REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 21 OF 2017

ANASTACIA KANJA.....APPELLANT

VERSUS

ATSUSHI INFORMATION SERVICES.....1ST RESPONDENT

SARUNI MATAPASH.....2ND RESPONDENT

(An appeal from the judgment and decree (Hon. S.M. Shitubi, CM)

dated 23rd November 2017 in CMCC No. 464 of 2016 at the

Chief Magistrate's Court, Kajiado).

JUDGMENT

1. The appellant a filed suit before the Chief Magistrate's Court at Kajiado, claiming general and special damages for personal injuries she sustained in a road traffic accident that occurred on 7th February 2015 along Kitengela-Isinya road, involving motor vehicle registration No. KAR 824W in which she was travelling as a fare paying passenger. The vehicle was owned by the 1st respondent and was being driven by the 2nd respondent.

2. The appellant blamed the 2nd respondent for negligently driving the vehicle and encroaching onto the lane of motor vehicle KBF 614N causing a collision and, as a result, she sustained bodily injuries, namely; compound fracture of tibia/fibula; deep cut wound and bruises to the forehead; trauma to the right leg, chest and right arm and cut wound to the right index finger and right lower leg.

3. The respondents filed a joint statement of defence dated 16th September 2016, denying the appellant's claim. They denied that they were registered and beneficial owners in actual possession of the vehicle respectively. They also denied occurrence of the accident and particulars of negligence and put the appellant to strict proof. They pleaded, in the alternative, that the accident was caused or substantially contributed to by the appellant's negligence and that of the driver of motor vehicle KBF 614 N.

4. The suit was heard by **Hon. S. M. Shitubi, (CM)** and in a judgment delivered on 23rd November 2017, the appellant's suit was dismissed with costs. The appellant was aggrieved with the court's decision and filed a memorandum of appeal dated 13th December 2017, raising the following grounds, namely;

> ***1. The learned trial magistrate erred in fact and in law in ignoring the Plaintiff's evidence on Liability and Quantum.***
>
> ***2. The learned trial magistrate erred in fact and in law in ignoring the evidence of the Plaintiff's witnesses.***
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> ***3. The learned trial magistrate erred in fact and in law in failing to find liability against the Defendants/ Respondents.***
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> ***4. The learned magistrate decision on liability was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.***
>
> ***5. The learned trial magistrate erred in fact and in law in dismissing the Plaintiff's case in the absence of any evidence disputing liability by the Defendants/ Respondents.***

6. The learned magistrate erred in law and in fact in failing to appreciate that the Defendants did not prove their case on liability as they failed to call any witness.

7. The learned trial magistrate erred in fact and in law in failing to hold the Defendant liable for the accident.

8. The learned trial magistrate erred in fact and in law in failing to consider the Plaintiff's submissions on liability and quantum.

9. The learned trial magistrate erred in fact and in law in that he disregarded the appellant's submissions and judicial authorities both on liability and quantum of damages with the resultant miscarriage of justice to the appellant.

5. Parties agreed to dispose of this appeal through written submissions. The appellant filed written submissions dated 25th February, 2021 and argued that the trial magistrate erred in dismissing her suit on grounds that she did not prove that she was a victim in the accident that occurred on 7th February, 2015, and further that she did not prove her claim against the respondent on a balance of probabilities. The appellant also faulted the trial magistrate for relying on ***Thuranira Karauri v Agnes Ncheche*** (C.A 192/ 96) to find that a police abstract cannot be proof of ownership of a motor vehicle involved in an accident.

6. According to the appellant, the trial magistrate should have considered the evidence on record and made a determination on it. She urged this court to reconsider the evidence on record and her submissions a fresh and with an open mind. She relied on ***Eunice Wayua Munyao v Mutilu Beatrice & 3 others*** [2017] eKLR.

7. The appellant submitted that according to her evidence and that of PW2, the occurrence of the accident was not disputed; that motor vehicle KAR 824 W was to blame for the accident; that she was a fare paying passenger in the said motor vehicle; and that no evidence was led by the respondents to demonstrate that the injuries she sustained were as a result of another cause other than the accident the subject of these proceedings. The appellant argued that she was one of the victims rushed to unknown hospitals according to the evidence of PW2 who also confirmed that she was classified as a passenger. She further argued that she could not have been issued with a P3 form and police abstract if she was not one of the victims of that accident. She faulted the investigating officer for omitting her name from the OB.

8. It was the appellant's case that the police officer in charge was obligated to make a subsequent report to capture the details of the victims who reported the accident after the initial OB entry. She also argued that section 73(1) of the Traffic Act only applied to drivers and, therefore, the fact that she later reported the accident and a police abstract issued to her, indicated that she was a passenger in the motor vehicle, which should have been treated as sufficient proof.

9. The appellant faulted the trial magistrate for stating that the claim was fraudulent an issue that had not been pleaded and proved. She relied on ***Kuria Kiarie & 2 others v Sammy Magera*** [2018] eKLR.

10. The appellant further faulted the trial court for shifting the standard of proof from a balance of probabilities to beyond reasonable doubt. She argued that the trial court did not adequately address the issue of liability. She asserted that the respondents were to blame for the accident and there was evidence (copy of records and police abstract), that the vehicle belonged to the 1st respondent and was being negligently driven by the 2nd respondent. She relied on ***Stapley v Gypsum Mines Ltd (2)*** [1953] AC 663-(Page 681) on how to determine what caused an accident. She, therefore, argued that she proved her case on a balance of probabilities.

11. With regard to quantum, the appellant relied on the medical evidence which included, a discharge summary indicating that she was admitted at the hospital from 8th February, 2015 to 24th February, 2015, P3 form that classified the injuries as grievous harm and medical report by Dr. A. O. Wandugu, PW1, as corroborating the injuries she had pleaded in the plaint and the estimate of the future medical expenses of Kshs. 250,000. She maintained that the medical report by PW1(Dr. Wandugu) corroborated the evidence of DW1 hence her injuries were not disputed. There was also no contradiction or denial of future medical expenses and, therefore, the injuries were proved on a balance of probabilities.

12. The appellant urged this court to award Kshs. 250,000 for future medical expenses and general damages of Kshs. 3,000,000. She relied on ***Peace Kemuna Nyang'era v Micheal Thuo & Another Ltd*** [2014] eKLR where the court awarded Kshs. 2,500,000 for similar injuries and ***Micheal Maina Gitonga v Serah Njuguna*** [2012] eKLR where the court awarded Kshs. 1,500,000. She urged that her appeal be allowed, she be awarded damages of Kshs. 3,000,000; special damages of Kshs. 188, 750; future medical expenses of Kshs. 250,000; costs and interest.

13. The respondents filed written submissions dated 22nd April, 2021. They argued that the appellant did not prove that she was involved in the accident and the injuries she sustained on a balance of probabilities. They contended that the OB did not contain the appellant's name as one of the victims of the accident; that the accident was reported more than five months after the date it occurred and that she could not confirm that she was involved in that accident. They relied on ***Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank*** [2004] eKLR for the argument that evidence of existence or non-existence of facts in issue should be advanced and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.

14. According to the respondents, the appellant's claim was aimed at gaining undue compensation. They relied on ***Timsales Ltd v Wilson Libuywa*** [2008] eKLR for the proposition that a medical report by a doctor who examines the plaintiff much later is of little, if any help at all, unless it is supported by initial treatment notes as it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did.

15. They also relied on ***David Brown Kipkoriri Chebii v Rael Chebii*** [2016] eKLR on when an appellate court can exercise its discretion to interfere with the decision of the trial court. They further relied on ***East Produce (K) Limited v Christopher Astiado Osiro*** (Civil Appeal No. 43 of 2001 and ***Statpack Industries v James Mbithi Munyao*** (Civil Appeal No. 152 of 2003) to contend that the appellant had failed to

discharge her duty of proving negligence against them.

16. Regarding quantum, they argued that assessment of damages is a discretionary matter and that the principles on the exercise of such discretion and when an appellate court should interfere with exercise of discretion are well settled. They cited ***Kanga v Manyoka*** [1961] EA 705**;** ***Lukenya Ranching and Farming Coop society v Kavoloto*** [1970] EA and ***Paul Kipsang & Another v Titus Osule Osore*** [2013] eKLR, to support their argument.

17. The respondents therefore argued that based on the medical report by Dr. Jennifer Kahuthu, future medical expenses should be allowed at Kshs. 40,000. They also argued that according to the pleadings and medical reports produced, the appellant sustained tibia, fibula fractures and soft tissue injuries. They proposed an award of between Kshs. 250,000 to 400,000. They relied on ***Daniel Otieno Owino & another v Elizabeth Atieno Owuor*** [2020] eKLR where the court reduced an award to Kshs. 400,000 for similar injuries; ***Zachariah Mwangi Njeru v Joseph Wachira Kanoga*** [2014] eKLR where the court substituted an award of Kshs 800,000 with Kshs. 400,000 for fracture of the tibia and fibula; ***Harun Muyoma Boge v Daniel Otieno Agulo*** [2015] eKLR where the court set aside an award of Kshs. 150,000 and substituted it with Kshs. 300,000 and ***Amritlal S. Shah wholesalers Ltd & Another v Joshua Ekeno*** [2012] eKLR where the court awarded Kshs. 350,000. They urged the court to dismiss the appeal with costs.

18. I have considered the appeal; submissions by the parties and the authorities relied on. This being a first appeal, this court as the first appellate court, has a duty to re-evaluate, re-analyse and reconsider the evidence on record and draw its own conclusion on that evidence, of course bearing in mind that it did not see the witnesses testify and give due allowance for that.

19. In ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] eKLR, the Court of Appeal stated with regard to the duty of the first appellate court;

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

20. In ***Kenya Ports Authority v Kusthon (Kenya) Limited*** (2009) 2EA 212, the Court of Appeal held, inter alia, that:

> ***On a first appeal…the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.***

21. PW1, ***Dr. Antonny Wandugu,*** testified that he examined the appellant on 1st July, 2015 who had a history of a road traffic accident. She had suffered multiple injuries. She had been treated at Shalom Hospital where she had surgical operation with implants. She complained of pain on the affected areas, had tenderness in the affected fingers and chest and had a limp on the leg. As a result of the injuries, she had chronic pains, permanent scars and chronic headaches, vulnerability to recurrent respiratory infections, weakness of the right hand and of both legs. The implants were still in place and their removal would cost about Kshs. 250,000. in a public hospital. He produced the medical report, receipt for Kshs. 2,000 for the report and Kshs. 20,000 for attendance as Pexh 1(a)-(c). He testified that Dr. Leah Wairimu's estimate of Kshs. 40,000 was an underestimate.

22. **PW2**, ***No. 82433 P C Anthony Opiyo*** of Kitengela Traffic Base, produced a police abstract and OB No. 6 of 7th February, 2015 for the accident that occurred at around 8pm along Kitengela-Isinya road. Motor vehicle KAR 824 W was blamed for encroaching on the lane of KBR 614M. The driver of KBR 614 M sustained soft tissue injuries and was taken to Kitengela medical for treatment while the driver of KAR 824 W and other unknown victims were also rushed to Kitengela medical and unknown hospitals for treatment. He confirmed that the appellant's name was not in the Occurrence Book (OB).

23. In cross examination, the witness admitted that to issue a police abstract, reference has to made to the OB. If the name is not in the initial OB entry the investigating officer makes a follow up entry in the Occurrence Book. He maintained that the appellant's name was not in the OB entry and that he was not sure whether there could have been a follow up entry. He also confirmed that they used OB No. 6 of 7th February, 2015 and that investigations were still pending and he was not aware if anyone was charged. He also confirmed that he was not the investigating officer.

24. The appellant testified as PW3, that she was involved in an accident on 7th February, 2015 while travelling as a fare paying passenger in motor vehicle KAR 824 W along Kitengela–Isinya road. She lost consciousness and when she came to the following day, she found herself in hospital. She was treated at Sukos Hospital. She testified that she had cut on the mouth, the right shoulder, on the right eye, chest and right hand injuries. She also had dislocation of index finger and fracture of left leg. She was referred to Shalom Hospital where metal plates were inserted on her left leg and remained in hospital until 24th February, 2015. She thereafter continued with outpatient treatment. She spent Kshs. 300,000 for treatment. She was given a P3 form and police abstract from Kitengela police station after she recovered. She blamed the respondents for the accident. She produced documents in her list of documents as exhibits except the medical report and police abstract which were produced by PW1 and PW2 respectively.

25. DW1, ***Dr. Jennifer Kahodho*** produced a medical report by Dr. Leah Wainaina dated 11th October 2016 after she examined the appellant. She was in fair general condition, was walking with a slight limp and complained of pain in the left leg when walking for long distance. She had a healed scar on the right eye. The right leg had limited flexion. Other systems were normal and the x-ray done showed the fracture of tibia and fibula had adequately reunited. The right index finger had limited flexion. The doctor recommended an award of 100 permanent disability. She testified that the implant would require Kshs. 40, 000 to remove and not Kshs. 250,000 which was exaggerated. The doctor's conclusion was that the appellant sustained fracture of the left tibia and fibula, soft tissue injuries to the scalp, chest and right index fingers. She produced the medical report as Dexh 1. In cross examination, she confirmed that the injuries were similar but differed on

the cost of future treatment and disability. Disability on the index finger was placed at 10%.

26. After considering the above evidence, the trial magistrate was not satisfied that the appellant had proved her case to the required standard and dismissed the suit, prompting this appeal. From the grounds of appeal and submissions by parties, the issues that arise for determination are whether the appellant proved that she was a passenger in the motor vehicle and, depending on the answer to this issue, whether she was entitled to compensation.

27. The appellant's evidence and submission is that she was a fare paying passenger in motor vehicle KAR 824 W and she sustained injuries leading to her admission and treatment for some time. She then reported the accident afterwards. The respondents maintain that the appellant was not a passenger in the motor vehicle and the suit was meant to enrich her for injuries, if any, that she did not sustain in that accident. According to the respondents, the appellant did not explain why her name was not in OB No. 6 of 7th February 2015.

28. I have considered the evidence on record and the exhibits produced by the appellant. The appellant produced medical documents, P3 and police abstract. PW2 the police officer admitted that the appellant's name was not in OB No. 6 of 7th February 2015, which was a report made regarding the accident involving motor vehicle KAR 824 W. He also stated that he was not sure whether there was a follow up report of other people involved in the accident which is supposed to be the practice. The appellant on her part, blamed the investigating officer for not including her name in the OB. She did not however tell the court when she reported the accident at the police station.

29. The police abstract produced by PW2 shows that it was issued on 3rd August 2015 while the P3 form was issued on 28th July 2015. The police abstract shows that it is an extract from OB No. 6 of 7th February 2015. There is no explanation when the appellant reported the accident given that the information in OB No 6 of 2015 did not include her as a victim of the road accident that was reported under that entry.

30. The appellant also stated in her statement filed together with her plaint that she was rushed to Sucos Hospital and later transferred to Athi River Shalom Community Hospital for admission. There is no medical document to show that the appellant was attended to at Sucos hospital this being the first point for her medical attention immediately after the accident. What she produced was a cash receipt dated 8th February 2015 for Kshs. 5,850 and one dated 7th October 2016 for Kshs. 3,000. These receipts could not on their own, be taken to be evidence of treatment in that hospital.

31. Section 107 of the Evidence Act is clear 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. Further, section 108 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Similarly, section 109 states that 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. The appellant bore the burden to prove on a balance of probabilities that she was involved in the accident that occurred on 7th February 2015 and reported under OB No. 6 at Kitengela Police station.

32. The trial court did not believe her evidence because it was not satisfied that the appellant had proved that she was involved in that accident. This court has re-evaluated the evidence and considered the documents produced by the appellant in support of her case. There was no evidence when the appellant reported to the police that she had been involved in that accident given that her name was not in the OB relating to that accident. It The police (PW2) was also at pains to explain how a police abstract could be issued to a person whose name was not in the OB entry used to issue the abstract. According to PW2, a follow up report should have been made but he was not sure whether this happened. With such evidence, it cannot be taken that because the OB stated that there were other accident victims, the appellant must have been one of the "other" victims.

33. In ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others*** [2017] eKLR the Supreme Court stated on the evidential burden of proof:

> ***[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.***

34. In ***Ephantus Mwangi v Duncan Mwngi Wambugu*** [1984] eKLR, the Court of Appeal pronounced 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.***

35. I have carefully re-evaluated the evidence on record and reconsidered it. There was no evidence that the appellant reported the accident at all and if so, when she reported, given that the police themselves admitted that her name was not in the initial report made to them and recorded in the OB No. 6 of 7th February 2015 about that accident. I have also perused the police abstract issued to the appellant and produced as an exhibit before the trial court. It lists her name and others without indicating the names of those others and how many they were. It also quotes OB No. 6 of 7th July 2015 even though the appellant's name was not in that OB entry.

36. With all these gaps, whether deliberate or not, I am unable to fault the trial court's finding of fact that the appellant did not prove liability to the required standard. Consequently, this appeal is declined and dismissed. Each party will, however, bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 30TH DAY OF JULY 2021.

E C MWITA

JUDGE