REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL CASE NO. 62 of 2017

ANNASTACIA NDUKU JOHN.....APPELLANT

VERSUS

AGGREY OGUTU OYUGI.....RESPONDENT

BETWEEN

ANNASTACIA NDUKU JOHN.....PLAINTIFF

VERSUS

MARK MUGO MAINA.....1ST DEFENDANT

AGGREY OGUTU OYUGI.....2ND DEFENDANT

(Being an appeal from the Judgement of the Hon. J. A. Agonda – Senior Resident

Magistrate sitting at Mavoko in Civil Suit No. 919 of 2014 delivered on the 07/04/2017

JUDGEMENT

1. Vide a Plaint dated 11/09/2014 the Appellant sued the Respondent herein for both general and special damages as well as costs of the suit in respect of injuries sustained in a road traffic accident which occurred on 11/10/2013 involving motor vehicle Registration No. KAC 373 L beneficially owned and possessed by the Respondent and who was then driving it. Particulars of negligence and injuries as well as special damages were pleaded vide paragraphs 5 and 6 of the Plaint. The Appellant also pleaded the doctrine of *Res Ipsa Loquitor*.

2. The Respondent filed a statement of defence dated 6/11/2014 in which he denied being the beneficial owner and denied being in actual possession or control of motor vehicle KAC 373 L. The Respondent also denied that the alleged accident took place. The Respondent further pleaded that if such an accident took place then the same was wholly or substantially contributed by the Appellant. The Respondent particularized the Appellants negligence vide paragraph 4 of the Defence.

3. The trial court heard the testimonies of the Appellant and Respondent and vide a judgement dated 7/04/2017 found that the Appellant's case had not been proved and duly dismissed it with costs.

4. The Appellant being aggrieved by the said dismissal filed her Memorandum of Appeal dated 5/05/2017 in which she raised the following grounds of appeal namely:

> ***(i) The learned trial magistrate erred in law and fact by finding that the evidence of PW.1 was completely insufficient on determining whether the Appellant was indeed hit by the Respondent and sustained injuries as a result of the said accident.***
>
> ***(ii) The learned trial magistrate further erred in law and fact in that she failed to find that the case before the court was a civil case and the Appellant had indeed proved the elements of negligence on the part of the Respondent as required by the law and thereby the court imposed a higher degree of proof on the part of the appellant and subsequently the court arrived on a wrong finding.***

(iii) The learned trial magistrate erred in law and fact in that she found that the evidence of the appellant was not corroborated and that she did not prove to the required standard the particulars of negligence pleaded in the plaint in spite of the evidence of witnesses attesting to the fact that the appellant had been hit by the Respondent.

(iv) The learned magistrate erred in law and fact in finding that the Respondent who had not been charged or blamed by the police was therefore not to blame for the accident.

(v) The learned magistrate erred in law and fact in failing to disbelieve the police officer who testified just because he was not the investigating officer.

(vi) The learned magistrate erred in law and fact when she ignored the reports on the accident which left no doubt that the appellant had been hit.

(vii) The learned magistrate erred in law and fact when she held that the Respondents vehicle having had no dents then it could not be possible that it had hit the appellant.

(viii) The learned magistrate erred in law and fact when she held that the Appellant would have suffered more severe injuries if she had been hit by the Respondents vehicle yet the Appellant truly sustained severe bones and soft tissue injuries.

(ix) The learned magistrate erred in law and fact when she failed to assess the general damages payable to the Appellant if the suit had succeeded in spite of submissions thereon by both parties.

(x) The learned magistrate erred in law and fact as she disregarded the appellant's submissions on liability and quantum thereby resulting in miscarriage of justice to the Appellant.

(xi) The learned magistrate erred in law and fact by failing to evaluate the entire evidence on record and make a finding that the Appellant had proved her case on balance of probabilities.

5. This being a first appeal, the role of this court is well settled namely to re-evaluate and analyze the evidence presented before the trial court and to come to its own independent conclusion as to whether or not to uphold the trial court's decision. This court will also take into account the fact that it did not see or hear the witnesses.(See the case of **Oluoch Erick Gogo V Universal Corporation Limited (2015) eKLR** where the court restated the duty of the appellate court as follows:

''As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing, or seeing the parties as they testified and therefore, make an allowance in that respect…''

6. **PW.1** was **No.82433 Pc. Anthony Opiyo** of Kitengela police station who confirmed that indeed an accident had taken place involving motor vehicle KAC 373 L along Namanga road near Tosha petrol station in which the Appellant who was crossing the road from the right to the left side facing Athi River general direction was hit and who sustained injuries on right hand, fist and both legs. He produced the police abstract as an exhibit. On cross examination, he stated that the pedestrian was to blame and further stated that the driver was never charged.

7. **PW.2** was **Annastacia Nduku John (Appellant).** She stated that upon being hit by the Respondent, he escorted her to hospital. She sought to adopt the contents of her witness statement dated 16/09/2015. She stated after being medically attended to she reported the incident at Kitengela police station where she was issued with a P3 form and was later examined by Dr. Kimuyu who issued her with a medical report. On cross – examination, she stated that she was standing on her right hand side as a pedestrian and that there was no zebra crossing at the place where the accident took place. She also stated that the motor vehicle was coming from the left and right as she faced Athi River.

8. The Respondent **Aggrey Ogutu Oyugi (DW.1)** sought to rely on his witness statement dated 20/05/2015. He stated that on 11/10/2013 he was driving motor vehicle KAC 373 L from Kajiado towards Nairobi and on reaching Tosha Petrol station the Appellant herein ran across the road whereupon he hit her. He stated that he assisted her to Kitengela Medical Services where he paid the medical expenses. He added that the Appellant was running at a speed and slid on the road. On cross-examination, he stated that he blamed the Appellant who crossed the road, slid and got injured. He also added that he assisted her as a good Samaritan and paid her medical costs. On re-examination, he stated that Appellant needed to refund him his money. He also confirmed that when one is involved in an accident it is prudent that one should assist the injured before reporting to the police.

9. The appeal was canvassed by way of written submissions. It is only learned counsel for the Appellant who has filed submissions. Learned counsel for the Appellant raised three issues for determination namely: *whether or not the trial court was justified in making a finding that there was no evidence showing that the Respondent knocked down the Appellant; what damages are payable to the Appellant and lastly who is liable to pay the costs*? On the first issue, learned counsel submitted that the evidence of the Respondent and the exhibits produced established that the vehicle was beneficially owned by the Respondent and who was then driving it at the time of the accident. Learned counsel faulted the trial court for rejecting the Appellant's evidence yet the Respondent himself admitted that he hit the Appellant with his car. It was proposed that liability be wholly attributed to the Respondent at 100%. On the issue of damages, the sum of Kshs. 2,500,000/= was proposed and reliance was placed in the cases of **Peris Onduso Omondi –Vs- Tectura International Limited & another [2012] eKLR** and **Michael Njagi Karimi –Vs- Gideon Ndungu Nguribu & Another [2013] eKLR.**

10. I have considered the evidence adduced before the trial court as well as the submissions. It is not in dispute that indeed an accident took place involving the Appellant and the Respondent's vehicle registration No. KAC 373L Toyota Station Wagon on the 11/10/2013. It is also

not in dispute that the Appellant sustained injuries. The following issues are necessary for determination namely:

(i) Whether the Appellant proved her case on balance of probabilities against the Respondent.

(ii) What orders can be made by the court?

11. As regards the first issue, it is noted the learned trial magistrate dismissed the Appellant's case on the ground that she had crossed the road hastily and that the motor vehicle inspection report indicated nil damages after the accident and finally that she had not been hit by the vehicle. However, the evidence of the Appellant was corroborated by that of the Respondent who confirmed in his evidence in chief that he had actually hit the Appellant and later assisted her to hospital. Even though the police abstract indicated that the Appellant who was a pedestrian was to blame, there was need by the trial court to consider the evidence of the appellant and Respondent in totality so as to come to a balanced decision. The police officer called by the Appellant was rightly dismissed by the trial court as unhelpful to the Appellant's case since he did not participate in the investigations and also did not avail the sketch plans taken at the scene. This then left the Appellant's evidence and that of the Respondent for scrutiny as to who between them was negligent. Under Section 107 of the Evidence Act the burden of proof lies upon whoever desires any court to give judgement as to any legal right or liability dependent on the existence of a fact which he asserts and has to prove that those facts exist. Again under Section 109 of the said Act the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact lies on any particular person. Both the Appellant and Respondent relied on their witness statements during the presentation of their testimonies in court. The Appellant maintained that she was standing off the road when the Respondent car hit her. On the other hand, the Respondent claimed that the Appellant jumped onto the road and ran across and then landed in a ditch and injured herself. However, the Respondent in his evidence in chief stated that he hit the Appellant who had run across the road and that he assisted her to Kitengela Medial Services which was the nearest hospital from the accident scene. The Respondent on cross – examination blamed the Appellant for crossing the road and added that he assisted her as a good Samaritan. He also stated that when one is involved in an accident it is prudent that one assists the injured before reporting to the police but went ahead to seek a refund of what he had spent on the Appellant in hospital. I have keenly looked at the two statements and find that the one filed by the Respondent appears too good to be true. For instance, the claim by the Respondent that upon the Appellant falling into a ditch a group of boda boda riders descended upon her and assaulted her for having been careless in attempting to cross the road. I am unable to believe such a preposterous story from the Respondent. It is highly unlikely that some motorcycle operators had attacked the Appellant as claimed by the Respondent. In fact, the Respondent in his evidence in chief confirmed having hit the Appellant and assisted her to hospital and therefore the other version in his statement should be treated as a cock and bull story. It is not conceivable that a person who has been involved in an accident would thereafter be assaulted by bystanders for the flimsy reason that the person had been responsible for the accident. The appellant having presented her evidence in accordance to the pleadings particularly the plea of res ipsa loquitur, the respondent was expected to dislodge the same. If indeed the appellant had sustained injuries from beatings by a mob as contended by the respondent, then he ought to have called them to bolster his case. In any case the respondent admitted in his testimony that he had actually hit the appellant.

The learned trial magistrate in her judgment faulted the Appellant for not calling an independent witness to corroborate on the issue of the accident. I find that this was a misdirection in the sense that the Appellant's evidence was already corroborated by none other than the Respondent who confirmed in his evidence in chief that he had hit the appellant and rushed her to a nearby hospital. Hence any shortfall in the Appellant's burden of proof was bolstered by the Respondent. That being the position, the next issue to be determined is on the question of who was to blame for the accident. The Appellant being a pedestrian was expected to exercise great care and caution while venturing out on the highway. On the other hand, the Respondent who was a motorist was expected to adhere to the Highway Code of traffic at all times. It is noted that no sketch maps of the scene were produced save that the police abstract indicated that the Appellant was to blame. The investigating officer who filled the same did not testify so as to shed light on his findings. The Respondent having agreed to have hit the appellant ought to have shown the measures or efforts taken in order to avoid hitting the pedestrian whom he had seen crossing the road. There is no evidence at all as to whether he applied brakes or even swerved in order to avoid his vehicle coming into contact with the Appellant. In the absence of such evidence, I find the doctrine of *Res Ipsa Loquitur* pleaded by the Appellant applicable in the circumstances. It is obvious that had the Respondent applied brakes or taken any evasive measures the accident would not have occurred. The contents of the police abstract lays blame upon the appellant but the evidence adduced show the contrary. Even if the Appellant had crossed the road that in itself did not justify the Respondent to hit her just because she became an impediment on his right of access on the highway. If such logic were to be applied, then there would be mayhem on our roads. It is clear to me that had the learned trial magistrate considered all the evidence she would have come to a finding that both parties herein contributed to the accident. Further the trial court's finding that the respondent's vehicle remained with no accident defects was a misdirection since the respondent's car could still remain without dents after the accident depending on the speed and force of the vehicle. It was thus erroneous on the part of the trial court to make an assumption that the appellant was not injured on the ground that the vehicle had no dents. This raises a high possibility that both parties did contribute to the accident. The lower court's finding on liability must therefore be interfered with. From my analysis of the evidence of the Appellant and Respondent, I am satisfied that both contributed to the accident and hence I apportion the liability at 50% to 50%. To that extent the Appellant's case is found to have been proved on a balance of probabilities.

12. Having established that the Appellant had proved her case, my next duty is to determine the quantum of damages payable. I note that the trial court did not make an assessment of the damages even after finding that the Appellant's case had not been proved. The P3 form and medical report indicate that the appellant sustained injuries due to the accident. The medical report dated 2/03/2015 by Dr. Kimuyu noted blunt injuries on the head, chest, abdomen, left shoulder and bruises on left ankle region. The report also disclosed fracture of radius. According to the doctor there was no abnormality noted save that the appellant would need physiotherapy of the left shoulder joint and that there was a likelihood of future post traumatic osteoarthritis. The doctor directed that a current X-ray be conducted. However, from the documents presented no such current X-ray was availed implying that the Appellant must have fully recovered from her injuries. Learned counsel for the Appellant has proposed a sum of Khs. 2,500,000/= as general damages and relied on two cases namely **Peris Onduso Omondi –Vs- Tectura International Limited & another [2012] eKLR** and **Michael Njagi Karimi –Vs- Gideon Ndungu Nguribu & Another [2013] eKLR.** I have noted that the Plaintiffs in the cited authorities sustained severe injuries such as fractures of tibia, humorous radius, ulna, femur as well as loss of teeth and loss of consciousness. I find the plaintiff did not suffer such serious injuries as her doctor clearly noted that there was no abnormality. I find the authority that had been cited by the Respondents Advocates before the trial court to be relevant. It is the case of **Joseph Maso Kiilu –Vs- Kingsway Tyres & Auto Mart limited [2000] eKLR** where the sum of Kshs. 250,000/= was awarded for pain, suffering and loss of amenities for a plaintiff who sustained mainly soft tissue injuries. Due to the incidence of inflation I am of the view that an award of Kshs. 600,000/= would be adequate as general damages for pain, suffering and loss of amenities.

On special damages, I note the sum of Kshs. 4,380/= was pleaded. There are receipts produced and which amount to such sum. I award the said sum as special damages.

13. In the result the Appeal succeeds. The same is allowed. The judgement of the trial court is hereby set aside and substituted with an order that judgement be and is hereby entered for the Appellant against the Respondent as follows:

(a) Liability apportioned in the ratio of 50%to 50%.

(b) General damages of Kshs. 600,000/=

(c) Special damages of Kshs. 4,380/=

(d) Costs of the appeal and in the lower court.

Orders accordingly.

Dated and delivered at Machakos this 29th day of July, 2020.

D. K. Kemei

Judge