REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 20 OF 2017

RUFINAH KINYA.....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. 321 of 2016 at the Chief Magistrate's Court, Kajiado).

JUDGMENT

1. The appellant filed a 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 accident on the 2nd respondent's negligence for encroaching onto the lane for motor vehicle KBF 614N thereby causing a collision and, as a result, she sustained injuries on the head and right shoulder; bruises on the right lower limb, thigh muscle and on the right knee.

3. The respondents filed a statement of defence dated 28th July 2016 denying the appellant's claim 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 by or substantially contributed to by the negligence of the appellant and of the driver of motor vehicle registration No. KBF 614 N.

4. The suit was heard before **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 trial 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.***
>
> ***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 witnesses.***

7. The learned trial magistrate erred in fact and in law in failing to hold the Defendants 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 by way of 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 of 7th February, 2015 and that she did not prove her claim against the respondent on a balance of probabilities. She 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 the vehicle that caused the accident.

6. According to the appellant, the trial court did not address the real issue whether the indication in the police abstract that she was a victim of the accident could stand. She urged this court to consider the evidence on record and her submissions from a fresh perspective and with an open mind. She relied on ***Eunice Wayua Munyao v Mutilu Beatrice & 3 others*** [2017] eKLR.

7. The appellant argued, that the occurrence of the accident was undisputed considering the evidence of PW2 and PW3; that motor vehicle KAR 824 W was to blame for the accident; that she was a fare paying passenger in the said motor vehicle; that no evidence was lead to demonstrate that the injuries she sustained were as a result of another cause other than the accident the subject of these proceedings and whether it was possible that she was one of the victims rushed to unknown hospitals as per the evidence of PW2 who also confirmed that she was classified as a passenger. She also argued that she could not have been given a P3 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. According to the appellant, 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 asserted 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, indicated that she was a passenger in KAR 824 W which should have been treated as sufficient proof given that it was also corroborated by her evidence. The appellant faulted the trial magistrate for stating that her claim was fraudulent a fact that was not pleaded and proved. She relied on ***Kuria Kiarie & 2 others v Sammy Magera*** [2018] eKLR.

9. The appellant further blamed 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, arguing that the respondents were to blame for the accident and there was evidence (copy of records and police abstract) that the vehicle was owned by the 1st respondent; was being driven by the 2nd respondent and it was being negligently driven. She relied on ***Stapley v Gypsum Mines Ltd (2)*** [1953] AC 663 (Page 681) on how to determine what caused an accident. She maintained that she proved her case on a balance of probabilities.

10. Regarding quantum, the appellant relied on the medical evidence which included, treatment notes from Kisaju medical clinic, P3 form and medical report by Dr. A. O. Wandugu, (PW1) which corroborated the injuries pleaded in the plaint. She suggested general damages of Kshs. 500,000, and relied on ***Patrick Kinoti Miguna v Peter Mburunga G. Muthamia*** [2014] eKLR where the court awarded Kshs. 300,000 for similar injuries and ***Dr. Adolf Muyoti & Another v Thomas Micha Sawe*** (Civil Appeal No. 101 of 2005 Kisumu High Court), where an award of Kshs. 180,000 was upheld on appeal. She urged that her appeal be allowed, she be awarded damages of Kshs. 500,000; special damages of Kshs. 4,400; costs and interest.

11. The respondents filed written submissions dated 29th April, 2021 in response to the appellant's submissions. They argued that the appellant did not prove that she was involved in the subject accident and the injuries sustained on a balance of probabilities. They further argued that although the appellant testified that she was seated behind the driver, her name was not listed in Occurrence Book (OB) as one of the other passengers involved in that accident. She also did not explain why she obtained a police abstract several months after the accident.

12. They relied on ***Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank*** [2004] eKLR for the proposition that evidence of existence or non-existence of facts in issue should be adduced and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.

13. According to the respondents, the appellant's claim was aimed at gaining undue compensation. They argued that although the appellant claimed to have been treated at Sukos hospital, she did not produce medical documents to support that assertion. They relied on ***Timsales Ltd v Wilson Libuywa*** [2008] eKLR for the argument that the 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.

14. 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 supported the trial court's decision in dismissing the suit for failure to prove negligence.

15. The respondents 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 argue that the appellant did not discharge her duty in proving negligence against the respondents.

16. According to the respondents, assessment of damages is a discretionary matter and there are settled principles on the exercise of such discretion and when an appellate court should interfere with exercise of discretion. 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.

17. The respondent contended that from the plaint, treatment notes from Athi River Shalom Hospital and medical report by Dr. A. Wandugu, the appellant sustained cut wounds. They urged the court to grant an award Kshs. 100,000. They relied on ***PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & Another*** [2018] eKLR where a lower court award was substituted with Kshs. 100,000 for soft tissue injuries***; Hantex Garments (EPZ) ltd v Haron Mwasala Mwakawa*** [2017] eKLR where an award of Kshs. 100,000 was upheld on appeal and ***Ndungu Dennis v Ann Wangari Ndirangu & another*** [2018] eKLR where the trial court's award was substituted for Kshs. 100,000. They urged the court to uphold the trial court decision and dismiss the appeal with costs.

18. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. I have also considered the record and the impugned judgment. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. The court should however bear in mind that it did not see the witnesses testifying and give due allowance for that.

19. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated that;

> ***[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect.***

20. In ***Peters v Sunday Post Ltd*** [1958] EA 424, the Court held that;

> ***Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.***

21. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] eKLR, the same court 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 reanalyze 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.***

22. PW1, ***Dr. Antony Wandugu,*** testified that he examined the appellant on 16th February, 2016 who had a history of a road traffic accident. She sustained injuries on the head, right shoulder joint, right leg and loss of blood. She complained of pain in the affected areas. He was of the opined that she suffered harm, a lot of pain and mental anguish. The result was chronic pains in the injured areas, permanent scars, chronic headaches, weakness of the right arm and right leg. He produced the medical report, receipt for Kshs. 2,000 and attendance receipt for Kshs. 20,000 as Exhibit 1(a)-(c). In cross examination he stated that the appellant would have permanent weakness in the shoulder joint.

23. PW2, ***No. 82433 P C Anthony Opiyo*** of Kitengela Traffic Base, adopted his evidence in CMCC No. 464 of 2016 (Civil Appeal No. 21 of 2017). He stated that motor vehicle KAR 824 W was to blame for the accident for careless driving. He produced a police abstract issued to the appellant on 29th January, 2016 which related to an accident captured in OB No. 6 of 7th February, 2015. The appellant was described as a passenger and motor vehicle KAR 824 W was blamed for the accident. In cross examination, he stated that the case was pending under investigation and no one was charged. He also confirmed that the appellant's name was not in the OB entry and he did not know about any follow up report made in the OB. He again confirmed that the abstract was issued in reference to OB No. 6 of 7th February, 2015. He told the court that the investigating officer was deceased and was the only one who could have known if a follow up was made.

24. The appellant testified as PW3 adopting her witness statement dated 3rd June, 2016 filed together with her plaint. She told the court that she was involved in an accident on 7th February, 2015 while travelling from Kitengela to Isinya in motor vehicle KAR 824 W at around 8 pm. She lost consciousness and when she came to, she found herself at Kisaju medical clinic where she was treated and discharged. She sustained injuries on the head, right chin and right leg. She continued with dressing of the leg. She blamed the driver of KAR 824 W for the accident. She produced the documents in her list of documents except the police abstract and the medical report. She prayed that her suit be allowed with costs.

25. The respondents did not call any witness and lead no evidence.

26. The trial court considered the evidence but was not satisfied that the appellant had proved her case on a balance of probabilities and dismissed the suit prompting this appeal. The appellant has faulted the trial magistrate for dismissing the suit on various grounds. 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 the first issue, whether she was entitled to compensation

27. The appellant's evidence and submissions are that she was a fare paying passenger in motor vehicle KAR 824 W; that she sustained injuries and was treated at Kisaju Medical Clinic where she was treated and discharged. She later sued for compensation. The respondents maintained the opposite that the appellant was not a passenger in the motor vehicle. According to the respondents, the appellant had not explained why the abstract and P3 form were obtained several months after the accident and her name was not included in the OB.

28. I have considered the arguments by both sides and perused the record. The appellant and her witness admitted that her name was not in the OB relating to the accident that is OB No. 6 of 7th February 2015. It was also admitted that there was no follow up report about other people who were involved in that accident. There was therefore no police record that the appellant had reported that she was involved in the

accident on 7th February 2015.

29. The appellant produced exhibits that included the medical report, P3 form and police abstract. The police abstract and P3 were issued on 29th January 2016, one year after the accident despite the fact that the accident occurred on 7th February 2015. The appellant did not state why she obtained the police abstract after that long.

30. I have also perused the medical document from Kisaju Medical Clinic for 7th February 2015 relating to the appellant. The fact alone that there is this document, cannot be taken to mean only she was involved in the accident in the absence of the appellant making a report of the accident within a reasonable time to obviate possible fraudulent claims. I say so because if the appellant was involved in an accident on 7th February 2015, when did she not make her report to the police given that her name was not in the OB. Why was the police abstract obtained one year later?

31. Section 107 of the Evidence Act 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. Section 108 is also to the effect 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, while 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.

32. The appellant's case was that she was involved in the accident that occurred on 7th February 2015 and reported under OB No. 6 at Kitengela Police station. She bore the burden of proving that she was indeed involved in that accident. I have perused the police abstract issued to the appellant on 29th January 2016. It indicates only her name despite the fact that PW2 testified that her name was not in OB No. 6 of 7th February 2015. That witness was also clear that a police abstract is issued based on the information in the OB. Both PW2 (police officer) and PW3, (the appellant) did not tell the court when a report regarding the appellant was made and if she recorded a statement that she was involved in the accident of 7th February 2015

33. The trial court dismissed the appellant's suit because it was not satisfied that she had proved that she was involved in that accident. This court has re-evaluated the evidence and considered the documents alone cannot be proof that she was involved in that particular accident. Similarly, 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 cannot be taken that because the OB stated that there were other victims, she must have been one of the "other" victims.

34. 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.***

35. In ***Ephantus Mwangi v Duncan Mwangi Wambugu*** [1984] eKLR, the Court of Appeal rendered 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.***

36. Having considered this appeal, the evidence and the arguments as well as the decision of the trial court and reasons thereof, and having given due consideration to all the materials on record, I am unable to fault the trial court on its finding of fact.

37. This appeal is declined and Dismissed. Each party will, however, bear their own costs.

Dated, Signed and Delivered at Kajiado this 30th day of July 2021.

E C MWITA

JUDGE