REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 46 OF 2018

SAMSON MWANIKI NYAGA.....APPELLANT

VERSUS

FAUSTINE NJERU RUGIRI.....RESPONDENT

JUDGMENT

A. Introduction

1. The appeal herein was instituted vide the memorandum of appeal dated 19/09/2018 and filed in court on 21/09/2018. It's an appeal from the judgment of Hon. Thomas T. Nzyoki SPM in Siakago SPMCC No. 72 of 2016. The appellant raised six (6) grounds of appeal and which can be summarized as hereunder: -

> ***1)*** *That the learned trial magistrate erred in fact and in law in finding that the appellant did not bother to establish the particulars of negligence pleaded and to establish his case on a balance of probabilities.*
>
> ***2)*** *That the learned trial magistrate erred in law and fact in finding that the appellant had failed to establish liability of the accident against the Respondent.*
>
> ***3)*** *That the learned trial magistrate erred in law and fact in failing to appreciate that the appellant's witness statement dated 8/06/2018 and which was adopted as his evidence squarely blames the Respondent for hitting the appellant from behind while overtaking and that his evidence neither contradicted nor controverted by that of the respondent*
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> ***4)*** *That the learned trial magistrate erred in law and fact in failing to appreciate that once interlocutory judgment has been entered against the respondent for failing to file a defense then such judgment is final with regards to liability and unassailable.*

2. The appellant thus prayed that the appeal be allowed with costs to the appellant, that this court do determine that the respondent was 100% to blame for the accident of 27/02/2016 and the court do enter judgment in favour of the plaintiff in general damages at Kshs. 150,000/= and special damages at Kshs. 10,500/=. The appellant further prayed for the costs of the appeal and in the subordinate court.

B. Submission by the Appellant

3. On the day of the hearing of the appeal, the appellant erected to canvass the appeal by way of written submissions and which submissions were filed and in which the appellant reiterated his grounds of appeal to the effect that special damages were pleaded and proved and hence it was wrong for the trial court to deny the same; that the trial court failed to take into account the appellant's witness statement which would have clarified as to the fact that the appellant was hit from behind and hence the respondent was liable; the trial court failed to appreciate the effect of entry of interlocutory judgment and reliance was made on **Felix Mathenge –vs- Kenya Power & Lighting Co. Ltd (2008) eKLR**; the trial court erred in finding that it was not enough for the plaintiff (appellant) to rely on the doctrine of *res ipsa loquitor* and that under the said doctrine there was presumption of negligence which was never rebutted. Reliance was made on **Anastacia Kamene Chege –vs- Lawrence Nduati Kiguta NBI HCCC 1786 of 1984.**

4. The respondent did not participate in the appeal.

C. Re-evaluation of evidence

5. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). However, it should be appreciated that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings {See

Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and **Kiruga –versus- Kiruga & Another (1988) KLR 348}. In r**e-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length. (See **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).**

6. In the case before the trial court, the appellant herein (the plaintiff therein) sued the respondent herein (the defendant therein) for damages for injuries suffered in a road traffic accident which occurred on 27/02/2016 when the motorcycle he was riding on, was knocked by motor vehicle registration number KAR 144Y driven by the respondent herein. The appellant blamed the accident on negligence on the part of the respondent and relied on the doctrine of *res ipsa loquitor*. The respondent was served with the pleadings but failed to enter appearance and defend the matter as a result of which, interlocutory judgment was entered against him, and the matter proceeded to formal proof hearing. The appellant testified as PW1 and called Dr. Godfrey Njuki who testified as PW2 and produced the medical report as evidence.

D. Issues for determination

7. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the authorities referred to by the appellant, and in my view the issue which the court ought to decide on is whether the trial court did err in dismissing the appellant's case and what orders should be given in the event that the trial court erred.

E. Determination of the issue

i. Whether the trial court did err in dismissing the appellant's case.

8. The trial court in dismissing the appellant's case noted that the appellant did not tender sufficient evidence to prove negligence on the part of the respondent herein and that it was not enough for the appellant to rely on the doctrine of *res ipsa loquitor*. The appellant submitted that the said burden of proof was discharged by the fact that the appellant produced witness statements in the trial court and which was not controverted and further that there was interlocutory judgment on record.

9. It is a principle in law that whoever asserts a fact is under an obligation to prove it in order to succeed. In civil cases the standard of proof is the balance of probabilities (See **Miller v Minister of Pensions [1947] 2 All ER 372** and **Section 107 of the Evidence Act**). The suit before the trial court was premised on the tort of negligence. In **East Produce (K) Limited -vs- Christopher Astiado Osiro in Civil Appeal No. 43 Of 2001** the Court of Appeal held that: -

> ***"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."*** (See **Mount Elgon Hardware –vs- Millers C.A. No. 19 of 1996** and **Mwaura Mwalo v Akamba Public Road Services Ltd HCC No 5 of 1989).**

10. It follows that the legal burden of proof lies on the plaintiff, the appellant in this appeal to prove negligence and the elements therein as was explained in **Donoghue v. Stevenson [1932] A.C. 562.)** This would entail prove of liability and quantum of damages. The aspect of liability will mainly deal with the ownership of the vehicle and how the accident occurred. The aspect of quantum of damages will deal with the compensation. The appellant pleaded the ownership of the vehicle and how the accident occurred in the suit.

11. However, as I have noted above the trial court on 25/01/2018 entered interlocutory judgment against the respondent herein.

12. The matter thereafter proceeded for formal proof during which, the appellant testified and called one witness in support of his case. In his well-reasoned judgment, the learned magistrate appreciated the law on the hearing of formal proof and the implication, in respect to the issue of liability. In the case of **Roseline Mary Gachubu Vs National Bank of Kenya Limited [2014] eKLR** by Havelock J. in which he quoted with approval a passage by Emukule J. in **Samson S. Maitai & Another Vs Africa Safari Club Limited & Another [2010] eKLR** which is persuasive to this court and which I duly agree with and in particular the following passage by Havelock J;

> "***In contrast at a formal proof hearing, if a party with onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on merit.***

13. Judge Hancox went further and approved this: -

> ***Neither can I agree with Mr. Waweru that the burden of proof is in any way lessened because the case is heard by way of formal proof. The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended, that burden may become easier to discharge***.

14. However, the trial court fell into error when it reached the conclusion that the appellant did not bother to establish the particulars of negligence against the respondent as pleaded in the plaint. This court has taken time to peruse the proceedings by the trial court and it is appreciated that the learned magistrate only relied on the evidence of the appellant as adduced in court on the 10th May, 2018. This court, however, has taken notice of the fact that the appellant filed a witness statement on the 26th October, 2016 in which he explained how the accident occurred by stating that motor vehicle KAR 144Y hit him from behind while it was trying to overtake him carelessly.

15. The matter having proceeded as a formal proof, and in my considered view, this part of the appellant's statement was very material to his case in respect to liability. As it is, this court will not hesitate to find that the appellant, by stating that he was hit from behind, had discharged the legal burden of proof and the learned magistrate ought to have entered judgment on liability in his favour. In failing to do so, and in dismissing the suit, the trial court made a fundamental error of principle.

ii. <u>What orders should be given in the event that the trial court erred</u>?

16. In interfering with the said judgment, this court ought to assess the general damages which the appellant ought to have been awarded. This is in appreciation of the powers of this court donated to it by virtue of Section 78 of the Civil Procedure Act Chapter 21 which includes the power to determine a case finally.

17. The appellant prayed for general damages for pain, suffering, loss of amenities, and loss of future earning capacity to be assessed by the court. It was his pleading that he sustained serious injuries and suffered much pain and damage. The injuries were indicated to be cut wound on the left parietal region and cut wound on the left lower limb. PW2 produced a medical report {PExbt 6(a)} which confirmed the said injuries. The trial court in exercise of its duty (to assess the damages it would have awarded had it allowed the suit) observed that *"in the event the plaintiff was successful, the injuries sustained were soft tissue injuries which would attract an award of Kshs. 150,000/=."* The importance of this assessment was appreciated by the Court of Appeal in **<u>Nyeri Civil Appeal No. 181 of 2011 Andrew Mwori Kasaya vs. Kenya Bus Service (2016) eKLR</u>** where the court stated that: -

> ***"Turning to issue No. 2, the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in <u>Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No. 124 of 1993 (UR)</u>. The court made the following observations on this issue:***
>
> > ***The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. <u>That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this Court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment</u>".***

18. In the trial court, the appellant while relying on the case of **<u>Raiply Wood (K) Ltd- vs- Joseph Simiyu Semoi (2011) eKLR</u>** and **<u>John Njue –vs- Daniel Nyaga Muriuki Embu HCCA 46 of 2015</u>** submitted that an award of Kshs. 150,000/= would suffice. It is the same award which they prayed this court to award in appeal.

19. In **<u>Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini -v-A.M. Lubia and Olive Lubia (1982 –88) 1 KAR 727</u>** at p. 730 Kneller, JA. said: -

> ***The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. …."*** (See also ***<u>Gicheru -vs- Morton and Another (2005) 2 KLR 333</u>)***

20. The Court of Appeal in **<u>Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55</u>** in setting out the circumstances under which an appellate court can interfere with an award of damages held that assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance.

21. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **<u>Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730</u>** where it was held that discretion in measurement of quantum for damages has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated. The court should also consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award and taking caution and paying heed to the figures of awards in other cases.

22. It is my opinion that considering the above principles in awarding general damages and looking at the authority relied upon by the appellant in the trial court, the award of Kshs. 150,000/- as general damages was proper in the circumstances. The same cannot therefore be termed as being inordinately high as to justify interference.

23. As for the special damages, it is trite that a claim for special damages must indeed be specifically pleaded and strictly proved with a degree of certainty and particularity. (See **<u>Richard Okuku Oloo –vs- South Nyanza Sugar Co. Ltd [2013</u>**]). The appellant produced a receipt for Kshs. 500/= being payment for the search of the motor vehicle, certificate of postage for Kshs. 85/=, receipts issued by Tenri Hospital evidencing payment of a total of Kshs. 1,750/= and the receipt evidencing payment of Kshs. 4,000/= for medical report. This makes the total amount proved as special damages at Kshs. 6,335/=. The said special damages ought to be awarded to the appellant.

24. As such, considering the above legal principles, the instant appeal succeeds as prayed in the memorandum of appeal.

25. The court makes no order as to costs as the appeal was not defended.

26. Orders accordingly.

Dated, delivered and **signed** at **Embu** this **25th** day of **November, 2020**.

L. NJUGUNA

JUDGE

In the presence of: -

……..…for the Appellant

…….……for the Respondent