REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 27 OF 2014

BERNADETTE AMOLO OKOTH.....APPELLANT

VERSUS

BASH HAULIERS CO. LTD.....RESPONDENT

JUDGEMENT

Outline of fact

1. This is an appeal from the judgement delivered on 12th February 2014 in Mombasa **SRM Civil Suit No. 1217 of 2012**. The record of appeal shows that the appellant filed Civil Suit No. 1217 of 2012 seeking to recover damages following a road traffic accident which occurred along Nairobi/Mombasa road near Changamwe stage on or about the 3rd January 2012.

2. According to the plaint, the appellant was lawfully standing beside the road when the respondent's authorised driver negligently drove motor vehicle KTCB 524G/ ZD 6760 and caused it to knock down the appellant. The appellant submitted that she suffered serious injuries as a result of the accident. She contended that the accident was occasioned by the negligence of the respondent and its authorised driver, one Fredrick Kimathi Gituma and set out the particulars of the alleged negligence

The evidence adduced in the lower Court

3. At trial, three witnesses testified in support of the appellant's case. The appellant testified as PW 1 and one Dr. Ajoni Adede as PW 2. Police constable Pius Njeru testified as PW 3. PW 1 told the court that on the fateful day, she was standing beside the road when the respondent's motor vehicle veered off the road and hit her. That she suffered injuries on her forehead, left eye, nose and teeth. She was taken to Coast General Hospital where she was treated and discharged. She produced a bundle of receipts to support her claim for special damages.

4. PW 2 testified that he examined the appellant on 21st March 2012. He found that there was a disfigurement of the face and scars on the forehead and lower lip and the left eye was swollen and protruding. He also found that the appellant's tooth 22 had been reconstructed. PW 2 estimated permanent partial disability at 5%. He produced a medical report containing his findings.

5. PW 3 testified that he did not visit the accident scene. He however produced the police abstract. According to his understanding of the Occurrence Book report, the appellant hit herself at the edge of the trailer.

6. The respondent called two witnesses in support of its case. Frederick Kimathi Gituma testified as DW 1 while Benson Mbuvi Leli testified as DW 2. DW1 testified that on the day of the accident, he was driving at a low speed of between 15-20 km/hr. At the Changamwe stage, there was a woman attempting to cross. He saw her and actually passed her. All of a sudden he heard screams. He applied his brakes and stopped. Upon inspecting the scene, he was certain that the appellant hit herself on the trailer.

7. DW 2 is an investigator with Pin Eye Investments who was instructed by the insurers of the respondent's motor vehicle to investigate the accident. He recorded all the relevant statements, took pictures and drew a sketch map. He was of the opinion that the pedestrian was to blame for the accident. According to him, the fact that the appellant was hit by the left rear side of the trailer means that she didn't check whether the road was clear before proceeding to cross. The witness added that in any event, there was no provision for a pedestrian crossing where the appellant purported to cross. He produced his report in evidence without any objection by the appellant

A summary of the trial court's finding

8. After the close of the respondent's case, the parties filed written submissions in support of their respective cases. After an in-depth consideration of the totality of the evidence, the trial court was of the view that the appellant was to blame for the accident. The trial

magistrate also found that the appellant had not proved her case on a balance of probabilities. As such, the respondent could not be found liable for the accident. The learned trial magistrate proceeded to dismiss the case with costs. That decision aggrieved the appellant hence the instant appeal in which some five grounds were preferred.

Summary of the Parties' submissions on the appeal

9. Both parties filed written submissions in support of their respective cases. The appellant's submissions are dated 8th November 2019 while the respondent's submissions are dated 6th December 2019 and by the consent order dated 11th June 2020, the parties agreed that the appeal be disposed off by way of the court written submissions without any need for highlighting.

10. In her submissions, the appellant heavily faulted the trial court for relying on the evidence of Police constable Pius Njeru (PW 3), who did not visit the accident scene. It was submitted that PW 3 was not well placed to guide the Court since firstly, he was not the investigating officer and secondly, he did not have the proper facts of the accident. In addition, the appellant insisted that the rear part of the trailer swerved off the road and knocked her, a clear indication that the respondent's driver was driving in utter recklessness and without control of the vehicle. She urged the court to allow the appeal with costs.

11. The respondent began by faulting the appellant for late filing of the record of appeal on 30th September 2019 some five years after the Memorandum was filed and contended that such was invalid unless with the leave of the court. He cited to court order 42 rules 13(1) and 35(2) for that contention. On the merits, the respondent cited a number of cases to show that the appellant had the duty of proving negligence which duty it failed to discharge. The respondent asked the Court to dismiss the appeal with costs.

Issues for determination

12. Even though there are five grounds of appeal the main issue arising from the said grounds and calling for determination is whether on the evidence led showed that the tort of negligence had been proved against the respondent.

Analysis and determination

13. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.

14. The duty of the court in a first appeal such as this one was reinstated by the court of appeal in ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*** as follows:

> **This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.**
>
> **See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: -**
>
> **"On a first appeal from the High Court, the Court of Appeal should 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 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"**

15. In undertaking such analysis however an appellate court must be hesitant to freely interfere with the factual conclusions based on evidence tendered unless it be demonstrated the findings are not in congruence with the evidence led or that the finding is just but perverse. In ***Mwangi v Wambugu*** ***[1984] KLR 453*** reiterated the law in the following words

> **"2. A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistence with the evidence in the case generally."**

16. Of the five witnesses called, only Pw1 and Dw1 were at the scene of the accident and could say first- hand what each observed. It being true that police constable Pius Njeru did not visit the accident scene, his attendance in court must be viewed in light of section 147 of the evidence Act. His task was to produce the document without being made a witness to the accident. His inability as witness is discernible from the answers he gave including the fact that he did not even avail the police file but only carried an abstract of the Occurrence Book. It is my finding that all the witness told the court was his opinion rather than facts from own knowledge acquired from observation, yet he was never called as an expert. His evidence, like that of Benson Mbuvi Leli, must remain evidence of opinion as far as the causation is concerned. The only factual evidence availed to court must remain that of the appellant and Dw2.

17. In coming to her conclusion, the trial court went into great and studious analysis of the evidence on record and came to the conclusion

that the appellant hit herself against the trailer and that there was no negligence proved against the respondent. The conclusion by the trial court easily get support from the appellant's own evidence at pages 87 and 88 of the record where she is recorded to say:-

> Page 87 line 4; "**I was hit by the middle part of the trailer…"**
>
> Page 88 line 12;-"**Thought the trailer had passed me, the same had side mirrors the driver could have used the same to see what was happening behind him…"**

18. This piece of evidence show that the horse or cabin of the vehicle had passed the appellant without hitting her and that it is the middle of the trailer being towed which hit her. I do take notice of the ordinary manner motor vehicles move and appreciate that they never move sideways. There was no allegation that the vehicle was reversing so as to hit the appellant by its rear. I therefore find it improbable that the appellant could have been hit in the fashion and manner given in her version of the evidence. That evidence is wanting in credibility and belief. It could not have been the basis to burden the respondent with liability in negligence.

19. In conclusion I do find that the finding and conclusion by the trial court sits in perfect harmony with the evidence on record and find no justification to interfere with the conclusion by the trier of fact. I may only add that the burden of proof was always upon the appellant to prove that the admitted accident was out of fault by the respondent but that obligation was never discharged.

20. The upshot is that I find no merit in the appeal which is therefore dismissed with costs to the respondent.

21. It is so ordered.

Dated, **signed** and **delivered** at **Mombasa** this **25th** day of **September 2020**

P.J.O. OTIENO

JUDGE