



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 150 OF 2017**

**DICKSON CIURI WANJIRU.....APPELLANT**

**VERSUS**

**MUNICIPAL COUNCIL OF NAKURU.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAKURU....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the Judgment/Decree and Orders of Hon F. Munyi Senior Resident Magistrate dated 13<sup>th</sup> October, 2017 in Nakuru CMCC No. 426 of 2013)**

**JUDGMENT**

**BACKGROUND**

1. The Appellant filed suit in the lower court seeking general and special damages for the injuries he sustained when the motor cycle registration number KMCT 378C which he was riding collided with the Defendant's motor vehicle registration number KBQ 112 D on 24<sup>th</sup> December 2012 along Kenyatta Avenue Nakuru. The Plaintiff availed 4 witnesses and the Defendants availed one witness. In its determination, the trial magistrate found that the Plaintiff had failed to prove his case on a balance of probabilities.
2. The Appellant being dissatisfied with the trial court's determination, the Appellant filed this appeal on the following grounds:-
  - a. The Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit and finding that the Appellant had not proved his case on a balance of probabilities notwithstanding overwhelming evidence to the contrary.
  - b. The Learned Trial Magistrate erred in law and fact in disregarding and/or ignoring the evidence adduced by the Appellant, the Appellant's witnesses and the Appellant's submissions.
  - c. The Learned Trial Magistrate erred in law and in fact by going out of her way and relying on information on the police abstract and OB extract whose information is not conclusive in determination of liability.
  - d. The Learned Trial Magistrate erred in law and in fact by assessing damages that were inordinately low in the circumstances.
3. Parties agreed to proceed with the appeal by way of written submissions

**APPELLANT'S SUBMISSIONS**

4. The Appellant submitted that he would canvass each ground with its merits and relied on **Peter Wainana Kinyua v Peter Githendi Njeri (2018) Sir Clement de Lestang VP in Stelle v Associated Motor Boat Company (1968) E.A 123** where he stated;

**“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 demeanour of a witness is inconsistent with the evidence in the case generally.”**

5. On the first and second ground of appeal, the Appellant submitted that the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit and finding that the Appellant had not proved his case on a balance of probabilities notwithstanding overwhelming evidence to the contrary; that the Learned Trial Magistrate disregarded and/or ignored the evidence adduced by the Appellant, the Appellant's witnesses and the Appellant's submissions.

6. The Appellant submitted that he testified as PW1 and stated that he was lawfully riding a motor cycle registration number KMCT 378 along Kenyatta Avenue when he was hit by a motor vehicle registration number KBQ 112D causing him to fall on the road before he was run over and dragged. He testified that he sustained a fracture on the toes and a cut wound on the thigh, the driver of the car took him to Nakuru PGH where he was admitted for two weeks and thereafter he attended the hospital for dressing for a period of one year.

7. He stated that he reported the matter at Central Police Station where he was issued P3 form which was filled at Nakuru PGH and later a medical report was prepared by **Dr. Kiamba**.

8. The Doctor confirmed that he examined the Appellant and found that he had a septic wound. He estimated temporary disability at 8 months and permanent disability of 20%. At the time the appellant testified, he had recovered from the injuries although his foot felt numb and he was no longer able to ride the motor cycle.

9. The Appellant submitted that no investigation was conducted. He submitted that the driver of the vehicle who testified as DW1 on cross-examination stated that he was the one who sketched the map that was used by the insurance investigation department and it was not drawn by the police officer nor the investigation officer. He also said that when the police got to the scene of the accident they did not find the victim or the motor vehicle.

10. Plaintiff further submitted that from Respondent's evidence, when he saw the Appellant from a distance he did not take any action to avoid the accident; further the Respondent stated that he was driving at a speed of 40-50 km/hr and considering that the accident occurred within the town the recommended speed within town is 15-20km/hr so the speed he was driving at was high; it is the Appellant's submission that the Respondent did not do anything to prevent the accident from occurring.

11. The Appellant further submit that the Respondent interfered with the evidence since he moved the motor vehicle and the Appellant from the scene of the accident before the police got to the scene. The Respondent went ahead and sketched the maps and it was relied on to conduct the investigations yet he was no expert on such matters.

12. The Appellant stated that the Trial Magistrate erred in dismissing the suit by relying entirely on the Respondent's word without any support and disregarded on Appellant's evidence. Appellant urged the court to consider Appellant's evidence and find that he proved his case on a balance of probabilities.

13. On reliance on police abstract and Occurrence Book (OB) extract by the trial court to determine liability, the Appellant submitted that though produced in court, police abstract is not conclusive report; that it was not possible to tell who was to blame for the accident since no investigations were conducted to determine who would be liable as confirmed by PW4; this gave rise to different version of events.

14. Further that the police abstract had the initial report which were mere observations by the police which do not bind the Honourable Court while making any determination of the case. Appellant cited the case of **Peter Wainaina Kinyua v Peter Githendi Njeri (2018)** the Court stated that;

**"In the circumstances, the same police abstract No. 0117213 that the Appellant was issued which states "pending under investigations" (the rider to blame) is not supported by any cogent evidence. Having evaluated the evidence, I am in agreement with the holding by the trial magistrate that the Appellant was 100% liable for the accident."**

15. It's the Appellant's submission that he established his case within the required standard and it was the Respondent's negligence that caused the accident which he could have avoided. The Respondent is 100% liable for the accident.

## **THE 2<sup>ND</sup> RESPONDENT'S WRITTEN SUBMISSIONS**

16. The 2<sup>nd</sup> Respondent filed their submissions on 14<sup>th</sup> September 2019. The 2<sup>nd</sup> Respondent urged court to take caution while reviewing determination by trial court this being the first appeal.

17. As to whether the Prosecution had proved its case on a balance of probability, the Appellant referred to **Section 107 of the Evidence Act** which provide as follows:-

**"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 exists (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

18. The 2<sup>nd</sup> Respondent stated that it was the duty of the Appellant to prove that the driver was driving the vehicle negligently; that the police abstract put the blame on the Appellant and PW4 confirmed the same when he testified; that PW4 stated that from the abstract the accident was a result of the Appellant's mistake.

19. The Respondent submitted that it is the appellant who called PW4 as a witness to produce police abstract and he could not therefore run away from the liability ascribed to him by virtue of the police abstract. Moreover, the testimony of DW1 corroborated the evidence of PW4

that the Appellant made a faulty turn hence causing the accident. The production of a document allows the Court to place a reliance on its content hence the Appellant should be estopped from denying the contents of the document.

20. As to whether the trial magistrate disregarded and/or ignored the evidence adduced by the Appellant, the Appellant's witnesses and the Appellant's submissions, the 2<sup>nd</sup> Respondent submitted that the Appellant adduced evidence to prove that he was indeed injured but did not tender evidence to show that the 2<sup>nd</sup> Respondent was liable for the accident.

21. 2<sup>nd</sup> respondent cited the case of **Agnes Mutinda Ndolo & Another v Mboya Wambua & 2 Others (2017)** the Court stated that;

**“The Plaintiff must adduce evidence which on a balance of probability, a connection between the two may be drawn. An injury per se is not sufficient to hold someone liable for the same.”**

22. On reliance on police abstract by the trial magistrate respondent submitted that was the Appellant is the one who sought the police officer and listed the police abstract in his list of documents. The police officer testified that the driver of KBQ 112D ambulance belonging to Nakuru Municipal Council was being driven along Kenyatta Avenue and on reaching near Woolmatt Supermarket the cyclist made a faulty turn and was hit by the ambulance. He confirmed that is what was recorded in the Occurrence Book; that it is not fair and just for appellant to deny his own testimony.

23. In **Jacob Momanyi Orioki v Kevian Kenya Ltd [2018] eKLR**, the judge stated:

**“Going further, the police abstract was clear that the Appellant was blamed for having caused the accident. Although the police were not called to tender in evidence the said police Abstract Report, the appellant did not object to the same being produced in court by the Respondent. In the absence of any documentary evidence to the contrary, this court concluded that the Respondent case had remained unrebutted and /or uncontroverted. The judge further held: For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged in court on 9<sup>th</sup> July 2014 was not merited and the same is hereby dismissed. The decision of the Learned Trial Magistrate's decision is hereby upheld. Appellant will bear the Respondent's costs of this Appeal.”**

24. 2<sup>nd</sup> Respondent submitted that no evidence was tendered to rebut police officer evidence.

25. 2<sup>nd</sup> Respondent submitted that the trial magistrate made the following observations:-

**“PW1 however testified that the police were lying that he was to blame for the accident yet he is relying on their testimony and documents to prove defendant was liable for the accident one may understand that since he had been hospitalized for some time, the defendant may have taken the opportunity to record his own version of events.**

**My view is that he could have sought to have his version of how the accident occurred as soon as he was able to move on his feet so that the matter could have been investigated. There is nothing on record to convince the court that the police are lying are more so because he is relying on their documentary evidence to prove their case.”**

Further, the learned Trial Magistrate (page 114 of the Record of Appeal) stated that, **“if the reports and the documents prepared by the police have false information, it was upon him to have shown that he did not agree with the contents in the OB report and in the police abstract”**

27. During re-examination of PW4, (page 85 of the record of appeal) Corporal Jackson Nkonge, it was in his testimony that the abstract was filled by PC Owuor, the investigating officer then.

27. Respondent submitted that the Appellant had opportunity of calling witnesses and he cannot create an excuse of not relying on his own witnesses' testimony. In fact he was at liberty to call PC Owuor who he states was the investigating officer but instead he called Corporal Jackson Nkonge; that no evidence was produced to challenge the police abstract and the appellant cannot deny the testimony of his own witness.

28. The Respondent agreed with the learned Trial Magistrate that no documentary evidence was rendered to prove the police was lying or the abstract contained errors and the Trial Magistrate had every right to rely on the police Abstract produced by plaintiff's witness corporal Jackson Nkonge.

29. 2<sup>nd</sup> Respondent submitted that in the Kenyan legal system the court cannot find liability without fault and the Appellant must prove negligence against his claim on 2<sup>nd</sup> Respondent; that in **Eunice Wayua Munyao v Mutilu Beatrice and 3 Others [2017] eKLR** the court quoted the case of **East Produce (K) Limited v Christopher Astiado Osiro in civil Appeal No. 43 of 2001** where it was held as follows:-

**“it is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held that “there is a yet no liability without fault without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based.**

30. Further, the Respondent cited several authorities which include the case of **Grace Kanini Muthini V Kenya Bus Services & Another**

where **Justice Ringera** held that:

**“It is common position that where a plaintiff has not proven negligence against the defendant on a balance of probabilities then the court cannot find fault without evidence; that the court cannot decide the matter by adopting one or the other probability without supporting evidence.”**

31. 2<sup>nd</sup> Respondent concluded that the learned Trial Magistrate dismissed the case because on a balance of probability, the Appellant failed to prove liability on part of the Respondent because it is the Appellant's own witness who produced the police abstract that blamed the Appellant for the occurrence of the accident and further corroborated by his testimony. 2<sup>nd</sup> Respondent prayed that the appeal be dismissed with costs.

#### **ANALYSIS AND DETERMINATION**

32. This being the first appellate court, I am required to re-evaluate evidence adduced and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I never got opportunity to take evidence first hand and observe the demeanour of witnesses. For this I give due allowance.

33. Record show that the Plaintiff testified that he was knocked from behind he said he was riding motor bicycle registration number KMCT 378C on the left side of the road. He said the driver of the vehicle took him to hospital immediately and there was no mark on the road.

34. PW4 a police officer who produced police abstract testified that the vehicle was being driven along Kenyatta Avenue near Woolmart Supermarket when a motorcyclist made a faulty turn to the right lane from the opposite direction and was hit by the ambulance. He testified that the cyclist and pillion passenger sustained injuries. He said they were rushed to Nakuru PGH and the vehicle was detained for investigation. He said the entry in the Occurrence Book (OB) was made at 20.00 hrs and the accident occurred at 5.30 pm; he said the initial report does not indicate the time police visited the scene but they returned from the scene at 20.00hrs. He said he could not say who was liable for the accident.

35. From the evidence adduced, there is no dispute that the Appellant's motor cycle and 2<sup>nd</sup> Defendant's vehicle were involved in an accident. It is evident that the scene was interfered with immediately after occurrence of the accident. It is not clear whether police visited the scene immediately. Plaintiff also testified that there was no mark at the scene, which could have guided the police in investigation. The police officer who produced the initial report was not able to tell who was to blame for the accident though the investigating officer blamed the Appellant in the police abstract. The basis of his decision to blame the motor cyclist is not given.

36. The circumstances of the accident herein do not give clear indication on who is to blame for the accident. In view of the fact that the appellant was hit from behind, the driver of 2<sup>nd</sup> Defendant should have been able to see the Appellant ahead. There is also no dispute that the accident occurred in town an area where the 2<sup>nd</sup> Respondent's driver was expected to drive in low speed; and if he was driving in low speed he should have been able to control the vehicle ion seeing the Appellant ahead even if he tried to turn as alleged.

37. My view is that in the circumstances liability should have been apportioned at 50:50 as between plaintiff and 2<sup>nd</sup> defendant.

38. In respect to quantum I note that the Appellant sustained the following injuries:-

39. On quantum the Appellant submitted that injuries listed below were confirmed by **Dr.Kiamba** were as follows:-

**a. Crush injury to the foot with compound fractures of the metatarsals resulting into amputation of the 2<sup>nd</sup>, 3<sup>rd</sup> and toes and 3<sup>rd</sup> metatarsals.**

**b. Fracture of the 4<sup>th</sup> and 5<sup>th</sup> metatarsals.**

**c. Fracture of the proximal phalanx left big toe.**

**d. Cut wound on the left thigh.**

**e. Bruises on the left knee.**

40. I note from the judgment that the trial magistrate assessed general damages for pain and suffering at Kshs.800, 000/=. The appellant in submissions filed in this appeal asked for Kshs.1, 000,000 for pain and suffering and Kshs.6, 600 as special damages. I note that he left out special damages. The judgment was delivered on 13th October 2017. Having compared the above injuries with injuries sustained by victims in the cited authorities, I find an award of Kshs.800, 000/= for pain and suffering reasonable. Special damages prayed for in the plaint is kshs 6,600 which I award.

#### **41. FINAL ORDERS**

**1. Order dismissing plaintiff's/Appellant's suit is set aside**

**2. Liability is apportioned at 50:50 between appellant/appellant and 2<sup>nd</sup> respondent /2<sup>nd</sup> respondent**

**3. Plaintiff is awarded kshs 800,000 plus kshs 6,600 less 50% contribution**

**4. Judgment is hereby entered for plaintiff against 2<sup>nd</sup> respondent for kshs 403,300**

**5. Costs of lower court to appellant.**

**6. Each party to bear own costs of appeal.**

**Judgment dated, signed and delivered at Nakuru this 27<sup>th</sup> day of February,2020**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:**

Jeniffer/Schola – Court Assistant

Momanyi holding brief for Gekonga Counsel for the Appellant

Ms. Obura holding brief for Momanyi Counsel for the Respondents