



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO. 315 OF 2017**

**VINCENT MOGENI NYAKUNDI.....APPELLANT**

**VERSUS**

**NAFTALI WANGAI.....1<sup>ST</sup> RESPONDENT**

**BENSON KANYI..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. I. W. Gichobi (SRM) given on 30/05/2017 in Nairobi CMCC No. 6925 of 2015)***

**JUDGEMENT**

1. The appellant herein sued the respondents for damages following a road traffic accident in which he sustained injuries. He claims that the accident had been caused by the 1<sup>st</sup> respondent's negligent control of the 2<sup>nd</sup> respondent's motor vehicle registration number KAT 986 C.
2. The respondents denied the appellant's claim and averred *inter alia* that if the appellant had indeed been injured as a result of the accident, which was denied, then such injuries had been occasioned by the appellant's negligence.
3. This being a first appeal, the court's duty is to re-evaluate the evidence and draw its own conclusions while giving allowance for the fact that it did not have the opportunity to hear or see the witnesses testify (See *Selle -Vs- Associated Boat Co Ltd. [1968] EA 123*, *Peter -Vs- Sunday Post Ltd [1958] EA 424*, *Williamson Diamonds Limited -Vs- Brown, [1970] EA 1.*)
4. The appellant called two witnesses to testify in support of his case when the matter came up for hearing before the trial court. The respondents elected not to call any witnesses.
5. PC Charles Ondieki (PW 1) from Kabete Police Station was the appellant's first witness. He testified that the accident had occurred on 25<sup>th</sup> March 2014 at around 4:00 p.m. along Naivasha Road at Equity Bank Junction. The accident had involved the appellant, whom he described as a pedestrian, and motor vehicle registration number KAT 986 C which was being driven by the 1<sup>st</sup> respondent. While the vehicle was being driven along the road, the appellant tried to board the moving vehicle but he fell down and was slightly hit on the right leg by the rear tyre. He sustained slight injuries and was rushed to Kenyatta National Hospital where he was treated and discharged.
6. PW 1 testified that he was not the investigating officer and that the driver was the one that had supplied the information in the occurrence book. He also stated that he could not tell the outcome of the investigation and that no one had been blamed for the accident per the occurrence book.
7. Vincent Mogereri Nyakundi (PW 2) testified that he sold sugarcane at Kawangware area. He recalled that on 25<sup>th</sup> March 2014 he was heading towards Kawangware along Naivasha Road, when he was hit by the side mirror of motor vehicle registration number KAT 986 C and his right leg run over by the vehicle.
8. He testified that on that day, he was taken to Riruta Health Clinic and later taken to Kenyatta National Hospital where he was admitted and discharged on 1<sup>st</sup> April 2014. He produced his medical documents and the P3 form and police abstract he had been issued at Kabete Police Station. He also produced a copy of records showing that motor vehicle registration number KAT 986 C belonged to the 2<sup>nd</sup> respondent. He denied telling the police that he was attempting to board the vehicle when the accident occurred and testified that he had been told by the good Samaritans who had taken him to hospital that the vehicle had hit him while overtaking another vehicle.
9. During cross examination, PW 1 insisted that he was a sugarcane seller and not a conductor as indicated by the doctor. He testified that he lost consciousness after the accident and had been taken to hospital by good Samaritans. After he was discharged, he went to the police

station to report the matter and did not know that the driver had made a report. He also testified that he had not fully healed and was confined to a small area for doing his business since he could not walk for long.

10. Having heard the appellant's case and upon considering the evidence tabled before it, the trial court was convinced that the appellant worked as a conductor of the ill fated vehicle and was the author of his own misfortune. The evidence that led the court to this conclusion was the information contained in the occurrence book, the medical report by Dr. Wokabi that referred to the appellant as a conductor and a treatment note from Riruta Health Centre which indicated that the appellant had fallen from a moving vehicle.

11. The parties consented to dispose of the appeal by way of written submissions.

12. Contesting the trial court's finding, the appellant's counsel submitted that it was clear from the evidence that PW 1 was not an eye witness, had not investigated the case and based his testimony on the OB record. He submitted that the person who recorded the information in the OB was not called to testify and the only eye witness was the appellant whose evidence was consistent with his pleadings.

13. Counsel relied on the case of ***Jimnah Munene Macharia v John Kamau Erera Civil Appeal No. 218 of 1998*** to support his position that an OB record is not evidence. He submits that the OB record had no probative value and the trial court erred in relying upon it.

14. The case of ***Mary Njeri Murigi v Peter Macharia & another Civil Case No. 318 of 2012[2016]eKLR*** was also relied upon in support of the proposition that questions in cross examination and matters raised in submissions without pleadings are not evidence and that the defendant must adduce rebuttal evidence.

15. He argued that it is trite law that cases are decided on pleadings and the adduced evidence. That in this case, there was no plea in the defence that the accident happened because the appellant was trying to board a moving vehicle. He submitted that it was wrong for the trial court to decide the case on an unpleaded issue which had not even been proved by the defence.

16. Counsel went on to argue that since the trial court had not found that the appellant was a liar or given any reason for disbelieving his evidence, it was erroneous for the court to dismiss the suit merely on the ground that the documents produced indicated that the appellant worked as a conductor and hence the author of his misfortune. He contended that there was no evidence that the appellant was a conductor of the suit vehicle, having denied being one and in any case working as a conductor could not be the basis to imply negligence on the appellant's part.

17. Counsel urged the court to set aside the trial court's decision and award the appellant damages of Kshs. 270,000/= based on the trial court's assessment of what would be a reasonable award in the circumstances had the claim been proved.

18. On the other hand, counsel for the respondent urged this court to uphold the finding of the trial court. In his written submissions, counsel argued that it behoved the appellant to discharge his burden of proof but he had instead provided the court with a series of inconsistent facts.

19. Enumerating the inconsistencies in the appellant's case, counsel observed that the appellant had testified that he had been hit by a side mirror as he was on the pedestrian walk but had no medical evidence of an injury on the part that was allegedly hit by the mirror. He submitted that the appellant had not attempted to discredit the evidence of PW 1 who testified that the plaintiff was trying to board the suit vehicle when he fell and was run over.

20. The respondent's counsel also noted that the appellant had stated that he was a sugarcane seller at Kawangware area during trial but produced a medical report indicating that he was a PSV conductor. The appellant had also produced a treatment note from Riruta Health Center which showed that he had sustained a fall from a moving vehicle. He also noted that in his examination in chief the appellant testified that the driver of the suit vehicle had taken him to hospital but later on recanted this and testified that an unidentified lady had taken him to hospital.

21. Counsel submitted that the appellant had a duty to call all witnesses to prove his case. He relied on the case of ***Boniface Mutuku Ndeti v Elizabeth Nzula Kioko [2018]eKLR*** where the court held;

*"This was quite crucial and the failure by the appellant to do so weakened his case against the respondent ... After considering the entire evidence before the trial court, I am inclined to agree with the finding of the trial magistrate that the appellant failed to prove his case on a balance of probabilities ... I am therefore unable to find any error on the part of the trial court in arriving at the conclusion that the Appellant's case did not pass the threshold of proof."*

22. Counsel submitted that the appellant's case had been weakened by inconsistencies and as such the appellant did not prove his case on a balance of probabilities.

23. Having analysed the evidence tendered by the appellant in his case before the trial court there is no doubt in my mind that motor vehicle registration number KAT 986 C belonged to the 2<sup>nd</sup> respondent. The copy of records produced as Pexhibit 7 proved this. The appellant also established that he sustained injuries as a result of the accident involving the vehicle on 25<sup>th</sup> March 2014 at about 4:00 p.m. The main dispute in this matter was who between the appellant or the 1<sup>st</sup> respondent had caused the accident.

24. The appellant testified that he was walking along the road when the side mirror of the vehicle which was being driven by the 1<sup>st</sup> respondent hit him and the vehicle ran over on his right leg. Conversely, PW 1, reading from a copy of the occurrence book, testified that the appellant was trying to board a vehicle while it was moving when he fell down and was slightly hit on the right leg by the rear tyre. The

treatment note from Riruta Health Clinic (Pexhibit 3) dated 25<sup>th</sup> March 2014, also indicated that the appellant sustained his injuries when he fell from a moving vehicle.

25. In the medical report prepared by Dr. Wokabi on 28<sup>th</sup> April 2015 the appellant was described as a PSV conductor. Despite the appellant's denial of this, the trial court found that there was overwhelming evidence to prove that the appellant was a conductor and had authored his own misfortune when he fell off the moving vehicle.

26. Further, PW 1 conceded that he was not the investigating officer. His testimony was based on information from the occurrence book which he testified had been supplied by the driver of the vehicle. Since the 1<sup>st</sup> respondent, who is alleged to have been the driver of the vehicle, did not attend court to shed light on the matter, the contents of the copy of the occurrence book and the police abstract only went to prove that a report had been made at Kabete Police Station. (See ***Robinson Ochola Awuonda v House of Manji Civil Appeal No. 93 of 2008 [2015] eKLR***)

27. That said, the inconsistencies in the appellant's case cannot be overlooked. On the one hand he claimed that he was hit by the side mirror of the vehicle while walking along the road but he went on to produce documentary evidence stating that he was attempting to board the vehicle when he was hit and run over. He also insisted that he had always been a sugarcane seller but produced a medical report filled by his doctor which described him as a PSV conductor. The appellant made no effort to explain the inconsistencies.

28. I concur with the respondents' submissions that their failure to tender evidence did not diminish the appellant's duty to prove his case on a balance of probabilities.

29. The question of whether the appellant was a sugar cane seller or a conductor in the subject motor vehicle is central to the resolution on the issue of causation of the accident. The inconsistencies in the evidence where on the one hand he states he was hit by the motor vehicle when walking and on the other hand he produces documents showing that he was attempting to board the vehicle when he was hit and run over and a medical report filled by his doctor indicating that he was a conductor are material contradictions which go to the root of how the accident occurred.

30. It is my considered view that the uncertainty created by these contradictions did not afford the trial court reliable evidence upon which to find the respondent liable for the accident either wholly or partially. The trial court based its finding on the information contained in the occurrence book and the appellant's own medical report that referred to the appellant as a conductor and a treatment note from Riruta Health Centre which indicated that the appellant had fallen from a moving vehicle. This was evidence adverse to the appellant and the trial court cannot be faulted for the decision it arrived at.

31. Whereas the OB report done may not be visited against the appellant as held in ***Jimnah Munene Macharia –Vs- John Kamau Erera, Civil Appeal No. 218 of 1998***, the medical and the treatment notes are the appellant's own documents and they do not support his case. The appeal is one for dismissal.

32. Had I found in favour of the appellant I would have awarded a sum of Kshs. 270,000/= in general damages and special damages of Kshs. 2,500 as I note this assessment by the trial court has not come under challenge by the respondent.

33. The upshot is that the appeal herein lacks merit. The same is dismissed with costs to the respondent.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of February, 2020.**

**A. K. NDUNG'U**

**JUDGE**