REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 17 OF 2020

PESA HAMISI.....APPELLANT

VERSUS

P. N. MASHRU LIMITED.....RESPONDENT

(Being an Appeal from the Judgment delivered by Hon. N. C. Adalo, Senior Resident Magistrate, on the 25th February 2020 in PMCC No. 22 of 2018)

Coram: Hon. Justice R. Nyakundi

Kariuki Gathuthi Advocates for the appellant

Oloo & Chatur Advocate for the respondent

JUDGMENT

This is an appeal against the Judgment of **Hon. N. C. Adalo (SRM)** at Mariakani dismissing the suit brought by the appellant seeking general and special damages for injuries sustained by the appellant on or about the 10.9.2016 through the negligence of the respondent's.

Background

What were the circumstances leading into the institution of the suit by the appellants? According to the Plaint lodged in Court on 30.1.2018 the appellant was a lawful pillion passenger on motorcycle registration number KMCX 589D along- Mombasa – Nairobi at Kwa Makongo area, when motor vehicle registration number KBQ 511 G – 2D- 7190 owned by the respondent was; so negligently driven managed and controlled at excessive speed by the respondent's driver, servant and or agent. That it was involved in an accident with the motor cycle, the appellant was riding in, as a consequence whereof the appellant suffered bodily injuries, loss and damage which the respondent is liable or vicariously liable.

At the hearing, the appellant **Pesa Hamisi (PW3)** gave evidence as to the cause of the accident. The effect of which created a narrative that on the material date and time he was a pillion passenger travelling along Kwa Magogo – Mazeras Road on board motor cycle KMCX 589D.

Further, in the excerpt of his evidence (PW3) testified that the cause of the accident was the negligent acts by the respondent's driver who drove towards the lane of their motor cycle. That the driver of the motor cycle fearing for his life jumped off abandoning both the motor cycle and the appellant. As a result, he fell down and sustained serious bodily injuries which were diagnosed initially at Mariakani Hospital with a further referral to Coast General Hospital. In support of the nature of injuries and mode of treatment the appellant produced treatment notes as exhibit 5.

On cross-examination by the respondents counsel it was averred by the appellant that the driver of the offending motor vehicle veered off its lane to the lane of the motor cycle and that was the cause of the accident.

(PW1) Dr. Stephen Ndegwa gave evidence on behalf of the appellant with regard to the injuries suffered on the day of the accident. During the medical examination, **Dr. Ndegwa** told the Court that the appellant injuries comprised of concussion, fracture of the right mandibular joint and chin, injury to the right eye, chest and lower back. As already noted he produced the medical report as exhibit.

The next witness called by the plaintiff was **(PW2) PC (W) Ann Wambui** of Mariakani Traffic Police. In her testimony she confirmed that a collision involving motor vehicle KBQ 511G – 7190 and motor cycle KMCX 589D was reported and investigated accordingly. Though she admitted not being the one who investigated the accident she particularly alluded to the facts: That the accident occurred and the appellant, herein a passenger riding the motorcycle sustained personal injuries in which the respondent's driver was to blame.

On cross-examination the witness told the Court that the driver of the respondent motor vehicle was yet to be charged with a traffic offence.

As is indicated in the record the respondent in answer to the appellant's claim called three witnesses. The first witness being **Dr. Udayan Sheth (DW1)** an orthopedic surgeon who examined the appellant on 29.11.2018 for purposes of a second medical report. According to **Dr. Sheth** reviewing the treatment notes and discharge summary from Coast General Hospital it was clear that the appellant suffered injuries to the head, fracture right temporal mandibular joint emphysema, retrophangeal area and right eye.

Concerning prognosis **Dr. Sheth** was of the opinion that the appellant has fully recovered from the injuries save for complaints in the eye injury which he advised required an eye specialist. He produced the report as D-exhibit 4.

DW2 – Flavian Masha testified as the claims officer with the respondent company. As to the occurrence of the accident the witness told the trial Court that he happened to be seated outside the premises of the company offices when he saw members of the public running towards a particular scene. He followed the people only to find that their stationary motor vehicle and a head of it was a motor cycle with a female victim next in pain a sign of infliction of injuries. He described the rider as fleeing the scene and underneath the front of the motor vehicle was a motor cycle but with no evidence of contact between the two vessels. Though he visited the scene after the accident the witness appeared to opine that the driver of the motorcycle was to blame for abandoning it thereafter losing control to inflict harm to **(PW2).**

(DW3) – Francis Shambi, the driver of the respondent's motor vehicle on the material day testified that while driving along Mombasa – Mazeras highway a motor cyclist lost control skidding under the vehicle. He attributed the cause of the accident to the rider who was driving at high speed and that's when another trailer happened to hoot, he must have been scared by hitting the bump, finally jumping off the motorcycle. He absolved himself of any blame on the occurrence of the accident.

It is against this backdrop the Learned Magistrate weighed the evidence arriving at a decision that the appellant failed to discharge the burden of proof on a balance of probabilities to obtain Judgment to affix liability. So how has he faired in persuading this Court to interfere with the decision of the trial Court.

From the submissions of the appellant, the Learned Magistrate erred in Law and fact in placing a higher burden of proof upon the 1st appellant on who was to blame for the accident than the degree allowed in Law.

Such a contention is contested by the respondent on how the subject matter of the accident occurred. Learned counsel contended that as stated in **Nadwa v Kenya Nazi Ltd {1988} KLR 488 and KPL v Mathew Kabage Wanyiri {2016} eKLR** the burden of proof at time, lies on the appellant and the evidence produced at the trial met the clear threshold set by the Law, consequently there was no basis for the appellant's claim to be dismissed for want of proof on a balance of probabilities.

According, to Learned counsel in terms of the entirety of evidence read in proper context in the instant case the conduct of the respondent was that of negligence and breach of duty care against the appellant. It was urged on this Court to exercise appellate jurisdiction pursuant to Section 78 of the Civil Procedure Act to allow the appeal on liability.

The counsel submitted that as regards the issue on liability the applicable Law on causation in respect of the accident which occurred on 10.9.2016 cannot be subject of interference for reasons of non-proof by the appellant.

Thus in addressing the jurisdiction of appeals Court in the context of the impugned Judgment Learned counsel set out to remind the Court the principles in **Selle v Associated Motor Boat Co. Ltd {1986} EA** on the dominant guide of re-evaluating the evidence tendered before the trial Court without seeking to introduce any new facts or collateral material in determining the appeal. The respondent screening through the evidence raised in the proceedings contends that its clear the appellant failed to discharge the burden of proof. In that line of submissions Learned counsel cited and placed reliance in the cases of **Wareham t/a Wareham & 2 others v Kenya Post Office Savings Bank {2004} 2 KLR 91, Patrick Lumumba Kimuyu v Prime Fuels (K) Limited {2017} eKLR** Towards this end Learned counsel argued and submitted that there isn't shred of evidence of error or misdirection on the part of the Learned trial Magistrate. Therefore, the appeal herein ought to be dismissed.

Analysis and determination

In order to maintain a proper focus of the issue at hand, it is important to restate the Law. I echo the principles in **Kenengyere & Another v Nyamagoye {1990 – 1994} EA 184** where it was held:

> ***"The Court of Appeal has to bear in mind that its duty is to rehear the case and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the Judgment appealed from, but carefully weighing and considering it, and shrinking from overruling it if on full consideration the court comes to the conclusion that the Judgment is wrong…. when the question turns on the manner and the demeanor, the Court of Appeal always is, and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances, quite apart from the manner and demeanor, which may show whether a statement is credible or not, and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen."*** **(Pandya v R {1957} EA 336)**

The starting point in discussing this appeal ought to be in answering the question on the burden of proof. According to the dictum by the **Supreme Court in Raila Odinga & Another v IEBC Petition No. 5 of 2013** the Court held:

> ***"A petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden the threshold of proof should, be above the balance of probabilities in Civil Law though not as high as beyond***

reasonable doubt in <u>Criminal cases…..</u> it is on that basis that the respondents bear the burden of proving the contrary. The same position was adopted in a comparative jurisprudence in US – Shirts and blouses. Appellate body report WT 1DS33/AB/R April 25 – 1997 where the following statement was made:

"it is a generally accepted canon of evidence in Civil Law, Common Law and infact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party who will fail unless it adduces sufficient evidence to rebut the presumption, that it is incumbent on the party challenging the conduct of another party to adduce primafacie evidence of facts and Law to show that the conduct of the challenged party is in violation of the provision in question. When such a proof is established, the burden of proof is shifted to the party under challenge to adduce a rebuttal that the allegation of the challenging party is not based on an appropriate ground. Thus the burden of proof rule has three steps to be followed in seriatim. First, a complainant member must present a primafacie case. Second, if it does, then it creates a rebuttable presumption that the measure complained of is inconsistent with the applicable rule. Third, the burden shifts to the respondent member to rebut the presumption."

This same basic pattern on the burden of proof prevails in the legal position taken in our civil justice system as exemplified in the cases of **Eastern Produce (K) Ltd v James K. Ngetich C.A. No. 21 of 2004, Eldoret Steel Mills Ltd v Peter Nyaata Miranga HCA No. 64 of 2000.** In **Stephen Kubai v Mikelina Amatu & Amatu {2006} eKLR**

"the Court took the view correctly so that it was the appellant's duty to prove the allegations of negligent and speculation cannot be a basis for proof."

So how is the Court expected to exercise discretion on the standard of proof, alongside the yardstick of fairness and equality in the less straight forward cases? As **M. Clermort E. Emily Sherwin** have argued in their rationale on approaches to standard of proof:

***"That standard of proof refers to the threshold of probability that must be exceeded in the adjudicators evaluation of the evidence in order for the adjudicator to reach Judgments about the existence of historical facts and to apply legal concepts to historical facts to reach legal conclusions."* (A comparative view of standards of proof, 50, AMJ Comp. L 243 {2000})**

Thus far in common I have identified the key principles which would guide the Court in making a determination whether the Learned trial Magistrate in her well-reasoned Judgment erred in Law and fact in dismissing the claim on liability. What was at stake in the exercise of discretion against the appellant are the elements on the duty of care and acts of negligence.

Salmond & Heuston on The Law of Torts 19th Edition defines negligence to be:

"a conduct, not state of mind which involves an unreasonably great risk of causing damage, negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinary regulate the conduct of human affairs would do, or doing something which a produce and reasonable man would not do?"

As is clear in **Lord Atkin said in Doroghne v Stevenson {1932} AC 562 at pg 580** that:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then in Law is my neighbor? Persons who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In **Rouse v Squires {1973} 2 ALL ER 903 Mckenna J** recognized this is to be so when he said:

"…. Where the party guilt of the prior negligence has created a dangerous situation, and the danger is continuing to a substantial degree at the time of the accident, and the accident would not have happened but for this continuing danger, he is responsible for the accident as well as the party who was subsequently negligence."

It is also true that a case involving contributory negligence presents the question of what a person ought or ought not to have done under the circumstances of a particular case.

The appellant must establish that he was injured by the negligence of the respondent that does not tend to show contributory negligence upon his part. The principal contention of the appellant in the argument canvassed of the case on appeal, was that the Learned trial Magistrate erred in refusing to give effect to the Law that he had established on a fair preponderance of evidence that the respondent was guilty of negligence.

This was how Lord Jamieson dealt with the doctrine of a duty to take reasonable care not to cause injury or damage to other road users in **Hay or Bourhill v James Young {1943} A. C. 92:**

"No doubt the duty of a driver is to use proper care to cause injury to persons on the highway or in the premises adjourning the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care."

In **Lang v London Transporters Executive {1959} WLR Ps Havers J** expressed the view on the doctrine as follows:

> ***"If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility, which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extra ordinary precautions."***

When taken as a whole **G. V. Odunga Digest on Civil Case Law and Procedure Vol. 3 2nd Edition Law Africa Publishing Ltd {2006} the Learned Judge observed thus at Pg 2964 para (6):**

> ***"the Law imposes a duty on a person who drives a vehicle on a road to use reasonable care to avoid colliding with other motor vehicles using the road, and the degree of obligation by much negligence ought to be adjudged in a traffic accident case is what sort of action could a reasonable man have taken to ensure that no accident occurred."***

In my view, whether the appellant was negligent or failed to proof that the respondent contributed to the accident to me was a matter of part inference to be drawn by the Learned trial Magistrate founded on the totality of the evidence. On behalf of the appellant the Court received the evidence as follows: That on 10.9.2016 while riding as a pillion passenger in motor cycle registration KMCX 589D they encountered the respondents motor vehicle KBQ – 511G being driven towards Nairobi from Mombasa. To the appellants recollection the vehicle was overtaking another vehicle when the respondent failed to exercise ordinary care and thereby did incur the risks of injury which he complains to have suffered.

It appears from the testimony of the appellant among other things that happened was for the motor cycle rider to jump off leaving him behind and as a consequence he suffered loss and damage.

In addition to the appellant evidence the Court was privy to the testimony of **(PW2) No. 91772 PC (W) Ann Wambui** of **Mariakani Police Station;** performing traffic duties.

The police officer testified that on the day of the accident a report was made to the station which subsequently investigated the circumstances on how the alleged incident occurred. She maintained not to have visited the scene of the accident or recorded witness statements who indicated that there was an accident between the appellant motor cycle with the respondent's motor vehicle.

Having considered the testimony of the police officer **(PW2)** in the instant case, it is clear that the basic prerequisites of admissibility on relevance, materiality and probative value to prove a fact that is at issue in that case was not discharged. Real and best evidence by **(PW2)** could have been authenticated if she was the investigating officer who visited the scene, identified the unique sued marks, residual debris and the point of impact on the collision.

It is at least desirable that the evidence of a police officer be the one to link in the chain objects of relevance at all times on the events in issue establishing the proximate cause of the accident. To my mind these utterances by the witness are not statements of facts. For such statements of fact to qualify as competent testimonial evidence it has to meet the following conditions as stipulated in the Evidence Act.

> ***(a). The witness must, with understanding, take the oath or a substitute of it.***
>
> ***(b). Here she must have personal knowledge about the subject matter of his testimony, in other words, the witness must have perceived something with his senses that is relevant to the case.***
>
> ***(c). He or she must remember what he or she perceived.***
>
> ***(d). He or she must be able to communicate what he or she perceived to the trier of facts."***

Additionally, the Learned trial Magistrate ought to have distinguished fact, from opinion or comment in the nature of the evidence given by **(PW2).** This was hearsay evidence admitted and valuable Court time was wasted giving undue weight to answer the sole question on causation.

In the present case to proof negligence one has to assess and evaluate the testimony of the appellant who for all intents was the only eye witness to the accident. It is not lost upon this Court that the evidence raised a primafacie case to warrant an answer from the respondent.

Emphasis on rebuttal can be deduced from **(DW3)** – testimony, as the driver of motor vehicle registration number KBQ 511G. Whereas it is true he admits of the accident he seems to deny any acts of negligence and blames him for the misfortune which befell the appellant.

As noted in cross-examination, the witness confirmed that the accident occurred in broad daylight on or about 1.40 p.m. He also confirmed that there were two vehicles on the road supposedly at the aforesaid scene. By way of explanation the respondent witness attributes the accident to the jumping off the motor rider exposing the appellant to risk of injury.

This is in contrast with evidence of **(PW3),** the appellant that the motor cycle rider sensed danger upon noticing imminent danger from the respondent's motor vehicle. According to the method of analysis the basis illustrated by the Learned trial Magistrate seems to indicate that the motor cycle rider action was the proximate cause of the accident. It will be noted that she put more considerations to the evidence of the driver to the respondent's motor vehicle. In other words, whereas the Learned trial Magistrate stated that the one who created any kind of unreasonable risk of injury was the motor cycle rider, but the scheme of events at the scene suggest otherwise. There are general significant factors that were not recognized by the Learned trial Magistrate on a second scrutiny of **(PW2)** and **(DW3)** respectively.

That for the respondent to be liable he created a risk of a general type as stated by the appellant. It is capable of consummation in a way such that it will not be unjust to hold that the motor cycle rider ran away on sensing imminent danger from the respondent's motor vehicle. According to this formula the respondent is liable for all the consequences actually ensuing from his conduct. It is also important to realize from the record that the investigations readily stated that the respondent's motor vehicle was at fault, but the scheme of events outlined failed the test of admissibility as outlined elsewhere in this analysis. In appraising the methodical Judgment, the Learned trial Magistrate fettered her discretion for not exercising judicial power to enlarge time so that the real evidence of investigations officer on liability could be adduced and tested in cross-examination. The paucity of the principles of liability and the exposition of the Law in this field sometimes has made it so difficult for the Courts to comprehend the appropriate scope of causation, proximate cause, breach of duty of care, negligent acts as they relate to liability and loss to adequately rationalize their Judgments.

Based on the evidence and authorities referred to in the foregoing paragraphs I am minded to find the dictum made by the **Court of Appeal in Abbay Abbubakar Haji & Another v Marair Freight Agencies Ltd CA No. {1984} KLR 139 Vol 1 KAR 474** where the Court held:

> ***"A Judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most accidents, it is possible on a balance of probabilities to conclude that one or the other was guilty or both parties were guilty of negligence. In many cases, for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no obstruction or other traffic affecting their courses, there is, in absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible, it is proper to divide the blame equally between them. Where however, there is lack of evidence the position is different."***

Applying an objective, reasonable person standard of behavior to this situation one has to weigh the respondent goal being that of doing everything at his disposal to have him exonerated of any liability. In the respondent's evidence it was the excess speed of the motor cycle rider that amounted to the negligence that actually caused the harm to the appellant, but the evidence of the appellant reveals otherwise that the respondent's driver could probably have directly hit them, anyway. I am of the conceded view that case illustrates the basic causation standard, the but for test, which requires that the respondent's negligence be a sine qua non of the appellant's harm, a necessary antecedent without which the harm would not have occurred. Quite, unlikely, there is no evidence that the motorcycle rider speed was in itself dangerous and the cause of the accident, contrary to the respondents denial of wrong doing as manifested from the evidence of **(DW1) – Flavian Masha** and **(DW2) – Francis Mukhwana Shambi.** In as much as this case was not a head on collision, the appellant testimony satisfied the criteria on primafacie case of negligence on the part of the respondent driver. The relevant statement here is one where the appellant describes the scene which ended up the motor rider fearing for his life to come to an abrupt stop to risk near end collision. This proof viewed favourably shows the motor cycle found itself under the front cabin of the motor vehicle. It is not lost upon this Court that **Mr. Flavian Masha** was made a witness in the suit and perhaps for good reason to readily embrace the trajectory and merely formulate identifiable components which draw together a cluster of related issues not to hold their driver liable for the accident. In view of the foregoing it is safe to state that the appellant has brought himself within the principles in **Bundi Marube v Joseph Onkoba Nyamuro {1983} KLR 403** to further interfere with the findings of fact by the trial Court on liability by setting it aside and substituting with apportionment of liability at **50%:50%** in favour of the appellant as against the respondent.

On quantum the classic exposition of the principles relating to an award of damages is that of **Idi Ayub Omar Shaban & Another v City Council of Nairobi CA No. 52 of 1984, Butt v Khan {1981} KLR 345**.

> ***"It is trite Law that assessment and apportionment of damages is an exercise of judicial discretion. The basic pecuniary loss recoverable by an order in that circumstances is the diminution in the value of harm suffered on the principle that he is entitled to be put back, so far as many can do it, into the same position as if the damage had not occurred.*** **(See H. West and Son v Shepherd {1964} AC 326).**

I accept the view by the Learned trial Magistrate on the weight of the evidence in so far as assessment of damages is concerned. The approach of this Court to such a situation is not to interfere with the decision as held in the dictum of **Bundi Marube case (supra).**

My conclusion of this matter is that the grounds of appeal raised by the appellant have merit. The threshold of proof on a balance of probabilities was met by the appellant for the trial Court to apportion liability in equal measure. It follows from the foregoing that I am of the view that the Learned trial Magistrate was in error in finding that this collision was in any way caused wholly by the negligence of the motor cycle rider. I opine that the immediate and proximate cause of the accident was the nature of the risk that the respondent's driver had created which became the blameworthy cause of the accident on 10.9.2016. I reject the view that the motor cycle rider breach of the duty of care generated the cause which gave rise to loss and damage claimed by the appellant. On this record, there is convincible latitude to blame both drivers equally as there is no possibility of the respondent negligence being a remote cause.

In the above, the said appeal succeeds on liability and as a consequence assessment of damages as sought and awarded by the trial Court to remain undisturbed with costs to be shared equally between both parties.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Wesonga for the appellant