REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 44 OF 2017

HARRISON BAYA YAA.....APPELLANT

VERSUS

MASH EAST AFRICA LIMITED.....RESPONDENT

J U D G M E N T

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 from behind while on his motor cycle registration number KMCC 280S by the defendant's vehicle registration number KBM 880 along Makupa Causeway at Makande area.

2. By Judgment delivered on the 21.2.2017, the trial magistrate found that the plaintiff/appellant failed to prove his case on a balance of probabilities. The appellant being aggrieved by the said determination filed this appeal on the following grounds:-

i. That the learned magistrate erred in law and in fact by putting the burden of proof on the Plaintiff higher than on a balance of probability.

ii. That the learned magistrate erred in law and in fact in failing to put any weight to the authentic police abstract that was produced by a police officer from the relevant police station showing an accident happened between motor vehicle KBM 880D and Motor Cycle KMCC280S.

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 law and in fact by completely closing his eyes to the fact that the incident was recorded in the police occurrence book and the subject motor vehicle was placed at the scene of the accident at about the time the Plaintiff alleges to have been injured.

v. The documents produced by the Plaintiff both the P3 form and the police abstract had reference only to the O.B.Yet the Learned Magistrate penalized the Plaintiff for not producing the police file which even the police who testified was not sure it existed.

vi. That the learned magistrate erred in law and in fact by showing a clear bias against the Plaintiff in his analysis of evidence thereby leading to a wrong conclusion.

vii. That the learned magistrate erred in law by not realizing that despite having being placed at the scene of accident, the Defendant driver offered no exculpatory evidence. The vehicle examination report that allegedly showed no dents were not produced in evidence.

viii. That the Learned Magistrate conclusion is based on the Application of a wrong principle or misunderstanding of relevant evidence.

3. By the directions on appeal given on the 13th June 2017, the appeal was ordered to be canvassed by way of written submissions to be filed within set timelines. Pursuant to those directions the appellant filed submissions on the 7.7 2017 and reply to the respondent's submissions on the 20.07.2017 with reference to some two decisions of the court of appeal while the respondent file submission together with a separate list of authorities on the 14.07.2014.

APPELLANT'S SUBMISSIONS

4. Counsel for the Appellant submitted that the record showed that it was the Appellant testimony that he was hit from behind by the Respondent vehicle and the same was reflected in the occurrence book of 14.5.2013, police abstract and a P3 which were produced in Court by a police officer. Further, counsel submitted that the trial Court made a blunder by finding that if the investigation officer is not called and sketches not produced then the Plaintiff claim must fail. Reliance was placed in the Court of Appeal case of **David Kajogi M'Mugaal vs Francis Muthomi [2012]** eKLR, where it was held the evidence of an investigating officer alone cannot be conclusive as to who is to blame for the accident nor is it binding to the Court.

5. Counsel also submitted that it is reflected in the police abstract that **Peter Mutisya** "DW1" was driving the Respondent vehicle when the accident occurred. Therefore, the burden of proof shifted to the Respondent to demonstrate that its vehicle was not involved in the said accident. The trial court was therefore faulted for having failed to address his mind to the question of the burden of proof nor did he make any comment on the credibility or demeanour of the witnesses. The appellant to the view that the trial court laid more premium on the quantity rather that quality of evidence that mattered and thereby ran into the grave error by finding that in every civil case where the investigating officer is not called and sketches produced must fail as of course. Reliance was then placed on the excerpts from Halsbury's Laws of England, cited by the respondent as being in support of the plaintiff's case.

RESPONDENT'S SUBMISSIONS

6. Counsel for the Respondent argued that no independent eye witness, save for the Appellant, testified in Court as to the material circumstances of the accident and therefore, the evidence of the police officer was a mere opinion which needed to be corroborated by independent witness or any other evidence.

7. Counsel further submitted that this Court could only interfere with the trial Court finding where it finds the trial Court estimate of the Appellant's witness credibility was wrong. In support of such positions the Respondent cited to court several decisions while conceding that as a first appellate court there is a duty to reevaluate the entire evidence so as to proceed by way of a rehearing and that assessment of damages being in the realm of judicial discretion , it is a strong thing for an appellate court to slightly disturb an award made.

ANALYSIS AND DETERMINATION

8. This being the first appellate court, I am required 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. For this, I give due allowance. See ***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…."***

9. The issue for determination in this appeal, even if the Memorandum of appeal sets out several grounds, is really one:-

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

10. That the burden of proof was on the Appellant to prove their case is not in doubt. The appellant's complaint is that the evidence led proved that an accident did occur and the appellant was thereby injured but the trial court did find that no accident occurred. The question that must be posed and answered is whether there was proof on a balance of probabilities that indeed the accident occurred. 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."**

11. 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."***

12. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 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 than 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."**

13. It was contended that the investigating officer ought to have `been called to testify instead of **P.C Linda Barasa** (PW3.). It is this court's view that proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. An investigating office even if he attends to the scene, takes measurements and comes up with sketches, does not thereby become a witness. The report the makes based on observations at the scene is at all times an opinion based on his experience and ability to interpret the scene and marks observed. Like all opinions, even those by experts, such can only persuade the court but does not bind the court. In **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 the court of appeal laid the law on the weight to be given to opinions in the following words:-**

> ***Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so***."

14. Being guide by the pronouncement in that decision, I find no difficulty in finding that when the court solely based its decision on failure to call the investigating officer to defeat the Appellants case, the court fell into grave error of the law. It is important to note that the Appellant his evidence was never challenged on the occurrence of the accident because no questions were directed at him in cross examination. in the converse, when DW1 gave evidence he did admit in cross examinations that his '***vehicle could have touched the motor circle just before hitting the alleged person'.*** That to this court was a sufficient admission that a collision did occur. It was therefore a misapprehension of the evidence for the trial court to hold that no accident occurred.

15. In the case of **Techard Steam & Power Limited v Mutio Muli & Mutua Ngao [2019] eKLR Odunga J held as follows in relation to proving negligence.**

> **"Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In Peter Kanithi Kimunya v. Aden Guyo Haro [2014] eKLR it was held:**

> **"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station**."

16. I have perused and considered the lower court record; I have also perused and considered submissions by parties herein. The Defendant has indeed admitted the occurrence of the accident on the 14.5.2013, involving the Appellant's motor cycle and the respondent's motor vehicle registration number KBM 880D.

17. It is my finding that that the occurrence of the accident having been established it was incumbent upon the trial court to determine whose negligence it was leading to the accident. That he did not do even though he had isolated it as an issue for determination. In so failing, he once again committed an obvious error of law that must be corrected by this court. It must be corrected because in failing to determine an isolated issue the court abdicated its duty to the parties.

18. Having so said, the evidence in totality, point to negligence on the part of the respondents driver because a motor vehicle when driven with proper lookout would not just hit other road users. That the driver admitted to the vehicle could have hit the cyclist but he did not stop or report to the police till directed by his employer itself point to a violation of the traffic Act for which the said driver should not be allowed to derive a benefit by being absolved of wrongdoing.

19. I have said enough to show that the accident did occur and was caused by the negligence of the respondent's driver for which the respondent was vicariously liable. Having so found, it follows that the decision of the trial court now stands set aside and in its place substituted a decision that the respondent is liable to the appellant at 100% and judgment is thus entered to that extent. Since the trial court did assess the damages it would awarded had he found for the appellant and that assessment having not been challenged, the assessment is upheld.

20. In the end the appeal succeeds in whole and in place of the dismissal order by the trial court, there is entered a judgment for the appellant against the respondent in the sum of Kshs. 100,000 for general damages and Kshs. 2,000 being pleaded and proved special damages. Those sums shall attract interests at court rates from the date of judgment of the lower court till payment in full.

21. Costs of the appeal as well as those at trial are awarded to the appellant.

Dated, Signed and Delivered at Mombasa

this 24th day of January 2020.

P J O Otieno

Judge