REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 37 OF 2018

JOSEPH MBITHI THUO.....APPELLANT

-VERSUS-

NJIRU BENSON.....1ST RESPONDENT

KAHURIA.....2ND RESPONDENT

(Being an appeal against the judgement of Hon G.O. Shikwe RM delivered on 4th April 2018 in Kithimani PMCC 295 of 2015*)*

BETWEEN

JOSEPH MBITHI THUO.....PLAINTIFF

-VERSUS-

NJIRU BENSON.....1ST DEFENDANT

KAHURIA.....2ND DEFENDANT

JUDGEMENT

1. The appellant herein, by way of a plaint filed dated 3rd November, 2015 filed in court on 4th October, 2015, claimed general damages as well as the costs of the suit against the Respondents herein arising out of a road traffic accident that it was alleged occurred on 16 th August, 2015.

2. According to the plaint, on that day, he was a passenger in Motor Vehicle registration number KAT 593H owned by the 2nd Respondent which was being driven along Garissa Road by the 1st respondent and or his driver and or his agent. The said vehicle, according to the plaint was so negligently and carelessly driven, managed and/or controlled that it was caused to move before the appellant was fully aboard. As a result, the appellant fell off and sustained injuries as particularized in the plaint. The appellant pleaded the particulars of negligence in the Plaint and sought general damages and interest and costs of the suit.

3. It was his case that as a result of the said accident, he sustained open oblique fracture of the middle third of the right femur, lacerations to the left thigh and blood loss.

4. In their joint defence, the respondents denied the accident; denied ownership of the suit vehicle and denied negligence that the respondent was a passenger. They denied the injuries and loss and pleaded that the accident was caused solely and or contributed to by the negligence of the appellant and prayed that the suit be dismissed with costs.

5. In his evidence, the appellant adopted his statement in which he stated that on the material day he was a passenger boarding the said vehicle when the 1st Respondent who was its driver caused the same to move before he was fully aboard as a result of which he fell off and

got injured.

6. Before the trial court, he produced the discharge summary, P3 form, police abstract, medical report by **Dr Wandigi**, receipts for the same, the second medical report by **Dr Leah Wainaina**, copy of the records of the motor vehicle, receipt for its search and demand letter and statutory notice. He blamed the driver for the accident since in his view, the driver ought to have checked the side mirror before driving off before he was fully seated. Further the driver could have braked. As a result, he broke his right leg at the femur which was shortened by one inch It was his evidence that he had not fully seated.

7. In cross-examination, he stated that he was a passenger though he was not given a receipt. When he boarded the vehicle the conductor signalled the driver to drive off and he slipped and fell. According to him, the driver ought to have checked his side mirror. He stated that where he boarded the vehicle was at a bus stop. Though the conductor was next to him he did not fall as he was holding onto the rail.

8. PW2, **Inspector Mohammed Mohammed Sirat** from Matuu Traffic Base, was called to produce the police abstract in respect of the plaintiff who was boarding a *matatu* at Muguga Stage on 16th August, 2015. According to him, the accident was investigated by **Constable Kimanzi**.

9. At the close of the plaintiff's case, the defence called **Cpl Peter Munyau** from Thika Police Station. According to him, on 16th August, 2015, there was a road traffic accident at 2200 hours which was investigated by **Cpl Mutegi** of Ngoliba sub base involving **John Mbithi**, the Appellant. He had with him the OB for that day. According to him, it was indicated in the police abstract which emanated from their station that the driver of the said vehicle was driving motor vehicle KAT 519 towards Thika when the Appellant who was drunk tried to alight from a moving vehicle and sustained injuries. According to the investigations, the Appellant was drunk and was to blame for the accident as he did not wait for the vehicle to stop.

10. In cross-examination, he confirmed that he was not the investigating officer and that he did not produce the OB extract in court. According to him the accident was reported by the driver of the motor vehicle and no the Appellant. He however confirmed that the P3 did not indicate that the Appellant was drunk.

11. In his judgement the learned trial magistrate did not believe the Appellant's version since it was not corroborated by the investigative agencies. He therefore found that liability was not proved against the Respondents. It was however his view that had he found in favour of the Appellant he would have awarded him Kshs 700,000.00. He however dismissed the case based on his finding on liability.

12. Aggrieved by the judgement the Appellant has lodged this appeal.

13. The appeal was canvassed vide written submissions that both parties filed and exchanged. Learned counsel for the appellant submitted that the trial magistrate went into error when he dismissed the whole case against the respondents without considering the evidence adduced by the Appellant and by mainly relying on the evidence by DW1. According to counsel, there was no medical evidence on the Plaintiff to support the allegation of drunkenness alluded to by DW1. Counsel placed reliance on Section 107, 109 and 112 of the evidence act as well as the case of **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334.**

14. It was counsel's argument that the proof of the accident meant the doctrine of *res ipsa loquitur ought to have been relied upon to infer negligence. Court was invited to consider the case of* **Board of Governors Kangubiri Girls High School v Jane Wanjiku Muriithi & Another [2014] eKLR** where it was held that when a car is proved to have caused damage by negligence, a presumption arises that the owner is responsible for the driver's liability. Counsel took issue with the court's failure to consider the submissions of the appellant. Learned counsel assailed the trial court for failing to consider the evidence on record urged the court to apply **Section 78(2)** of the ***Civil Procedure Act* which** gives the appellate court the same powers as are conferred and imposed on the lower court and relook at the evidence tendered in the trial court. Counsel cited the case of **P N M & another (the legal personal Representative of estate of L M M v Telkom Kenya Limited & 2 others [2015] eKLR** where it was stated that the driver was under a common law duty and obligation to exercise a high degree of care towards other road users and passengers and that had he exercised such care and caution, the accident would have been avoided. Counsel posited that liability for the accident lay on the Respondents and prayed that the court apportion liability towards the 2nd respondent and hold the 1st Defendant vicariously liable as the Principal of the 2nd Defendant.

15. On the issue of failure to assess general damages, counsel submitted that the injuries sustained by the appellant as evidenced by the medical report were: Open oblique fracture middle third of right femur; lacerations to the left thigh; and Blood loss. It was counsel's argument that an award of Kshs. 800,000/= in general damages be awarded to compensate the Appellant for pain, suffering and loss of amenities.

16. Learned counsel for the respondents vide submissions filed on 11th December, 2019 framed 2 issues for consideration being liability and quantum. On the issue of liability, it was counsel's submission that the evidence of Dw1 exonerated the respondents of liability for it was clear that the appellant jumped out of the vehicle whilst drunk. Counsel submitted that negligence was not proven by the appellant. On the issue of quantum, counsel submitted that Kshs 200,000/- to Kshs 400,000/- have been awarded by courts in respect of femur fractures. Counsel placed reliance on the case of **Michael Adeka Khaemba & 2 Others vs. Rassangyllo Muli Kumuyu (2018) eKLR, Zacharia Mwangi Njeru v Joseph Wachira Kanoga (2014) eKLR** and **Kenyatta University vs. Isaac Karumba Nyuthe (2014) eKLR.**

Determination

17. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"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."

18. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

19. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

20. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

21. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants 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."

22. 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."

23. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

24. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent.

25. In this case the Appellant testified on how the accident took place. According to him, he was boarding the matatu when the driver drove off before he could properly sit without confirming from the mirror that he was properly seated. That was the only evidence on record by an eye witness. Both the evidence of PW2 and DW1 were from police officers who themselves did not investigate the accident but relied on the records of the investigations which were conducted by their colleagues.

26. The learned trial magistrate however took issue with the fact that the Appellant's evidence was not corroborated by the evidence of the investigations agencies. There is however no rule of law or practice that in road traffic accidents, for a claim to succeed it must be supported by the evidence of investigative agencies since. A person who gets injured in a road accident in my view is entitled to succeed in his claim for damages notwithstanding that the accident was never reported if he can prove to the required standards that the accident did occur. Whereas the failure to do so may weaken his case where the defence rebuts his evidence, it does not necessarily follow that where there is no report of an accident, his case must fail.

27. In this case, from the judgement of the learned trial magistrate, it is clear that what influenced the decision was the evidence of the police officers. In this case the Appellant's evidence was that he was a passenger. That evidence was never rebutted.

28. DW1's evidence, which was based on information given by the driver of the vehicle, was that the appellant attempted to alight when the vehicle was in motion due to his drunken state. The person who gave this information was never availed to testify so that he could be subjected to cross-examination. As a result, his evidence was not in consonance with that of the Appellant. While the Appellant's evidence was that the accident occurred while he was boarding the vehicle, the report he relied on stated that the Appellant was alighting from the vehicle. It would have been prudent in the circumstances to have availed the person who made the report to testify in the case. But even assuming that that version was true, the Respondents would not escape liability since it was the responsibility of the Respondents to ensure that the vehicle had come to a complete standstill before permitting the Appellant to get off from the vehicle. To my mind, the door of a motor vehicle should always be closed when the vehicle is in motion and the conductor should inform the driver when passengers have either alighted or boarded the vehicle. It is therefore the responsibility of the conductor to ensure that the motor vehicle door is only opened when the vehicle has fully come to a standstill and the failure to do so makes the driver and/or the conductor and hence the owner of the vehicle liable.

29. I associate myself with the decision of **Wambilyangah, J** in **Mgao vs. Wokabi & Another Mombasa HCCC No. 165 of 1990 [1993] EA 685** in which he expressed himself as hereunder:

"The scenario of getting into a moving bus or matatu by a passenger is very common in this country. A prudent driver of a public vehicle should easily foresee that some passengers may be hampered by all sorts of factors, whether personal or otherwise from speedily jumping into the vehicle; and so it behoves him to be patient and allow them enough time to safely get into the vehicle. He should ensure that all his passengers are safely aboard or have safely alighted before he drives from that stage…I find as a fact that the driver in the present case failed to observe those fundamental rules. Instead he hastily and negligently drove off from the stage without checking that more passengers were still struggling to get in: and that is how or why the plaintiff was injured. So the 1st defendant's liability is assessed at 100%; and the 2nd defendant as his employer is vicariously liable."

30. I also agree with the position adopted by **Aburili, J** in **Mary Njeri Murigi vs. Peter Macharia & Another [2016] KLR** that:

"A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof."

31. The Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** held that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

32. By failing to appreciate that it is not mandatory that the evidence of a claimant be corroborated by that of investigative agencies and by arriving at a finding based on hearsay evidence by those to whom the information was not even transmitted, the learned trial magistrate clearly failed to take account of the particular circumstances and probabilities material to the estimate of evidence and arrived at an incorrect decision in dismissing the suit.

33. In the premises, this appeal succeeds, the decision dismissing the case is hereby set aside. Judgement is hereby entered jointly against the 1st and 2nd Respondents jointly. As for the damages, there is no basis upon which I can interfere with what was proposed by the learned trial magistrate which I find reasonable in the circumstances. Accordingly, I award the Appellant Kshs 700,000.00 with interest from the date of

the judgement in the lower court till payment in full. The Appellant will have the costs of the proceedings in the lower court and in this appeal.

34. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 10th day of March, 2020.

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey