REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 110 OF 2018

PASKALIA ABUKO SHIBERO ..... APPELLANT

VERSUS

GEORGE ONYANGO ORODI ..... RESPONDENT

(from the judgment and decree of Hon. T. A. Odera, SPM, in Mumias PMC Civil Case No. 238 of 2016 delivered on 27/7/2018)

JUDGMENT

1. The appellant sued the respondent at the lower court claiming general and special damages after the respondent's motor vehicle knocked down the motor cycle on which the appellant was riding on as a pillion passenger as a result of which the appellant sustained injuries. She blamed the driver of the respondent for occasioning the accident. Upon hearing the case the trial magistate found that the appellant had not proved her case against the respondent and consequently dismissed the suit with costs to the respondent. The appellant was dissatisfied with the judgment of the learned trial magistrate and filed this appeal through the firm of **Mukisu & Co. Advocates**.

2. The grounds of appeal are:-

(1) That the learned trial magistrate erred in law and in fact by failing to appreciate the standard of prove in civil cases.

(2) That the trial magistrate erred in law and in fact by finding that it is only a sketch map which can establish negligence.

(3) That the learned trial magistrate erred in law and in fact by arriving at a finding against the weight of evidence tendered by the appellant thereby occasioning miscarriage of justice.

(4) That the learned trial magistrate erred in law and in fact by creating an inference that the investigating officer had evidence adverse to the plaintiff's case thereby occasioning miscarriage of justice.

(5) That the learned trial magistrate erred in law and in fact by failing to find that the plaintiff was a pillion passenger and therefore could not have contributed to the accident.

(6) The learned trial magistrate erred in law and in fact by disregarding the plaintiff's testimony when the same was not rebuted by failure on the part of the respondent to call a defence witness.

3. The appeal was opposed by the respondent through the written submissions of their advocates, **Omwenga & Co. Advocates**. 4. The appellant testified and called 2 witnesses in the case – a policeman from Mumias Police Station PW2 and Dr. Andai PW3. The respondent did not call any evidence.

5. The appellant's evidence was that on the 3/1/2016 at around 4 p.m. she and her minor child were riding as pillion passengers on a motor cycle towards the direction of Mumias town. That the respondent's motor vehicle appeared from the opposite direction. It veered from its side of the road and encroached on the path of the motor cycle. It hit the motor cycle from the front. They fell down. The appellant was injured. She was taken to St. Mary's Hospital where she was admitted for 2 days with a fracture of the left collar bone. She reported the accident at Mumias Police Station. She was later on seen by Dr. Andai PW3 who prepared her medical report.

6. The police officer PW2 testified that the case was investigated by one Cpl. Omondi. That the investigating officer indicated in the OB report that the motor cyclist was trying to avoid a pot-hole when the accident occurred though the investigating officer did not indicate the source of that information. That the motor cyclist disappeared after the accident. The witness produced the police abstract of the accident as exhibit, P. Exh. 4.

7. The evidence of Dr. Andai was on the medical reports of the appellant that he produced as exhibits.

8. In cross-examination the appellant denied that the cyclist was trying to avoid a pot-hole when the accident occurred. She said that it is the motor vehicle which was trying to avoid a pot-hole when the accident occurred.

Submissions –

9. The advocates for the appellant submitted that the trial court dismissed the appellant's case solely on the basis of an entry into the OB report that the motor cyclist was avoiding a pot-hole when the accident occurred. That the OB entry could only have originated from information of an eye witness. That the name of the witness was not disclosed and no such witness was called. Therefore that the suit was dismissed on the basis of hearsay evidence. That the evidence of the appellant on how the accident occurred was not rebutted. That the trial magistrate erred in finding that the case was not proved on a balance of probabilities.

10. The advocates submitted that the respondent had produced a third party notice in the case. That they did not prove their case against the third party. Therefore that they should be found singularly and wholly liable for occasioning the accident.

11. That the trial court made a finding that it is only the sketch plan which could prove negligence. That this is not legally tenable as the standard of proof in civil cases is on a balance of probabilities.

12. It was further submitted that the appellant was a pillion passenger. That a pillion passenger cannot be blamed for an accident. That the appellant did not contribute to the occurrence of the accident. Counsel urged the court to find the respondent 100% liable for the accident.

13. The advocates for the respondent on the other hand submitted that the evidence of the appellant (PW1) and the police officer PW2 was at variance. That the appellant testified that it is the driver of the motor vehicle who caused the accident when he tried to avoid a pot-hole. That PW2 on the other hand stated that the OB report indicated that it is the motor cyclist who caused the accident when trying to avoid a pot-hole. That since the evidence was at variance negligence on the part of the respondent was not proved. Counsel cited the case of **Joseph Mbuta Nziu –Vs- Kenya Orient Insurance Company Limited (2005) eKLR** where the court cited the case of **Adetoun Oladeji (NIG) Ltd –Vs- Nigeria Breweries PLC S.C 91/2002**, holding that:-

> ***"…it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

14. Counsel submitted that failure by the respondent to call any witness in support of his case does not amount to an admission of the element of negligence alleged against him. That the burden of proof never shifts to the defendant in a case.

15. Counsel further submitted that the police officer PW2 did not produce sketch maps to show the point of impact of the accident. That PW2 said that the accident was still pending under investigation. That the appellant did not call the investigating officer in the case to produce the sketch maps. That without the same, the trial court could not be in a position to ascertain the point of impact and therefore there is no clear picture on how the accident occurred. Counsel cited the case of **Postal Corporation of Kenya & Another –Vs- Dickens Munayi (2014) eKLR** where it was held that:-

> ***"In my view, it is only a sketch plan of the scene that could clearly map out how the accident occurred and particularly where the point of impact was. The lack of this crucial piece of evidence leads me to doubt the entire evidence of PW2 and PW3. It also costs benefit to the defence case that probably it could as well be the respondent who pulled to his lane."***

16. Counsel submitted that the appellant admitted that she was not wearing a helmet. That the minor was an excess passenger on the motor cycle. Therefore that the appellant neglected her own safety and should be held liable for the same. Counsel urged the court to dismiss the appeal.

Analysis and determination -

17. This being a first appeal, the court is guided by the decision of the Court of Appeal in **Abok James Odera T/A A. J. Odera & Associates –Vs- John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** where the duty of an appellate court was stated to be as follows:-

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

18. The issues for determination herein are –

> *(1) Whether the learned trial magistrate erred in law and in fact by failing to appreciate the standard of proof in civil cases.*
>
> *(2) Whether the learned trial magistrate erred in law and in fact in arriving at a finding against the weight of evidence tendered by the appellant.*

19. The standard of proof in civil cases is on a balance of probabilities. In **Kanyangu Njogu –Vs- Daniel Kimani Maingi (2001) eKLR** it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. In **Siraj Din –Vs- Ali Mohamed Khan (1957) EA 25**, it was held that:-

> ***"The quantum of proof required in civil litigations is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other ….." (as cited in BWK –VS- EK & Ano. (2017) eKLR).***

20. In dismissing the case for the appellant the learned trial magistrate held that PW2 had noted that the occurrence book indicated that the motor cycle was trying to avoid a pot-hole when it hit the motor vehicle. That the sketch maps were not produced. That the same were important to show how the accident occurred. That since the investigating officer was not called the inference was that had he been called his evidence was adverse to the plaintiff's case. That in the premises the accident was caused by the cyclist as he was trying to avoid a pot-hole as indicated in the occurrence book. That there was no evidence of negligence on the part of the defendant. That liability on the part of the defendant was not proved.

21. The learned trial magistrate therefore relied on the evidence of the police officer PW2 to hold that the accident occurred as the motor cyclist tried to avoid a pot-hole. The evidence of the said officer that it is the cyclist who was to blame for the accident was based on an entry into the Occurrence Book which book was not produced in court. The police officer who made the report in the OB did not testify in the case. The evidence of PW2 therefore amounted to hearsay. The evidence was not admissible. It could not be relied on to reach a finding that the cyclist was the one to blame for the accident.

22. I agree that it was important for the appellant to have called the investigating officer to indicate to the court how the accident may have occurred. The question is whether in the absence of such evidence there was evidence to prove the case on the usual standard of proof of a balance of probabilities.

23. The evidence that was before the court was that the accident occurred when the respondent's motor vehicle left its side of the road and veered into the path of the motor cycle and knocked it down. The respondent did not testify in the case. The evidence of the appellant therefore as to how the accident occurred was not controverted. Though the respondent had filed a defence and denied the allegations of negligence he did not testify in the case. Failure to testify in the case rendered his pleadings mere statements of fact that were not substantiated as was held in the case of **Trust Bank Ltd –Vs- Paramount Bank Limited & 2 Others (2009) eKLR**. The case of **Postal Corporation of Kenya & Another –Vs- Dickens Munayi** (supra) that was cited by the advocates for the respondents on the importance of producing sketch maps can be distinguished from the appellant's case in that in that case the defence had called evidence controverting the plaintiff's case. That is why the court doubted the evidence for the plaintiffs in face of the evidence for the defence. That was not the case here as the defence did not adduce any evidence. Where a party does not call evidence in a case in face of evidence from the other side, it is open for the court to believe the evidence of the party who has testified. In my view the trial magistrate was wrong in dismissing the case for the appellant when there was no evidence to controvert her evidence that it is the motor vehicle that veered to the motor cycle's side of the road and caused the accident.

24. The appellant was a pillion passenger. A pillion passenger cannot be held liable for the causation of an accident – See **Rosemary Wanjiku Kungu –Vs- Francis Mutua Mbuvi & Another (2014) eKLR** and **Viviane Anyango Onyango –Vs- Charity Wanjiku (2017) eKLR**. In any case the appellant received a fracture of the collarbone. Even if she had been wearing a helmet as submitted this could not have prevented the said injury. The trial magistrate erred in relying on hearsay evidence to dismiss the appellant's case. In my view the appellant had proved on a balance of probability that the respondent was entirely to blame for the accident.

25. The upshot is that the finding on liability by the trial magistrate is set aside. I find the respondent 100% liable for the accident.

Quantum –

26. The medical report prepared by Dr. Andai indicated that the appellant had sustained closed displaced fracture of the left clavicle bone that had healed with mal-union.

27. The trial magistrate stated that had the appellant proved her case she would have awarded her Ksh. 400,000/= in general damages. No authorities were cited. No award for special damages was suggested..

28. When making awards in general damages a court is guided by the principle that comparative injuries ought to attract similar awards. In **Shaban –Vs- City Council of Nairobi (1985) KLR 516** the Court of Appeal held that:-

> ***"There is no doubt that some degree of uniformity must be sought in the award of general damages and the best guide to this respect is to have regard to recent awards in comparative cases in local courts."***

29. The advocates for the appellant submitted in favour of a sum of Ksh. 1 million in general damages. They relied on the case of **Charles Mwania & Another –Vs- Betty Hassan (2008) eKLR** where Sitati J. upheld an award of Ksh. 800,000/= for bruises on the forehead, wounds on the right thumb and left wrist joint, wound on the second right finger, fracture of the right tibia and fibula, wound below the right knee and wound on the lateral aspect of the right ankle joint. The respondent in the case required to undergo an operation for skin grafting.

30. The advocates for the respondent had in the court below made submissions in favour of a sum of Ksh. 250,000/=. They relied on the case of **Hassan Noor Mahmoud –Vs- Tae Youn Ann (2001) eKLR** where Ang'awa J. (as she then was) awarded Ksh. 200,000/= for fracture of left tibia and fibula, dislocation of left ankle and fracture of left colar bone.

31. I have considered awards in some other cases that involved fracture of the clavicle. In **Jaldessa Diba T/A Dikus Transporters &**

Another –Vs- Joseph Mbithi Isika, Mks HCCA No. 96 of 2011 the respondent had sustained blunt back injury, blunt injury right shoulder joint and fractured and dislocated right clavicle. An award of Ksh. 350,000/= was made. In **George Kinyanjui T/A Climax Coaches & Another –Vs- Hassan Musa Agoi**, **Eldoret HCCA No. 29 of 2012 (2016) eKLR** the respondent had suffered fracture of the left clavicle, fracture of the 4th and 5th left ribs midshaft, dislocation of the left shoulder joint and multiple soft tissue injuries. On appeal the High Court reduced the award from Ksh. 800,000/- to Ksh. 450,000/=.

32. In my view the authority relied on by the advocates for the appellant involved far more serious injuries than those sustained by the appellant in this appeal. I consider that a sum of Ksh. 400,000/= is sufficient for the injuries suffered and I so award.

33. Both counsels were in agreement in their submissions to the award of Ksh. 6,000/= in special damages. The same is awarded.

34. In the foregoing the judgment of the lower court is set aside. I enter judgment for the appellant as follows:-

Liability - 100% against the respondent

General Damages - Ksh. 400,000/=

Special Damages - Ksh. 6,000/=

T o t a l - Ksh. 406,000/=

with costs of the suit and interest at court rates. The appellant to have costs of the appeal.

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mukisu Advocates for Appellant have consented through e-mail

No appearance for Respondent

Appellant - Absent

Respondent - Absent

Court Assistant - Polycap

30 days right of appeal.