



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 91 OF 2018**

**PHILIP KARIUKI WAITHAKA.....APPELLANT**

**-VERSUS-**

**NAAMAN BASHEIKI.....1<sup>ST</sup> RESPONDENT**

**PETER NJOROGE.....2<sup>ND</sup> RESPONDENT**

**JOHN WAHOME NDEGWA.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and Decree of the Senior Resident Magistrate Honorable Y. I. Khatambi delivered on 6<sup>th</sup> July 2018 in Nakuru CMCC No. 1314 of 2012)*

**JUDGMENT**

1. This appeal arises from a claim filed by the plaintiff/appellant against the defendant for injuries sustained by the plaintiff which he sustained on 25<sup>th</sup> June 2019 while travelling in motor vehicle registration number KAV 309T which collided with motor vehicle registration number KAS 116W. Motor vehicle registration number KAV 309T was driven by 3<sup>rd</sup> defendant, registered in 1<sup>st</sup> defendant's name with the 2<sup>nd</sup> defendant as the beneficial owner.

2. After hearing, the trial magistrate found that the accident occurred and held the 3<sup>rd</sup> defendant 100% liable and found the 1<sup>st</sup> and 2<sup>nd</sup> defendants vicariously liable for negligence of the 3<sup>rd</sup> defendant. She however found that the appellant failed to prove injuries sustained and dismissed the suit. She went further to assess general damages that would have been awarded at kshs 100,000 and special damages of kshs 7,500.

3. Being agreed by the trial magistrate's decision, the appellant/plaintiff filed this appeal on the following grounds: -

*i. That the honorable learned trial magistrate erred in law and fact in failing to consider appropriately evidence adduced by the appellant hence arrived at a wrong conclusion that the plaintiff did not prove his case to the required standard.*

*ii. That the honorable learned trial magistrate erred in law and fact in not taking into account relevant facts but instead took account of irrelevant ones hence reaching a wrong conclusion.*

*iii. That the honorable learned trial magistrate erred in law and fact in dismissing the plaintiff's case contrary to evidence on record and without assessing and or assessing adequately the number of damages that she could have awarded.*

4. The parties agreed to have the appeal canvassed by way of written submissions.

**APPELLANT'S SUBMISSIONS**

5. On the issue of liability, counsel for the appellant submitted that the magistrate found that the defendants were 100% liable "... I find the accident occurred due to negligence on the part of the 3<sup>rd</sup> defendant who was the driver of the subject motor vehicle. He is 100% liable for the said accident.... I hold the 1<sup>st</sup> and 2<sup>nd</sup> defendant vicariously liable for the negligence on the part of the 3<sup>rd</sup> defendant"

6. The appellant's argument is that he produced treatment notes from Nakuru PGH, a P3 form, and a medical report from **Dr. Obed Omuoyoma** and the evidence adduced was sufficient to support his case.

7. He submitted that the dates in the treatment notes being 15<sup>th</sup> January 2012 instead of 16<sup>th</sup> January 2016 were computer errors which he

should not be construed to prejudice his case.

8. The appellant argued that the discrepancies in the treatment notes ought not to be visited on an innocent litigant as he was not the author of the treatment notes. He cited the case of **Henry Binya Oyala vs Sabera O. Itira (2011) eKLR** the court held that **the primary source of information on injuries sustained is by the victim and the evidence of the medical officer is not mandatory. That a victim's own statement with regard to injuries should not be dismissed merely on ground that it was not matched by the initial treatment from hospital.**

9. The plaintiff submitted that having produced the P3, medical report, police abstract, and the treatment notes from Nakuru PGH, he had proved his case on a balance of probability and urged the Court to find the defendants jointly and severally liable.

10. On the issue of quantum, the appellant proposed a sum of Kshs. 200,000/= as compensation for the injuries sustained for pain, suffering, and loss of amenities.

11. The appellant urged this Court to allow this appeal and set aside the judgment of the magistrate's court and proceed to award damages.

### **RESPONDENT'S SUBMISSIONS**

12. The respondent's counsel submitted that the Appellants failed to sustain a claim of negligence as he failed to prove any injury sustained.

13. The respondent submitted that the appellant gave contradicting evidence in his pleadings; that in the plaint, he stated that he sustained injuries in the right leg while at trial, he said he suffered injuries in the left leg, the P3 and the medico-legal report states the injuries are on the right leg the medico-legal report is amended to read left leg with no clear indication of who amended, and he therefore failed to discharge his burden in proving the injuries sustained and submitted that that parties are bound by their own pleadings and cited the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd (2018) eKLR.**

14. Further that there was no certainty on the injuries sustained and cited the case of **Fadna Issa Omar v Malne Sirengo Chipso & 3 others (2016) eKLR** where the court held that; **"the P3 produced was unreliable as there was no basis of the injuries stated herein."**

15. The respondent urged this court to dismiss the appeal and award costs to the respondents.

### **ANALYSIS AND DETERMINATION**

16. This being the first Appellate Court, I am invited to re-evaluate the evidence presented in the lower court and arrive at my own independent conclusion. This position was held in the case of **Selle -vs- Associated Motor Boat Co. [1968] EA 123** where the Court stated as follows: -

**"An 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 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 demeanor of a witness is inconsistent with the evidence.**

17. In view of the above, I have perused the proceedings before the trial court and considered submissions filed herein. I note that the trial magistrate made a finding on liability by holding the 3<sup>rd</sup> defendant 100% liable and the 1<sup>st</sup> and 2<sup>nd</sup> defendants vicariously liable for negligence of the 3<sup>rd</sup> defendant. She however found that the plaintiff/appellant failed to prove injuries on ground that documents produced contradicted with his evidence in court; that the P3 indicate injury to right leg while his testimony in court is injury on left leg; further that the medicolegal report was altered to read left leg but the alteration was not countersigned.

18. What I find to be in issue is whether the plaintiff proved that he sustained injuries in the accident; whether his evidence on a balance of probabilities, proved that he was injured.

19. PW2 **Benjamin Kipkoech** a record officer from Nakuru PGH testified that he had the records to show that plaintiff was treated at the facility after the accident.

20. The plaintiff's argument is that the indication of injuries to right leg instead of left is typographical error.

21. The Defense did not call any witnesses and closed their case.

22. During the lower court trial, the appellant availed 2 witnesses in support of his case. He stated on 16<sup>th</sup> January 2012 while abode motor vehicle registration number KAV 309Q the vehicle collided with motor vehicle KAS 116W, the motor vehicle KAV 309Q lost control and veered off the road and he sustained injuries to the left leg. He was taken to Nakuru General Hospital for treatment.

23. PW2 a record officer from Nakuru PGH testified that he had the records to show that plaintiff was treated at the facility after the accident. On perusal of page 33b of the record of appeal I note that it indicate swollen tender left lower leg/bruise on the right lower limb on 16<sup>th</sup> January 2012. Date of accident is 16th January 2012. The police abstract confirm that the plaintiff is listed as among passengers injured. The

police abstract together with treatment record from Nakuru PGH are initial documents which indicate whether a passenger sustained injuries.

24. The medical legal report show that it was altered to read left from right. In his testimony, the plaintiff indicated that he showed the doctor the leg injured. He testified that it is the left leg that was injured. In my view the plaintiff could not be made to suffer for an error on part of the doctor who indicated left instead of right in P3 and the doctor who altered without countersigning in the P3. It is the plaintiff who sustained the injury and his information is first hand.

25. From the forgoing the indication on left instead of right by the doctor who filled P3 is not fatal to plaintiff's case especially in the absence by defense evidence to controvert his evidence. I therefore see merit in this appeal.

26. In respect to damages awarded I am of the view that the assessment of kshs 100,000 as general damages and special damages of kshs 7,500 is adequate to compensate the plaintiff for injuries sustained.

**27. FINAL ORDERS**

- 1) Appeal is hereby allowed.**
- 2) Order dismissing plaintiff's claim is set aside.**
- 3) Plaintiff/appellant awarded kshs.100,000 general damages and kshs. 7,500 special damages.**
- 4) Costs of the trial court to the plaintiff.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 23RD DAY OF SEPTEMBER, 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jeniffer - Court Assistant

Mr. Nam holding brief for Mr. Mbogo for the Appellant

Mr. Kairu holdinb brief for Kabute for Respondents