



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO.232 OF 2017**

**SHIRIN SEIFUDDIN JANOOWALLA.....APPELLANT**

**VERSUS**

**NAOMI AKINYI SILAS .....1<sup>ST</sup> RESPONDENT**

**PATRICK OMBOK OKONDE.....2<sup>ND</sup> RESPONDENT**

**ABDUL ABDUL ..... 3<sup>RD</sup> RESPONDENT**

**UNIK DRIVING SCHOOL .....4<sup>TH</sup> RESPONDENT**

**AUTO HOUSE (K) LIMITED .....5<sup>TH</sup> RESPONDENT**

***(Being an Appeal from the Judgment and Decree of the Principal Magistrate in Mombasa, Hon. H. Nyakweba delivered on the 31<sup>st</sup> October, 2017 in Mombasa CMCC No.1618 of 2012)***

**JUDGMENT**

1. The Appellant filed a case being **Mombasa CMCC No.1618 of 2012** against the Respondents seeking for an award of general and special damages as well as the costs of the suit. Those are damages that resulted after the accident, which occurred on **17<sup>th</sup> March, 2012**.
2. As pleaded in the amended **Plaint**, the Appellant was walking long Moi Avenue in Mombasa, when the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents and/or their authorized driver allegedly negligently drove motor vehicle **KBN 185U** thereby causing the said motor vehicle to collide into motor vehicle **KAZ 407C** belonging to the 3<sup>rd</sup> & 4<sup>th</sup> Respondents, which was also being negligently driven and as a result occasioned her serious injuries.
3. As a result of that accident, the Appellant stated in her **Plaint** that she suffered the following injuries.
  - a) **Cuts on the head;**
  - b) **Bruises on the left leg;**
  - c) **Head injury.**
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to enter appearance nor file a defence and an interlocutory Judgment in default was entered against them, while the 3<sup>rd</sup> & 4<sup>th</sup> Respondents entered appearance and filed their defence whereby they denied the Appellant's claim as having caused the accident were pleaded thereof.
5. In its Judgment dated **31<sup>st</sup> October, 2020**, the trial court in dismissing the suit found that liability could not be attached against the 5<sup>th</sup> Respondent because an interlocutory Judgment was not entered against the 5<sup>th</sup> Defendant. The court further stated that liability could not attach against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as the driver of motor vehicle **KAZ 407C** was not to blame at all in the circumstances. As against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the trial court found that liability could not attach against an agent of a known principal whose case has fallen.
6. The said Judgment is the subject of this Appeal. The Appellant by his **Memorandum of Appeal** has faulted that Judgment on the basis of the following grounds:-

- a) *That the learned trial Magistrate erred in law and fact by failing to determine that the Appellant had proved her case on a balance of probabilities as per the law required.*
- b) *The learned trial Magistrate erred in law and fact by failing to appreciate the existence of interlocutory Judgment lawfully entered against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, its effect on the proceedings before court and thus reaching a wrong decision.*
- c) *The learned trial Magistrate erred in law and fact by failing to appreciate the adversarial nature of our jurisprudence and court system and proceeded to dwell on unpleaded and irrelevant matters and thus descending into the arena of litigation.*
- d) *The learned trial Magistrate erred in law and fact by purporting to set aside the interlocutory Judgment entered herein, the 1<sup>st</sup> Respondents suo moto and in the absence of any application to that effect.*
- e) *The learned trial Magistrate erred in law and fact by determining that the 1<sup>st</sup> Respondent was not the beneficial owner of the subject vehicle when by dint of the interlocutory Judgment entered herein, the 1<sup>st</sup> Respondent is deemed not to have controverted the fact of ownership.*
- f) *The learned trial Magistrate erred in law and fact by reaching a finding that the 2<sup>nd</sup> Respondent herein was the agent of the 5<sup>th</sup> Respondent and not the agent of the 1<sup>st</sup> Respondent without any evidence.*
- g) *The learned trial Magistrate erred in law and fact by dismissing the Appellant's case as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein when in fact there is already an uncontested interlocutory Judgment lawfully entered against them.*
- h) *The learned trial Magistrate erred in law and fact by falling to consider and/or casually considering the Appellant's evidence, that of her witnesses and the final submissions filed by the appellant and thus reaching an erroneous decision.*

7. When the Appeal came up for directions, the court gave directions that the Appeal be disposed by way of written submissions. Both parties filed their submissions and opted not to highlight the same. Consequently, a Judgment date was fixed and I will consider the submissions as follow;

#### **APPELLANT'S SUBMISSIONS**

8. **Mr. Otieno**, learned Counsel for the Appellant submitted that the Appellant discharged her duty and proved her case on a balance of probability as against the Defendants. Further, Counsel submitted that the adopted statement by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' witness probative value did not controvert the Plaintiff's evidence that motor vehicle **KAZ 407C** was pushed off the road and knocked the Appellant down.

9. **Mr. Otieno** further submitted that the Appellant requested for an interlocutory Judgment to be entered against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants as the law requires and what the court meant by regularizing was beyond the scope of what the law hinges on the Plaintiff as what obtains upon request is endorsement of the same by the Honourable court. Therefore, it would be an injustice for the trial Magistrate to find that liability would not attach against the 5<sup>th</sup> Defendant.

10. On quantum, Counsel submitted that this Court ought to assess the general damages afresh since the trial court failed to appreciate the principles in the case of **Kemfro Africa Ltd T/A Meru Express & Another –vs- A. M. Lubia & Another [No.12 of 1987]KLR 30.**

#### **SUBMISSIONS BY THE RESPONDENT**

11. On the other hand, **Ms Mutune**, learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the Appellant failed to prove liability on the part of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and it was the Appellant's burden to prove the causative link between the 3<sup>rd</sup> and 4<sup>th</sup> Respondents negligence and his injury.

12. In considering this Appeal, I will be guided by the case of **Selle –vs- Associated Motor Boat Co.[1968]EA. 123 at page 126,** where the Court of Appeal stated:-

*“... (the) principles upon which this court in such an appeal are well settled. Briefly put they are but this court must reconsider the evidence, evaluate itself and draw its own conclusion 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 this 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”.*

13. It is trite law that an appellate court can only interfere with findings of fact made by the lower court if such findings were based on no evidence or on a misrepresentation of the evidence or if the trial court, in reaching its decision applied the wrong legal principles. (See the case of **Sumaria & Another –vs- Allied Industrial Limited.[2007]2 KLR 1, Jabane –vs- Olenja, [1986] KLR 661 and Simon Muchemi & Another –vs- Gordon Osore.[2003]eKLR).**

14. Bearing in mind the principles in that case, I proceed to examine the evidence that was adduced before the lower court. Preliminarily, I

note that on **15<sup>th</sup> October, 2012**, an interlocutory Judgment was entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. However, on **19<sup>th</sup> February, 2013** and **27<sup>th</sup> June, 2013** respectively, the Plaintiff was informed by the trial court that an interlocutory Judgment had not been entered against the 5<sup>th</sup> Defendant.

15. The Plaintiff testified as PW1 and she told the court that on the material day she had just passed the **Sairose Chemist** when she heard screams from behind her. That before she knew it, a vehicle hit her and she passed out. When she woke up, she was confused and surrounded by a crowd. Upon cross-examination, PW1 conformed that she did not see how the accident occurred, since she was hit from behind. However, in the police abstract which was produced by PW2 - **P.C Peter Marende**, the driver of motor vehicle **KBN 185U**, who is the 2<sup>nd</sup> Defendant was charged with careless driving and convicted on his own plea of guilty.

16. **PW2 Peter Marende**, who had the police file in court, testified and stated that the accident occurred on **17<sup>th</sup> March, 2011** at 5.30pm along Moi Avenue, and the same involved motor vehicle **KBN 185U**, Toyota Wish and **KAZ 407C**, Toyota Salon. He stated that the driver of **KBN 185U** failed to keep reasonable distance, rammed into the rear of motor vehicle **KAZ 407C**, and due to the impact, motor vehicle **KAZ 407C** was pushed off the road causing it to knock down the Plaintiff who was walking off the road. PW2 further stated that the investigating officer visited the scene of the accident and preferred charges against the 2<sup>nd</sup> Defendant who was later charged for careless driving of motor vehicle **KBN 185U**. He pleaded guilty to the said charged whereby he was convicted and sentenced.

#### **ANALYSIS AND DETERMINATION**

17. Having considered the evidence that was adduced before the trial court for the Plaintiff/Appellant and the Defendants/Respondents herein, the grounds of appeal and submissions together with a plethora of authorities cited by the Counsel, in my humble view, the main issue for determination is as follows;

**a) Whether the Plaintiff/Appellant proved liability against the Defendant/Respondent at 100% on a balance of probabilities.**

18. The question of liability becomes moot upon entry of interlocutory Judgment. Therefore, the Plaintiff/Appellant need not prove liability in instances where an interlocutory Judgment is entered since such Judgment is considered final on the issue of liability. In the circumstances, all that a Plaintiff is required to do is to prove damages. In the case of **Felix Mathenge –vs- Kenya Power & Lighting Co. Ltd (2008)eKLR**, the Court of Appeal states thus:-

***“The role of the court after entering the interlocutory Judgment was only to assess damages since interlocutory Judgment having been regularly obtained there can never be any doubt that Judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages”.***

19. It is noteworthy that vide a Request for Judgment dated **11<sup>th</sup> October, 2012**, the Appellant had requested for Judgment against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants. However, on the **15<sup>th</sup> October, 2012**, the court entered the interlocutory Judgment as prayed. In this Court’s opinion, there was an evident error of omission of the 5<sup>th</sup> Defendant’s name from the parties against whom the said interlocutory Judgment had been entered against by the trial court which resulted into the said court arriving at an erroneous finding on the liability of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents when in fact, the trial court only needed to deal with the issue of quantum of damages in relation to the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants.

#### **DISPOSITION**

20. In the end, this Court finds that the trial Magistrate erred when it took into account extraneous matters which were never raised by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents into consideration. Further, the trial court also erred in holding that liability could not attach against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents because an interlocutory Judgment had not been entered against the 5<sup>th</sup> Defendant when in fact the failure to enter an interlocutory Judgment against the 5<sup>th</sup> Defendant was an error apparent on record and as a result of the said error, the trial court arrived at the wrong decision in relation to the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents.

21. This court is also satisfied that there is no basis for interfering with the trial court’s finding on liability against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents since the Appellant failed to prove any negligence on the part of the driver of motor vehicle **KAZ 407C** and the same was admitted by consent of the parties on the **29<sup>th</sup> March, 2014**.

22. Consequently, this Appeal partially succeeds. The trial court’s finding on liability against the 3<sup>rd</sup> and 4<sup>th</sup> Respondent is upheld while the finding on liability against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents is hereby set aside.

23. Each party to bear its own costs of the Appeal.

It is hereby so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> DAY OF JUNE 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**In the Presence of:**

M/S Omondi counsel holding brief for Otieno for Applicant

M/S Muthure Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Court Assistant - Bancy