle and the sum of Kshs 60,000/ being proved special damages.

2. Being aggrieved by the said decision, the Appellant lodged the present appeal where he raised five (5) grounds of appeal as set out in the memorandum of appeal dated **30th November, 2017**. They are as follows: -

> ***i. The learned magistrate erred in law and fact in wrongly evaluating the evidence on record and thereby arriving at a wrong conclusion that the accident in question was wholly caused by the negligence of the Appellant and therefore proceeded to apportion liability at 100% in favour of the Respondent.***
>
> ***ii. The learned magistrate erred in law and fact when he awarded damages in the amount of Kshs. 460,000/= when the same had not been specifically proven as per the law.***
>
> ***iii. The learned magistrate erred in law by awarding special damages based on pre-accident value of the motor vehicle registration number KAV 758C which the Respondent valued at Kshs. 400,000/=but failed to provide proof of the same as required by the law.***
>
> ***iv. The learned magistrate erred in law and fact by awarding further special damages over and above the Pre-accident value of the said vehicle when the only receipts properly produced by the Respondent before the trial court amounted to Kshs. 17,000/=.***
>
> ***v. The learned magistrate erred in law and fact in failing to consider in totality the evidence and the submissions filed on behalf of the appellant in support of its defence therefore thus arriving at a wrong decision.***

3. The Appellant seeks to have the trial court judgement set aside and a fresh determination on liability and quantum be made.

4. The Appellant contends that the learned magistrate erred in apportioning 100% liability upon the Appellant and that the burden of proving that the Appellant was to blame for the accident is with the Respondent. He further contends that the Respondent did not discharge that

burden as no police officer came to court to testify as to how they concluded that the Appellant was to blame for the accident, and that the award of Special damages not claimed and proved by way of original stamps was a wrong decision. The appellant sought for the setting aside of the lower court judgement.

5. The appeal was opposed by the respondent. Parties filed written submissions. The appellant's submissions are dated 23/12/2020 while those by the respondent are dated 3/01/2021. The Respondent argues that liability having been arrived at from the Judgment of the trial court was well proved on balance of probabilities. The Respondent further submitted that, a claim for special damages must not only be pleaded, but must strictly be proved. In this case, the Respondent submitted that, PW1 testified on special damages and that the same being a material damage claim need not be shown to have been incurred. The Respondent further contends that the instant Appeal is fatally incompetent and should be dismissed with costs. The appellant submitted that the respondent did not prove his case on the threshold of proof in that the evidence of the police was wanting since the sketch maps were not produced so as to help the court determine the question as to how the accident and the party to be blamed therefor. It was submitted that since the facts leading to the accident were not clear, then the trial court ought to have ordered the parties to share liability. On quantum, it was submitted that the assessor's report should not have been taken as the gospel truth as the same was not conclusive regarding the manner in which the pre- accident value was arrived at. On special damages, it was submitted that only Kshs 17,000/ was specifically pleaded and proved and hence the award of Kshs 60,000/ should be set aside.

6. This being a first appeal, the duty of this court is to re-evaluate the evidence adduced before the trial court so as to arrive at an independent decision as to whether to uphold the decision of the trial court. The brief background to the matter is that vide a plaint dated 14 th March 2017, the Respondent sought damages and loss occasioned by the Appellant's negligence when the appellant's driver or agent in control of mv registration number KBY 873 hit the respondent's vehicle registration number KAV 758 C and which led to the respondent's car being severely damaged and which whose pre- accident value was assessed at Kshs 400,000/. The respondent maintained that the accident took place at around 10 pm when the appellant's driver or agent was overtaking a series of vehicles. The respondent called the accident loss assessor James Mwaura who assessed the pre-accident value at Kshs 400.000/. The said assessor stated that he carried out the assessment nine months after the accident. The respondent also called a police officer Pc Kihoyo who produced a police abstract and maintained that he did not visit the scene and that the appellant's driver or agent was to blame for the accident. On cross-examination, the witness (Pw3) stated that he did not know why the investigating officer did not prefer charges against the appellant's driver or agent.

The appellant's witness Wambua testified that he was driving along Mombasa road when he spotted some headlights which he assumed to be from a motorcycle and realized too late that it was a motor vehicle and suddenly there was a collision. The appellant maintained that he was on his lawful lane.

7. I have given due consideration to the appeal and the record as well as the submissions of both learned counsels. The issues for determination are as follows:

> ***i. whether the apportionment of liability at 100% on the Appellant by the trial court was justified.***
>
> ***ii. whether this Honourable Court should interfere with the trial court's assessment of damages.***

8. On issue of who was liable for the accident, it is imperative at this juncture to determine how the accident occurred and who was responsible for the same. The police officer (Pw3) testified that he did not go to the scene of the accident and was not the one who investigated the case. He produced the police abstract as an exhibit. He further testified that, according to the police abstract the driver of the motor vehicle registration no. KBY 873D was to blame. He added that motor vehicle registration no. KBY 873D was heading to Machakos, overtaking other motor vehicles and collided with motor vehicle registration no. KAV 758C which was heading in the opposite direction leading to the extensive damage on both motor vehicles. He pointed out that, no charges were preferred against the driver of motor vehicle registration no. KBY 873D. The Respondent testified that he attempted to avoid the head on collision by swerving to his left side and that the Appellant followed him after he lost control of his motor vehicle. The appellant's witness testified that he saw some headlights which he assumed to be those of a motorcycle only to bump onto a vehicle and could not avoid the accident as it was too late and only tried to swerve to the left. The appellant's witness confirmed that his vehicle's lights were in good condition. If that is true, then he was expected to have had a proper lookout for other road users. It also transpired that he was at the time overtaking a series of other vehicles. It is thus clear that he failed to observe carefully the highway code of traffic and thus caused the accident. He ought to have checked whether it was safe to overtake other vehicles at the time. Since the appellant's driver was overtaking other vehicles, then he must have encroached onto the lane of the respondent who was forced to swerve to the left in a bid to avoid the accident but was hit by the appellant's vehicle. The respondent was rightfully driving on his lane and thus he did not contribute to the accident in any manner. Even though the investigating officer was not called to testify and to produce the sketch maps, the available evidence by the respondent, the police officer and the appellant's witness was sufficient to establish negligence on the part of the appellant. 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 dependent on the existence of facts which he asserts must prove that those facts exist.***

9. 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 that 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 that fact is upon him.***

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 cast 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."***

10. In the case of **Nandwa vs Kenya Kazi Ltd [1988] KLR 488,** the Court of Appeal held thus:

> ***"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence provides some answer adequate to displace that inference."***

11. In this case, it was contended that the learned trial magistrate did not consider the evidence of the defence witness. According to the defence witness, the police officer conceded that he was not the investigating officer who dealt with the matter and his evidence was a secondary source of information. The police officer did not produce the investigation report, police file or the sketch map to corroborate the evidence on the police abstract.

12. It was therefore submitted that the evidence of the Police Officer in the instant Appeal was not one which can be admissible in evidence since he was not the investigating Officer as he was never involved with investigations and did not produce the Police file in court or any sketch plans in absence of investigating officer's evidence and police file. It was contended that the investigating officer ought to have been called to testify instead of PW3. I agree with the decision of **Khamoni J.** in **High Court Civil Case No. 656 of 2002 Francis Njoroge Njonjo vs. Irene Muroki Kariuki** and **7 Others** where he expressed himself as follows:

> ***"In her submissions concerning the 6th Defendant, M/s Oburu has relied on the evidence of PW5, a Police Constable Joseph Mutungi who produced copy of the Police Abstract and Occurrence Book from Parkland Police Station concerning that accident. They were P Exhibit 15 and P Exhibits 16 and 17. PW5 was not the Investigating Officer and was not attached to Parklands Police Station during the time of the accident. His evidence was therefore based on those three documents he was given to produce in the court and the Plaintiff's Counsel has pointed out that the documents included information that the Investigating Officer found the 6th Defendant responsible for causing the accident that was why the 6th Defendant faced charges of causing death by dangerous driving."***

20. In this case there was evidence of PW3, the police officer who reiterated the information gathered by the investigations officer who was transferred. PW3 noted that the investigations officer in his police abstract noted that the driver of the motor vehicle registration no. KBY 873D, the Appellant/Defendant, was to blame for the accident. Accordingly, the Respondent's case cannot be dismissed merely on the ground that the investigations officer did not testify. It is not in doubt that the Respondent/Plaintiff was driving from the opposite side. It is also not in doubt that ordinarily, DW1 would have been liable for the accident since he was expected to give way to the Respondent. In any case it transpired from the evidence that the appellant's driver was at the time overtaking several vehicles and in the process failed to notice the respondent who was driving on his rightful lane.

21. The evidence of the Appellant's witness (Dw1) is quite interesting and telling about his culpability for the accident when he testified that the motor vehicle looked like a motor cycle as the lights were dim only to realize the same was a motor vehicle at a very close range. He further testified that the same was being driven almost on the yellow line or beyond the yellow line and that he did not cross over to that lane as he swerved to his left to avoid the head on. As the appellant was then overtaking other vehicles, it is obvious that his vehicle must have occupied the respondent's lane and thus his mention of a yellow lane. It is instructive that having overtaken other vehicles the appellant and the respondent were now using the available lane which was rightfully the respondent's and hence the collision. The respondent stated that he was forced to swerve to the left but still his vehicle was hit by that of the appellant. The appellant's claim that he swerved to the left is not truthful since there were other vehicles that he was overtaking at the time. Iam satisfied that the appellant wholly contributed to the accident and hence the finding by the trial court on liability was quite sound. I see no reason to interfere with it. The appeal on liability thus must fail.

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

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

23. It is noted that the trial court awarded the respondent Kshs 400,000/ for loss occasioned to the respondent's vehicle as per the evidence of the accident assessor. The trial court also awarded special damages of Kshs 60,000/ comprising of towing charges from the road to the police station and then to the garage (14,000/), storage charges (40,000/) and the loss assessor's report charges (6,000/). Learned counsel for the appellant has submitted that the said sums were not properly proved and ought to have been rejected by the trial court. Starting with the amount proposed by the loss assessor, it is noted that the accident assessor was an expert witness in his own right and he pointed out that the respondent's vehicle was a total loss and a write off as the vehicle had been damaged beyond repair. He produced the report and was cross examined at length by the appellant's advocate. His evidence did not betray him as one who did not know his field of expertise and thus i find that his evidence was credible regarding the total loss occasioned to the respondent's vehicle. The report was accompanied with several photographs showing the extensive damages occasioned to the respondent's vehicle. There is therefore no doubt that the vehicle suffered extensive damage. The expert gave his opinion and justified the various items giving rise to the eventual amount which he rounded it off to

Kshs 400,000/. It is instructive that the said amount had been specifically pleaded in the plaint and hence it was not plucked out of the blues and that the appellant had been forewarned. The amount was subsequently proved specifically by the author of the report who gave a breakdown on each loss item. It was not necessary for the expert to avail receipts on the various items since the vehicle was yet to be repaired and expenses incurred. The amount was needed so as to put the respondent in the position he was prior to the accident. The respondent's vehicle had been indeed damaged as a result of the accident and confirmed by the photographs. The report showed the extent of the cost of repairs which will be required to bring the vehicle back on the road. The appellant, being the tort feasor is expected to make good the same or engage his insurer to sort it out. The amount awarded was not inordinately high as to be an erroneous estimate of the damage as it was based on the expert evidence. As regards the special damages, I find that the sum of Kshs 60,000/ was specifically pleaded and proved. The trial court properly arrived at the said sums and hence I see no reason to interfere with the same. The Appellant's appeal on quantum fails.

24. In the result, it is my finding that the appeal lacks merit. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF JUNE, 2021.

D. K. KEMEI

JUDGE