**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 66 OF 2016**

**DANIEL MBECHE SERO.....APPELLANT**

**VERSUS**

**HUSSEINA ENTERPRISES**

**HUSSEIN GULAMALI SAIGER.....RESPONDENTS**

**JUDGMENT**

1. The Appellant who was the plaintiff in the lower court filed suit against the defendant/respondent seeking general and special damages for the injuries he sustained when he was hit on his left leg by the 1st defendant's vehicle registration number KBH 537P while crossing the road along Nyerere road.

2. By Judgment delivered on the 19.4.2016, the trial magistrate found that the plaintiff/appellant was 65% to blame for the accident while the Defendant/Respondent was to bear 35%. The appellant being aggrieved by the said determination filed this appeal and set up the following grounds:-

**i. That the learned magistrate erred in law and in fact by failing to consider or adequately consider and take into account the submissions of the Appellant on liability.**

**ii. That the learned magistrate erred in law by failing to appropriately analyse the evidence on record and thereby reaching a wrong finding that the Appellant was 65% to blame for the accident.**

**iii. That the learned magistrate erred in law and in fact by failing to analyze or properly analyze the evidence on record thereby dismissing the Plaintiff's case instead of confirming it.**

**iv. That the learned magistrate erred in placing an undue weight to the fact that there was no zebra crossing where the accident happened and failed to take into account that Mombasa is a built up area full of traffic not a rural outpost.**

**v. That the award is based on the Application of wrong principle or misunderstanding of relevant evidence.**

3. I read all the grounds of Appeal to fault the trial court for failure to properly analyze the evidence and thus reached an erroneous conclusion in the apportionment of liability.

**APPELLANT'S SUBMISSIONS**

4. Counsel for the Appellant submitted that the finding of Hon. Nyakweba was largely based on the significance of a zebra crossing and by dint of that then the Respondent was relieved of his duty to be carefully as the act of crossing the road at a non-designated pedestrian crossing was elevated into an omission that blinded the judicial officer yet clearly the Respondent substantially contributed to the occurrence of the accident.

**RESPONDENT'S SUBMISSIONS**

5. Counsel for the Respondent took the position that the 2nd Respondent statement was adopted by consent and on cross-examination the 2nd Defendant/Respondent maintained that he hooted to warn the Appellant of his approach but he continued crossing the road. Since there was no zebra crossing, there was required maximum alertness from the Appellant while crossing the road. For those reasons the finding by the

trial court was supported and proper and not amenable to be disturbed.

6. Counsel further submitted that this Court can only interfere with the trial Court finding if it is founded on the wrong application of principles and urged this Court to dismiss the Appeal with costs.

**ANALYSIS AND DETERMINATION**

7. This being the first appellate court, I am mandated to reevaluate evidence adduced in the trial court and arrive at an independent determination. While doing this, I am minded of the fact that unlike the trial court, I never took evidence first hand and never got opportunity to observe demeanor of witnesses a benefit enjoyed by the trial court. In ***Peters v. Sunday Post Ltd.*** (1958) EA 424, 429 where Sir Kenneth O'Connor, P. said:

> ***"It is a strong thing for an appellate court to differ from the findings of fact of a judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v. Thomas (1947) AC 484…."***

8. As said before there is only one issue for determination in this Appeal:-

***Whether the Plaintiff had proved its case on negligence on a balance of probabilities.***

9. That the burden of proof was at all times upon the Appellant to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

10. Similarly, in the case of ***Nadwa -vs- Kenya Kazi Ltd (1988) eKLR,*** the Court of Appeal observed**:**

> ***"In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant's evidence provides some answer adequate to displace that interference."***

11. In this instance, since the 2nd Respondent statement of what transpired was admitted by consent of the parties and the said testimony was not shaken through cross-examination by the Plaintiff's counsel, it was the duty of the Appellant to prove that the 2nd Respondent was driving at an excessive speed, or without proper look out thereby leading him to lose control and hitting the Appellant as a result. From the evidence on record, this court is unable to make a clear determination on the point of impact and the 2nd Respondent's speed at the time of the accident as no sketch plan of the scene or even the scene pictures to show evidence of skid marks was produced by the police officer (PW1) who could not do so in any event as he was neither the investigating officer nor did the police abstract he produce blame any party for the accident.

12. The Court finds that, It was incumbent upon the appellants to produce to the court all relevant materials and documents to enable it make well informed decision. Section 107 (1) of the Evidence Act.

13. From the evidence I note that I it was the Appellant's testimony that he did not see the 2nd Respondent vehicle until when it knocked him down. It was also in evidence that the driver hooted but the Appellant did not yield. In my view, a driver is not expected to do the impossible in the face of a pedestrian who dashes into the road on the path of an oncoming vehicle. The Court of Appeal case **Patrick Mutie Kamau & Another -vs-Judy Wambui ndurumo [1997]** ***eKLR*** had this to say on the pedestrians duty on the road:-

> ***"That pedestrians too owe a duty of care to other road users, and they ought to move with due care and follow the Highway Code. They should too take care of their own safety and not to run across the road when it is not safe to do so. If they do so, it is at their own peril and cannot blame and oncoming vehicle which is unable to avoid the accident due to short distance."***

14. I find that the Appellant substantially contributed to the accident that occurred on the 28.9.2013 and therefore the trial magistrate's findings, as to the trier of facts, were founded on sound the evidence as tendered. I associate myself with the holding in **Ndiritu -vs- Ropkoi & Another [EALR] 334, Okubasu, Githinji & Waki JJA,** that an appellate court should be very slow to differ with the trial court where the findings of fact are based on evidence and not on wrong misapprehension of evidence or on wrong principles of law.

15. The upshot is that the appeal is without merit and is dismissed with costs.

**Dated** and delivered at **Mombasa** this **24th** day of **January 2020.**

**P.J.O. OTIENO**

**JUDGE**