



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 171 OF 2018

JULIUS MAUNDU KISALU.....APPELLANT

VERSUS

1. DONALD MWARANGI

2. EMARAT AGENCIES.....RESPONDENTS

(Being an Appeal from the Judgment of Hon. H. Nyakweba (Principal Magistrate)

in CMCC No. 1062 of 2014, Mombasa delivered on 15th August, 2018)

JUDGMENT

1. The Appellant **Julius Maundu Kisalu**, was the Plaintiff in **Civil Suit No. 1062 of 2014** at Mombasa whereby he instituted a suit against the 1st and 2nd Respondents (Defendants) vide a Plaint dated 25th April, 2014 and filed on 30th May, 2014 wherein he was claiming for *general damages, special damages of Kshs. 951, 503/=, costs and interest* on account of injuries he alleged to have sustained as a result of a road traffic accident.

2. The particulars of the case were that on or about **4th September, 2012**, the Appellant was a lawfully fare paying passenger travelling in Motor Vehicle Registration No. KAX 676T-Nissan Matatu, which was so negligently driven, controlled, managed and/or handled that it collided with another vehicle registration No. GK B 24 732 B Isuzu FTS, at Taita village – Voi area.

3. The Appellant's case was that the accident occurred due to the negligence of the Respondents, its authorized driver, servant and/or agent. The Appellant stated that due to the said negligence, he suffered; head injury with impaired consciousness, bleeding in the brain subdural and sub-arachnoid hematomas, brain edema-swelling, left sided paralysis, fracture of the upper jaw maxilla bone (from tooth 22 to 25), Loss of teeth No. 22, 23 and 24, deep cut wound on the left leg, blunt object injury to the left lower jaw (mandible) and bruise on the head (scalp).

4. The Respondent filed a **Statement of Defence** on the **22nd July, 2014** in which he denied that any accident occurred, and that, if the same occurred, then it was due to the negligence of the Appellant. The Respondent sought that the Appellant's suit against them be dismissed with costs.

5. The Appellant called four (4) witnesses while the Respondent neither called any witness nor filed witness' statements. The Plaintiff/ Respondent testified as PW1 and stated that on 4th September, 2012, he was travelling to Maungu in Motor Vehicle KAY 676 T bus and before he reached his destination, the bus was involved in an accident.

6. PW1 stated that he was taken to Voi Hospital, transferred to Coast General Hospital and later treated at Aga Khan Hospital where he developed complications and was operated on. He stated that he had not fully recovered and required further treatment.

7. It was PW1's testimony that he was issued with treatment notes at Voi Hospital. He stated that he was later seen by Dr. Mohammed Abdul Hakim from Aga Khan who prepared a report. He further stated that he incurred expenses in seeking treatment and that the matter was reported at Voi Police Station where he was issued with a police abstract and a P3 form which was filled at Voi Hospital.

8. Further, PW1 testified that he was later seen at Gama clinic where a medical report was prepared. He stated that for the medical report from Gama Clinic he paid Kshs. 2,000/=. He prayed for compensation, costs and interest of the suit. He added that the Respondents' driver was to blame for careless driving which caused the bus to collide with GK B 24 732 B Isuzu FTS.

9. PW2 was **Dr. Abdi Hakim Mohammed** who was a surgeon at Aga Khan Hospital. He stated that he saw the Appellant and prepared a medical report and a discharge summary.

10. He testified that the Appellant complained of severe headache, voluntary and generalized weakness as per the findings in the medical report. He stated that the Appellant had a clot in the brain which resulted to bleeding therein.

11. PW2 told the court that the Appellant underwent emergency surgery, from which he gradually recovered and was discharged on 21st October, 2012.

12. **PW3** was **Dr. Ajoni Adede** who stated that he prepared the medical report after examining the Appellant on **30th July, 2013**. He stated that the Appellant was injured in a road traffic accident and incurred injuries as set out in his report.

13. He testified that to prepare his report, he relied on physical examination of the Appellant and treatment notes, reports of the CT scans and X-rays and also perused the P3 form. He also stated to prepare the report, he charged Kshs. 2,000/= and to attend court he was paid Kshs. 3,000/=.

14. **PW3** was **No 52061 PC Bernard Mwangi** who was stationed at Voi Police Station performing traffic duties. He stated that on **4th September, 2012 an accident was reported by a motorist as having occurred at Taita village along the Nairobi-Mombasa Road. He stated that CPL Yator, PC Kiprop and PC Njenga proceeded to the scene where they found vehicles GK B 24 732 B Isuzu FTS a police lorry and Nissan Matatu KAX 676T were involved in an accident.**

15. He testified that there were a lot of casualties who had been taken to Voi District Hospital for treatment. He stated that it was established by the reporting officers that the police vehicle was to blame because CPL Peter Murage whose vehicle was headed for Mombasa was overtaking when he collided with an on coming Nissan Matatu that was headed to Voi.

16. The Defendant did not call any witnesses.

17. On 23rd May, 2018 the parties to the suit herein consented that the medical report by Dr. Leah Wainaina dated 2nd April, 2014 be admitted in evidence without calling the maker to testify.

18. After hearing the evidence by the parties, the Trial Court, delivered its **Judgment on 15th August, 2018** and dismissed the Appellant's suit with costs.

19. Being dissatisfied with the quantum for future medical expenses, the Appellant filed an appeal before this Court and raised the following ground: -

1. THAT the learned trial Magistrate erred in law and fact in finding that the Plaintiff had failed to prove negligence on the part of the 1st and 2nd Defendants

2. THAT the learned trial Magistrate erred in law and fact in failing to apportion liability as against the 1st and 2nd Defendants.

3. THAT the learned trial Magistrate erred in law and fact in dismissing the suit against the 1st and 2nd Defendants

4. THAT the learned trial Magistrate erred in law and in fact in failing to award damages to the Plaintiff.

20. The Appellant prayed that the Appeal be allowed and the court do set aside the Judgment delivered on 15th August, 2018 and be at liberty to assess negligence, liability and enter judgment accordingly. That the cost of the Appeal be borne by the Respondents.

21. Directions were then given on **12th February, 2020** that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed submissions on the **30th November, 2020** while the Respondent filed theirs on the **22nd March, 2021**.

22. Parties relied on their written submissions in their entirety.

Analysis and determination

23. This being the first Appeal, this Court has a duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to see their demeanour. (See the case of **Peters-vs-Sunday Post Ltd [1958] EA 424**).

24. I have carefully considered the appeal and submissions filed herein. I find that the issue that arises for determination is *whether the Appellant/Plaintiff proved his case as against the 1st and 2nd Respondent on a balance of convenience to warrant the granting of the orders that were sought in the Plaint dated 25th April, 2014.*

25. It was the Appellant's submission that the Respondents did not call any witnesses nor adduce any evidence before the trial court to rebut the Appellant's claim.

26. On the other hand, the Respondent did not dispute that an accident occurred on the 4th September, 2012 involving GK B 24 732 B Isuzu FTS, a police lorry and Nissan Matatu KAX 676T. However, their main contention was that there was no proof to show that Respondents were responsible for the accident.

27. According to the Respondents, **Sections 107,108 and 109 of the Evidence Act** require that whoever alleges must prove. To the Respondents, the Appellants did not prove their case on a balance of probabilities to warrant the orders sought in the Plaintiff.

28. In the plaintiff, the Appellant pleaded particulars of negligence in respect of the Appellant, her driver, Agent and or servant as follows: -

- a. Driving at an excessive speed in the circumstances
- b. Driving without any due care and/or attention.
- c. Failing to keep any proper look out or to have any sufficient regard for traffic that was or might reasonably be expected on the said road
- d. Failing to give warning of its approach on the road
- e. Failing to maintain a safe distance
- f. Failing to drive on its designated path
- g. Failing to stop, brake, and slow down to avoid the said collision
- h. Failing to heed the presence of other road users on the said road
- i. Failing to exercise due care and skills in managing the motor vehicle
- j. Driving dangerously
- k. Overtaking when it was unsafe to do so

29. From the evidence on record, nothing pointed a finger to the Respondents and none of the particulars of negligence as enumerated above were proved during trial. In his testimony to court, PW1 as was found by the trial court did not elaborate as to the circumstances surrounding the accident. He only blamed the Respondent's driver for careless driving that caused the Nissan Matatu to collide with GK B 24 732 B Isuzu FTS.

30. PW4's evidence on the other hand did not corroborate the testimony of PW1 as he blamed the GK B 24 732 B Isuzu FTS police lorry for the accident. In view of the foregoing, it is clear that the evidence of PW4 exonerated the Respondent of any blame as alleged by the Appellant in her plaintiff.

31. In the case of Treadsetters Tyres Ltd –Vs- John Wekesa Wepukhulu [2010] eKLR, Ibrahim J. stated that: -

“...In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred...”

32. I agree with Respondents that the Appellant under Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya was the one with the burden to prove negligence and such burden does not shift to any other party. The sections provide as follows: -

107. Burden of proof

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

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.

33. Further, the Court of Appeal in the case of Eastern Produce (K) Limited -Vs- Christopher Astiado Osiro In Civil Appeal No. 43 Of 2001 held that: -

“...It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of *Kiema Mutuku -Vs- Kenya Cargo Hauling Services Ltd 1991* where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence...”

It was upon the Appellant, to not only plead negligence but prove the same.

34. I have looked at the evidence that was adduced before the trial court and find that the causation of the accident by the 1st Respondent has not been established by the Appellant as the negligence was never established and/or demonstrated. As such, I agree with the conclusion of the trial court that the negligence on the part of the driver of motor vehicle KAX 676T was not proved.

35. Having found that negligence was not proved as against the 1st and 2nd Respondent, I further agree with the finding of the trial court that liability cannot attach to the Respondents. The Appellant was required to *prima facie* establish that the 1st Respondent was negligent for the court to make a finding on liability.

36. Further, for the court to make an award for damages in personal injury claims such as this one, it is first required to establish that a party was negligent and liable. In the absence of a finding on negligence and liability, the trial court was right not to make an award for damages.

37. I find that the trial court was justified in dismissing the Appellant's suit as against the 1st and 2nd Respondents for lack of evidence on negligence and liability.

38. The upshot of the foregoing is that the Appellant's Appeal is dismissed in its entirety.

39. Cost to the 1st and 2nd Respondents.

It is so ordered.

SIGNED and DATED at MOMBASA this 26TH day of JULY, 2021

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JULY, 2021

A. ONG'INJO

JUDGE