REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.141 OF 2017

FREDRICK WICHENJE IKUTWA.....APPELLANT

VERSUS

FLORENCE MWIKALI.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the court in Milimani CMCC No.6003 of 2011 delivered on 13/3/2017.

2. The appellant had instituted the suit by way of a plaint dated 6/12/2011 seeking judgment against the respondent for ;

i. General damages

ii. Special damages and future medical expenses

iii. Costs of the suit

iv. Interest

v Any other suitable relief the court may deem fit to grant.

3. Upon hearing the evidence of 3 witnesses for the plaintiff and 2 witnesses for the defence, the trial court in its judgment dated 13/3/2017 dismissed the plaintiff's suit with an order that each party was to bear its own costs.

4. Aggrieved by the said judgment, the appellant lodged this appeal and relied on 7 grounds namely;

1. That the Learned Magistrate erred in law and fact when she totally disregarded the detailed written submission and judicial authorities filed by the Appellant and proceed to make a wrong finding dismissing the Appellant's suit merely on hearsay evidence.

2. That the learned magistrate erred in law and fact when she failed to evaluate the entire eye witness evidence adduced by the appellant and completely ignored the evidence of PC Muinde who directly adduced that there was no mention of a third party motor vehicle referred in the proceedings only as JATCO TAXI CAB.

3. That the Learned magistrate erred in law and fact when she relied solely on the uncorroborated hearsay evidence adduced by the Respondent who was neither the driver of KAP 409B nor an eye witness while completely ignoring the uncontroverted evidence adduced by the Appellant.

4. That the Learned Magistrate erred in law and fact when she failed to consider and take the following facts into account.

I. That PC Yegon the investigation Officer in the matter called by the defense stated that he visited the scene of the accident and identified motor vehicle KAP 409B.

II. That PC Yegon confirmed to the court that he found the driver a Mr. Ngugi and the Appellant.

III. That PC Yegon did not see nor was he ever told of the existence of a JATCO TAXI CAB.

5. That the Learned Magistrate erred in law when she failed to take cognizance of the failure by the Defence to call Mr. David the driver and the only eye witness and apply doctrine of withheld evidence in her assessment of liability.

6. That the learned Magistrate erred in law and fact in suggesting an award of damages that was manifestly low considering injuries, pain and suffering visited on the Appellant by the recklessness of the Respondent's driver.

7. That the learned Magistrate erred in law and fact when she failed to find that the case before the court was of a civil nature and that the Appellant had indeed proved the elements of negligence as required by law and by imposing a higher degree of proof the trial magistrate occasioned injustice upon the Appellant.

5. Directions were taken that the appeal herein be disposed off by way of written submissions and both parties duly complied.

6. This being a first appeal, the court is enjoined to review the evidence tendered and reach its own findings thereon. I am guided in that regard by the celebrated decision in **Selle vs Associated motor Boat co. Ltd [1968] EA 123** where the court stated;

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of appeal acts are that the 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 the 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."**

7. But first, a recap of the evidence.

8. The appellant testified as PW3. He stated he was hit by a vehicle as he walked or a pedestrian path. While at hospital he was given a paper (sic) by a nurse at Kenyatta National hospital which had the number of the motor vehicle that hit him. He didn't have the said paper in court at the time of the testimony. It is at the hospital that he learnt that the vehicle that hit him was motor vehicle Registration No.KAP 409B Toyota Corolla.

9. On cross examination and on being shown 2 police abstracts, he confirmed that one abstract dated 2/8/2009 issued to the defendant (No.0171726) was in relation to motor vehicle KAP 409B and showed that the accident involved motor vehicle KAP 409B and another hit and run motor vehicle.

10. A second police abstract issued to the appellant is dated 9/6/2010, close to 1 year after the accident. This one shows that the accident involved motor vehicle KAP 409B and a pedestrian.

11. For the respondent DW2 P.C. Peter Yegon told, the court that information he got at the scene when he visited was that motor vehicle KAP 409B had been hit by a hit and run vehicle and that is what he recorded in the police abstract dated 21/8/2009.

12. On being questioned on the 2nd abstract dated 9/6/2010, DW2 said that to the best of his knowledge the information that he got at the scene that was the 2 victims were pushing motor vehicle KAP 409B which had developed a mechanical problem and were hit by an unknown vehicle.

13. I have considered and re-evaluated the evidence on record. I have considered the submissions by counsel.

14. Of determination is whether the driver of motor vehicle KAP409B was liable for the injuries suffered by the appellant.

15. The burden of proof in a trial is clearly spelt out in section 107 of the evidence Act. The section provides;

> "*S 107* **(***1) 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 exist.
>
> (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."

16. The Court of appeal in **Charter house Bank Ltd vs Frank Kamau [2016] eKLR citing its decision in Karugi & Another vs Kabiya and 3 others (1987) KLR 347** held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter in not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.

17. This being a civil case the degree of prove was on a balance of probabilities. The burden of proof lay on the appellant to achieve this threshold of duty of the defence to fill any gaps in the appellant's case.

18. The appellant's submission that the trial court relied on hearsay evidence is in my view a double edged sword that has ended up puncturing the appellant's case.

19. True, the appellant was present at the scene of the accident. He however did not perceive anything at the scene. In his own words he

stated in evidence;

> I was hit by motor vehicle registration number KAP 409B Toyota Corolla white. I knew it hit me because while in hospital I was brought my job card, ID card, and a paper where they wrote the vehicle that hit me. I was given those documents by a nurse when I started to feel better. When I went to police station I had external fixators. They asked what happened. I told them I was involved in a road traffic accident on 17th August, 2009. They checked the OB and told me the vehicle that hit me was KAP 409B which was being driven by David Ngugi Ndung'u who had reported and had been recorded in OB. I cross-checked with the paper I had and found details to match.

20. The appellant, thus did not know of his own knowledge what vehicle hit him while at the scene. The authors of the note he was given are not called as witnesses. The appellant's bore the burden of proof in this case. He failed to discharge it. What is good for the goose is good for the gander. The appellant cannot possibly accuse the respondent of relying on hearsay evidence and at the same time expect to rely on hearsay evidence with any measure of success.

21. The documentary evidence produced by way of 2 police abstracts from the same police station are so contradictory that it is impossible to tell the true circumstances surrounding the accident in question.

22. On the material before me, I find the decision of the trial court fully supported by the nature of the evidence before it. I have no basis upon which to disturb the said findings. The appeal has no merit.

23. With the result that the appeal herein is dismissed.

24. Orders

1. The appeal is dismissed

2. Each party to bear its own costs.

Dated and **delivered** at **Nairobi** this **27th** day of **February 2020.**

A.K. NDUNG'U

JUDGE