REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 19 OF 2017

SALOME WANJIKU GITHUA.....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. 322 of 2016

at the Chief Magistrate's Court, Kajiado).

JUDGMENT

1. The appellant filed suit before the Chief Magistrate's Court at Kajiado, claiming both general and special damages arising from 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 of motor vehicle KBF 614N, causing a collision. She sustained bodily injuries, namely; cut wounds to both arms and legs knee joints, cut to right eyelid and on the forehead; trauma to the chest and to the left ankle joint. She claimed special damages of **Kshs. 4,400** for medical report, search of copy of recoveries and medical expenses.

3. The respondents filed a joint statement of defence dated 28th July 2016, denying the appellant's claim. They also denied that they were registered and beneficial owners in actual possession of the vehicle respectively. They further 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 the negligence of the appellant and of the driver of motor vehicle KBF 614 N and particularized their acts of negligence.

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 on grounds that she had not proved her case as required. 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.***

3. ***The learned trial magistrate erred in fact and in law in failing to find liability against the Defendants/ Respondents.***

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.

6. The appellant filed written submissions dated 25th February, 2021. She argued that the trial magistrate erred in dismissing her suit on the premise that she did not prove she was a victim in the accident of 7th February, 2015, and her claims against the respondents on a balance of probability. She faulted the trial magistrate 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 that caused the accident.

7. According to the appellant, the trial court did not address the real issue, whether the claim in the police abstract that she was a victim in that accident should 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.

8. The appellant further argued, that occurrence of the accident was undisputed going by the evidence of PW2 and PW3 that KAR 824 W was to blame for the accident; that she was a fare paying passenger in the said motor vehicle and that it was possible that she was one of the unknown passengers rushed to unknown hospitals as per the evidence of PW2. She also argued that she could not have been given a P3 and a police abstract if she was not one of the victims involved in the accident. She faulted the investigating officer for omitting her name in the Occurrence Book **(OB)**.

9. 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 further argued that section 73(1) of the Traffic Act was only applicable to drivers and thus the fact that she later reported the accident and an abstract issued to her, indicated that she was a passenger in KAR 824 W, and this should have been treated as sufficient proof which was also corroborated by her evidence.

10. The appellant again faulted the trial magistrate for the alleged issue of fraud which was neither pleaded nor proved and relied on ***Kuria Kiarie & 2 others v Sammy Magera*** [2018] eKLR for shifting the standard of proof from a balance of probability to beyond reasonable doubt.

11. On liability, the appellant argued that the trial court did not adequately address the issue. She submitted 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 and was being driven by the 2nd respondent and that the vehicle was also 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, therefore, argued that she proved her case on a balance of probabilities.

12. Regarding quantum, the appellant submitted that she produced medical evidence which included, treatment notes from Succos Hospital, Kisaju medical clinic, Kitengela Health Centre, P3 form that classified the injuries as harm and medical report by Dr. A. O. Wandugu, PW1, which corroborated the injuries as pleaded in the plaint. PW1, opined that she suffered harm, a lot of pain and mental anguish and that the results of the injuries were chronic pains, permanent scars, chronic headaches, visual disturbance to recurrent respiratory tract infections.

13. Submitting on general damages, she argued that the Kshs. 180,000 suggested by the trial magistrate was not commensurate with the injuries she sustained and instead urged this court to award Kshs. 500,000. She 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.

14. The respondents filed written submissions dated 22nd April, 2021, in response to the appellant's submissions. They submitted that the appellant did not prove that she was involved in the accident and the injuries she sustained on a balance of probabilities. They argued that although the appellant testified that she was seated behind the driver, her name was not listed among the passengers who were involved in the accident. According to the respondents, it could not be assumed that the appellant was one of the unknown passengers, and that she did not give reasons why she obtained a police abstract six months after the accident.

15. 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 proved and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.

16. It was the respondents' case that the appellant's suit was aimed at gaining undue compensation. They relied on ***Timsales Ltd v Wilson Libuywa*** [2008] eKLR, for the argument that the medical report by a doctor who examined the plaintiff much later is of little, if any help at all, unless it is supported by initial treatment notes since it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. 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 lower court.

17. 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 to prove negligence against the respondents and urged the court to uphold the trial court's decision and dismiss the appeal.

18. Regarding quantum, the respondents argued that assessment of damages is a discretionary matter and that 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.

19. They argued that based on the pleadings and documents, the appellant suffered soft tissue injuries and, therefore, proposed general damages of Kshs. 100,000. They relied on ***PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & Another*** [2018] eKLR where the lower court's 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 and ***Ndungu Dennis v Ann Wangari Ndirangu & another*** [2018] eKLR where the lower court's award was substituted for Kshs. 100,000. They urged this court to uphold the judgment of the trial court and dismiss the appeal with costs.

20. 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, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see the witnesses testifying and give due allowance for that.

21. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] e KLR, 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.***

22. 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.***

23. Similarly, 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 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.***

24. PW1, ***Dr. Antony Wandugu,*** testified that he examined the appellant on 16th March, 2016 who had a history of a road traffic accident. She sustained cut wounds to both arms and legs involving knee joints, cut wounds to the right eyelid, cut wound on the forehead, trauma to the right side of chest and trauma to the left ankle. She complained of pain in the affected areas and this affected functions of those areas. She had scars and tenderness in the affected areas. His opinion was that the appellant suffered harm, a lot of pain and mental anguish. The result was chronic pains, permanent scars, chronic headaches, visual disturbance in the affected eye. She was vulnerable to recurrent tract infection. The injuries resulted in weakness in the affected areas. He produced the medical report, receipt for Kshs. 2,000, and attendance fee receipt-(Exhibit 1(a)-(c)). In cross examination he confirmed that he examined the appellant a year after the accident and that the appellant had weakness because of the cut wound effect on the connected tissues, but she was in good general condition. He stated that he relied on the P3 form and treatment notes from Kisaju hospital to make his report.

25. PW2, ***No. 82433 P C Anthony Opiyo*** of Kitengela Traffic Base, adopted his evidence in Civil Suit No. 464 of 2016 (Civil Appeal No. 21 of 2017). He stated that 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 relating to an accident captured OB No. 6 of 7th February, 2015. The appellant was described as a passenger in motor vehicle KAR 824 W. In cross examination, he stated that everything in a police abstract emanates from the OB; that the appellant's name was not in the OB for that day and that investigations were still pending.

26. The appellant (PW3), testified adopting her witness statement dated 3rd June, 2016 filed together with the plaint, that she was involved in an accident on 7th February, 2015 while travelling in the motor vehicle from Kitengela to Isinya. The accident occurred near Acacia as the driver of their motor vehicle was overtaking resulting into a collision with an oncoming motor vehicle. She sustained cut wound above the right eye, her legs were bruised at the knees, right arm and chest were also injured. She was taken to Sukos hospital for treatment and then went home and continued with treatment at Kisaju. She reported the accident at Kitengela police and was issued with a P3 form which was filled at Kitengela Sub County hospital. She produced the documents in her list of documents as exhibits. In cross examination, she testified that she was seated on the 2nd seat after the driver and that she could tell that the motor vehicle was being driven fast from the way it was moving. She also told the court that she was seen at Sukos on 7th January, 2015.

27. The respondents did not call a witness and lead no evidence.

28. The trial court considered the evidence but was not satisfied that the appellant had proved her case on a balance of probabilities. It dismissed the suit prompting this appeal. The appellant has faulted the trial court on various grounds. In my view, the issues that arise for determination are; whether the appellant proved that she was a passenger in motor vehicle KAR 824 W and depending on the answer to this issue, whether she was entitled to compensation.

29. The appellant's evidence and submissions were to the effect that she was a fare paying passenger in motor vehicle KAR 824 W when the accident occurred. She sustained injuries for which she was treated at Sukos hospital and discharged. She later obtained a police abstract and P3 form. She then sued for damages for personal injuries sustained as a result of that accident.

30. The respondents who did not call evidence, contended that the appellant was not a passenger in the motor vehicle and that she only obtained a police abstract several months after the accident to enable her claim damages but she was not a victim of the accident. In their view, she was taking advantage to get compensation.

31. The accident occurred on 7th February 2015 at about 8pm. along Kitengela-Isinya road. The accident was reported at Kitengela police station under OB No 6 of 7th February 2015. The appellant and her witnesses admitted that her name was not recorded in OB No. 6 of 7th February 2015 relating to that Accident. In fact, PC. Opiyo, the Police officer who testified and produced the police abstract (Pex2), admitted that the appellant was not in the list of those reported to have been involved in the accident and that the matter was still under investigation. He also stated that he was not the investigating officer and that a follow up report ought to have been made in the OB when another person reported the accident. He did not know whether this was done.

32. I have perused the documents produced by the appellant as well as those attached to her list of documents filed together with her plaint before the trial court. A perusal of the police abstract, shows that it was issued to the appellant on 2nd March 2016. The appellant testified that she was taken to Sukos hospital where she was treated and discharge.

33. One of the documents attached to the appellant's list of documents filed with the plaint was a treatment note from Kisaju Medical Clinic for 7th February 2015. The appellant did not state in her statement filed with the plaint that she was taken to Kisaju Medical Clinic. She also did not state so in her evidence in chief when she testified. Her evidence both on oath and in the witness statement was that she was taken to Sukos hospital where she was treated and discharged.

34. A further perusal of the documents reveals that a copy of notes in an exercise book page showing 2nd March 2016 as the date she was at Kitengela Heath Centre. There is also a document from Sucos Hospital addressed **"To WHOM IT MAY CONCERN"** and states that the appellant was attended at the Hospital on **7th January 2015** following a road traffic accident. The P3 form was and police abstract were issued on 2nd March 2016, about one year after the accident and no explanation was given for this.

35. Section 107 of the Evidence Act states 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 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. In this regard, the appellant's case was that he 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.

36. The trial court dismissed the appellant's suit 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. The documents contradict the appellant's evidence. 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.

37. 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.***

38. 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.***

39. The question in this appeal is whether on the evidence on record, the appellant proved her case on a balance of probabilities. Having re considered the evidence and re-evaluated it myself, I am unable to agree with the appellant that she proved her case before the trial court to the required standard. There were obvious and unexplained contradictions in the appellant's testimony and documentary evidence. She also did not explain when she reported the accident and why so late, if at all, thus creating doubts that she was indeed a victim in that accident.

40. In the circumstances, I do not find fault with the trial court's finding of fact to warrant interfering with it. Consequently, I find no merit in this appeal. It is declined and dismissed. Each party will, however, bear own costs.

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

E C MWITA

JUDGE