REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 24 OF 2018

FRANKLIN MAINGI NKUNJA.....APPELLANT

VERSUS

ROSE MUTUMA.....1ST RESPONDENT

GODFREY MUTUMA.....2ND RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. MRS. L. Ambasi (CM)

delivered on 22/2/2018 in Meru CMCC No. 29 'A' of 2014)

JUDGMENT

1. By an amended plaint dated 19/1/2017, the appellant sued the respondents seeking general damages for loss of amenities, special damages and costs of the suit plus interest. In those proceedings, the appellant pleaded that on or about 28/5/2013, he was lawfully walking along Meru-Nkubu road on the pedestrian path at Ngonyi area, when the 1st respondent so negligently and recklessly drove Motor Vehicle Registration No. KBN 247 Z Toyota Fielder that it lost control, veered off the road into the pedestrian path and hit him, thereby occasioning him serious bodily injuries.

2. In support of his case, the appellant, **PW1** testified that on the material day, he was walking on the left side of the road while coming from Nkubu, when at Kiriene Kabukarare, the defendants' motor vehicle which was heading to Nkubu tried to overtake a stationary lorry but noted an oncoming vehicle and swerved back to her lane, but veered off the road and hit him on the side of the road. The driver took him to the hospital after making a report at the police station where the vehicle was detained. He described his injuries as cut on the back of the head, lost tooth and loosening of all the other teeth. He adopted his witness statement recorded on 19/1/2017 together with the list of documents which he produced as exhibits 1- 6 without any objections.

3. During cross examination, he stated that he was coming from Kariene heading home and he was on the right. The car hit him on his side. He denied ever drinking or being drunk although the treatment report indicated that he was drunk and smelling alcohol. In insisting that he was not drunk, he stated that he did not enter the road when he was hit. He still did not have 1 tooth although the loose ones had since healed. He concluded that there was traffic. In re-examination, he stated that he was off the road.

4. PW2 PC Leah Wangare attached at Meru police station stated that a report of a road traffic accident was made at about 5 pm on the material day. She stated that the police abstract was filled by her colleague who had since been transferred. The abstract indicated that no one had been charged and the motor vehicle was taken for inspection.

5. During cross examination, she stated that the OB showed that the driver came to Meru police station and reported. The witness did not visit the scene having not been the investigations officer and that no one was charged for the accident**.**

6. The respondents denied the claim by their amended statement of defence dated 24/4/2017 and prayed for the appellant's suit to be dismissed. In the said statement of defence all allegations by the plaint were traverse with alternative plea that if the accident ever occurred then it was caused by or substantially contributed to by a lorry which obstructed the driver's way and or by the plaintiff own negligence of failing to notice the presence of the vehicle on the road, failure to pay attention and carelessly dashing onto the road from a group of people and onto the way of the motor vehicle.

7. DW1 Rose Gakii Mutuma, the 1st respondent, recalled leaving the hospital at 5 pm on the material day, and at Kapukarara, hilly on her left side, there was a group of people. There was an oncoming lorry and one person who was in a green jacket emerged from the group and ran into the road while staggering. To avoid hitting him, she swerved to the road but her left side mirror left side hand caught him and he

fell on his face**.** She hooted but he did not respond. She came out and met the other people of the group were rough and she got out as he had stopped in the middle of the road. She pleaded her to take the appellant to hospital. The others also got in the motor vehicle after threatening her and beating the car. The appellant was smelling of alcohol. She together with the car were detained at the police station and later released. She blamed the appellant for staggering and denied that she was overtaking asserting that if she was, she would have hit him on the road. She said that she saw the group about 70 meters away and that on seeing the plaintiff dash onto the road she first swerved to the right then back thereby hitting him.

8. During cross examination, she stated that she was heading to Nkubu and denied pleading in her defence that the lorry was to blame. She hit the appellant on the left side and was travelling on the left lane. She swerved to the right and back to her lane to avoid hitting the appellant. She did not try to evade him as having drunk for 17 years, she could smell alcohol. She concluded that the appellant was drunk and he should have been charged for endangering her life.

9. In re-examination, she stated that there was an oncoming lorry and she knew the traffic rules of keeping left. The next day in the company of the investigating officer, they came to the scene where they saw blood stains in the middle in the yellow line. She adopted her witness statement as part of her evidence in chief.

10. DW2 Dr. Kenneth Muthomi of Meru Teaching and Referral Hospital, had the medical report of the appellant which had been filled by his colleague Dr. Munyoki. The report was not signed or stamped but the court allowed it to be produced as D.Exh. 1. The injuries noted therein were thumb deformities, 1 missing tooth, scalp laceration, ring finger and the appellant was smelling of alcohol.

11. During cross examination, he admitted that part 3 of Peh.1 did not include alcohol. The P3 was based on physical appearing and a fracture could be felt. Pexh.2 was signed by Dr. Adam together with the discharge summary.

12. During re-examination, he stated that Dr. Munyoki wrote the report the previous week based on the physical file. He concluded that P3 forms are filled by the duty MD upon examination of the patient.

13. After the conclusion of the trial, and in a reserved judgment, the trial court found that the appellant had failed to prove liability, that he was wholly to blame for the accident for having dashed onto the way and path of the first defendant and dismissed his case. He however assessed general damages at Kshs 200,000 and special damages at Kshs 6,925 had the case succeeded

14. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 20/3/2018 setting out eight (8) grounds of appeal. He faulted the trial court for; holding that he was wholly to blame for the material accident against the evidence adduced, that the accident was caused by the fact that he was drunk at the time of the accident by over reliance a belatedly filed medical report to make its findings, which contradicted the P3 form filled by the same hospital, for allowing the respondents to erroneously produce a medical report, when they had sought for production of the original treatment note without appreciation that the 1st respondent worked at Meru Teaching and Referral hospital and probably the alleged medical report was an afterthought. He also faulted the trial court for relying on conjecture and speculations, and failing to find that on a balance of probabilities, the 1st respondent was to blame for the accident, thereby reaching a finding that was against the weight of the evidence and the law.

Submissions

15. Upon the directions by the court, the parties filed their submissions in respect to the appeal on 4/8/2020 and 21/8/2020 respectively. The appellant faulted the respondents for shifting blame to the unnamed lorry, yet they did not bring any 3rd party proceedings against it and that there was neither evidence that he contributed to the causation of the accident nor that the respondents were not liable for accident. He faulted the trial court for failing to make a finding on liability, yet there was no justification for it. He further faulted the trial court for reaching a biased decision based on its negative attitude towards alcohol takers, yet there was no connection between alcohol and the accident. He submitted that the respondents had not tendered any evidence to support the allegation that he was drunk, as the same was not indicated in the P3 form, nor was there evidence that his drunken state contributed to the accident. He submitted that the 1st respondent had sought leave to produce the original treatment notes but ended up producing a medical report which had been made in his absence and that the filing of the treatment notes at the defence stage negated the very basis of the existence of Order 11 of the Civil Procedure Rules. He submitted that the 1st respondent's defence and testimony were contradictory, which shook their credibility. He faulted the trial court for relying on the belatedly filed medical report which contradicted the P3 form filled by the same hospital, and its failure to have the author of the report called was outright bias, which advanced an injustice. He submitted that the trial court ought to have given regard to the fact that the 1st respondent, who was an employee of Meru Teaching and Referral Hospital, had all the time to do all manner of reports in support of her case. Further submissions were made that the trial court had no regard to the respondents' defence, where they pleaded that the lorry was to blame for the accident, yet they did not take out 3rd party proceedings against the lorry in addition to the fact that the trial court for expecting proof at a standard higher than a balance of probabilities. To the appellant there was no evidence by the 1st respondent to support her claim that the appellant contributed to the causation of the accident or that he was wholly to blame. The trial court was additionally faulted for making an observation which was not in tandem with the evidence placed before it since the respondents did not produce anything to shake his documents and evidence, and therefore the finding by the trial court was against the weight of the evidence placed before it. He urged the court to find that the appellant had proved his case and award 100% liability against the respondents, and make its own finding on quantum. He relied on **Belita Kennedy & anor v Angelina Katili Musyoka (2016) eKLR and Wainaina Kagwe v Hussein Dairy Limited(2013)eKLR** in support of his submissions but without any attempt to align the decisions to any legal point raised in the submissions. Even the mechanical act of highlighting portions of the decisions thought relevant for the appeal was not done. This to me is a disservice by counsel to the court and a practice to be discouraged for merely sending the court on a wild goose chase.

16. For the respondents, submissions were offered to the effect that the appellant contributed to his misfortunes and could not pass the blame to anybody else and worse of all make an undeserved profit from the same. They cited ***Nzoia Sugar Company Limited v David Nalyanya (2008) eKLR and Walter Onyango v Foam Mattress Limited (2009)eKLR***, where it was stated that, **"as a general principle, negligence must be proved and there should be no liability without fault."** They submitted that the appellant had alleged negligence but failed to

prove the same and urged the court to consider the evidence on record. They cited ***Evans Muthaita Ndiva v Father Rino Meneghello & anor (2004) eKLR,*** on the need to proof negligence**.** They submitted that it was unfathomable to place blame on a party who had no fault in causing the accident. They cited ***Peter Kanithi Kimunya v Aden Guyo Haro(2014) eKLR***, on the duty of the appellant to prove the allegations leveled against the respondents as pleaded in his plaint and that the accident occurred due to the negligent acts particularized in his pleadings. They further relied on ***Julius Omollo Ochando & Joyce Atieno Muga v Samson Nyaga Kinyua CA 208/2007***, where the court of Appeal observed that, 'where an accident occurs and it is not clear who was to blame, then blame should be apportioned equally'. It was then submitted that since the 1st respondent was not charged with any traffic offence, she was not to blame for the accident. They maintained that it was clear beyond peradventure that the appellant was drunk at the time of the accident, contrary to his evidence in chief. They submitted that they called the doctors from the hospital where the appellant was treated because he elected to conceal material facts in the first place. They cited ***Nkube v Nyamiro (1983) KLR 403***, on when a court of Appeal can interfere with the finding of fact by the trial court. They submitted that the appellant did not prove that the accident was caused by the negligence of the respondents and he had failed to prove a case for negligence on a balance of probabilities. They implored the court to dismiss the appeal with costs.

Analysis and determination

17. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See ***Oluoch Erick Gogo v Universal Corporation Limited (2015) eKLR.***

18. It is clear that the determination of the appeal revolves around the question whether the appellant proved his case on the balance of probabilities. Put the other way, whose negligence occasioned the accident?

19. The provisions under section 107,109 and 112 of the Evidence Act were extensively dealt with in ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334***, in which the Court of Appeal held that:

> **"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that places upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."**

20. The appellant contends that the respondents were wholly to blame for the accident, because the 1st respondent tried to overtake a lorry but on seeing an oncoming vehicle, she swerved back into her lane but veered off the road where she hit him, while he was walking on the pedestrian path. While this is a plausible version of how the accident may have happened, the respondents gave a different account of events being that the appellant, who was drunk at the material time, solely caused the accident. The question I now pose is whether from the evidence of the appellant, it can be firmly concluded that he proved his case on a balance of probabilities. The testimony by the appellant was that he was knocked by the 1st respondent while he was lawfully walking on the pedestrian path. The respondents on the other hand insisted that the appellant, who was staggering, dashed into the road unannounced and the 1st respondent swerved in a bid to avoid the accident.

21. Kimaru, J in **William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLE 526** stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

22. No sketch plan was produced herein to show where the exact point of impact was yet the respondent say her and the investigating officer visited the scene the next day. It is difficult to take it that the police visited the scene and totally failed to do sketches. I can only draw an inference that any such sketches if proved would have provided adverse evidence against the respondent. Equally no eye witness was called by the appellant to support his version of events. The police abstract the appellant produced did not have any information of who was to blame for the accident.

23. The trial court, in internalizing the evidence led, observed in its judgement at page 83 of the record appeal, as follows; **"The court is presented with two conflicting versions of how the accident occurred. Further, observing the plaintiff's demeanor, this court was disinclined to believe he was a teetotaler as alleged, while the 1st defendant was quite confident in her testimony. The court is inclined to believe her version of events on a balance of probability, and consequently attributes the occurrence of this accident on the plaintiff wholly. Having due regard to the pleadings, filed documents and the submissions and authorities and injuries, I hereby dismiss the plaintiff case with costs."**

24. I think the court was merely observing that it was unable to say with certainty whose version was the more credible yet proceeded to believe the respondent without assigning any reason therefor. However there was uncontested evidence by the respondent that he saw the crowd of people in which the appellant was about 70 meter ahead and that she swerved right then left before knocking the appellant. That piece of evidence give the impression that the road was straight and view clear. If clear then what stopped the respondent from just keeping to the right lane! I take the view that there was an obstruction or indeed on coming traffic that forced her to swerve back and knock the appellant. That is to court consistent with the version of the appellant as conceded by paragraph 7 of the amended defense. Otherwise if there was no such danger then it was a negligent act to swerve back and hit the appellant rather than avoiding him.

25. What's more, the respondent maintained in the evidence that having swerved to her lane it is the left mirror that hit the appellant. I am prepared to take notice that when one is on his lane on a Kenyan road and her left mirror hits a pedestrian, the pedestrian can only fall on the left side of the road if not off the road. To the contrary, the respondents version was that the next day evidence of the collision was in the

middle of the road as evidenced by blood stains on the yellow line. That is the kind of evidence that should not have swayed the court in her favour. I find it to be contradictory and incapable of belief. It may as well pass as a conjecture.

26. With such evidence that there was an accident and that the respondent had a chance to swerve, did swerve right to avoid a collision only to swerve left and cause a collision, I find that there was evidence that the respondent was negligent. **In *Treadsetter Tyres Ltd v John Wekesa Wepukhulu (2010) eKLR*** Ibrahim J in allowing an appeal, quoted Charles Worth & Percy On Negligence, 9th Edition at P. 387 on the question of proof, and burden thereof where it is stated:-

> **"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 maybe reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is infact inferred."**

27. Similarly, in ***Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR*, Nyamweya, J** quoted ***Halsbury's Laws of England***, 4th Edition at paragraph 662 at page 476 where it is stated that:

> **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."**

28. Here I find the totality of the evidence on record was that the respondent was negligent. To say that the evidence recorded did not prove the case on a scale and standard higher than balance of preponderance. For that reason I find that it was more probable than not that the accident occurred on the left side of the road and was occasioned by the fact that the respondent was trying to overtake, noticed an oncoming traffic, swerved on her left thereby knocking down he appellant. I therefore find the respondent to have been 100% to blame. She is wholly liable to the appellant.

29. There was the issue of drunkenness introduced by a document that was produced by the respondents yet it was not indicated in the P3 form nor the treatment notes. There was no indication on when the report was asked for and by whom. There was no evidence that the disclosed author interacted with the appellant on the date of the treatment. In fact DW2 admitted that it was Dr Adan who treated and discharged the appellant. To that extent that report was suspect. More importantly, there was never satisfaction of the requirements of section 33 of the evidence Act. It was not enough that Dr Munyoki was unavailable to testify. It was equally erroneous for the trial court to dismiss the objection on production on a practice in criminal cases and that the same could be addressed by submissions. Once a document is produced it become part of the evidence and there is no room to challenge it by submissions. I do find that the admission of the medical report by Dr Munyoki was irregular and its contents ought not have been the basis of the court's finding on drunkenness as impacting on liability. In any event, there was no pleading by the respondent on drunkenness to justify admission evidence on drunkenness.

30. On the assessment of damages, I have no reason to depart from the trial court's finding thereon as there was no challenge on it in the grounds of appeal. As was reiterated by the Court of Appeal in ***Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55***:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

31. In the premises, I allow the appeal to the extent the finding on liability is reversed so that the respondent is held 100% liable. On that basis the finding dismissing the claim is set aside and in its place substituted a finding allowing the suit and entry of liability against the respondent at 100%. The award on both special and general damages is upheld.

32. The appellant gets the costs of the suit and this appeal as well as the interests of on damages at court rates. The general damages will attract interest from the date of the judgment while special damages will attract interest from the date of the suit.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF DECEMBER,

2021

PATRICK J.O OTIENO

JUDGE

IN PRESENCE OF

NO APPEARANCE FOR THE APPELLANT

NO APPEARANCE FOR THE RESPONDENT.

PATRICK J.O OTIENO

JUDGE