REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

HCCA NO. 28 OF 2015

GEORGE ONG'ANG'A.....APPELLANT

=VRS=

MARIONE B. OTWORI.....RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. J. Macharia – Senior Resident

Magistrate delivered on the 20th day of April 2012 in Nyamira SRM Civil Suit No. 54 of 2008)

JUDGEMENT

The appellant herein was the defendant in the lower court. He was aggrieved by the findings of that court both on liability and quantum of damages as according to him the respondent did not prove negligence against him. He therefore preferred this appeal the grounds of appeal being: -

"1. THAT the learned trial magistrate erred in law and fact in holding the Appellant 70% liable for the alleged accident whereas there was no sufficient evidence to that effect.

2. THAT the learned trial magistrate erred in law and in fact in holding the Respondent 30% liable for the accident without any basis as the Respondent was an alleged passenger when there was no sufficient evidence produced to that effect instead of dismissing the plaintiff's case for want of proof.

3. THAT the learned trial magistrate erred in law and fact in failing to make a finding that the Respondent had failed to proof her case to the required standard and further dismiss her case with costs to the Appellant.

4. THAT the learned trial magistrate erred in law and fact by failing to find that the evidence on record and the pleadings were at variance.

5. THAT the learned trial magistrate erred in law and fact by failing to take into account the evidence of DW1 which showed that the plaintiff was never treated at the alleged Hospital.

6. THAT the learned trial magistrate erred in law and fact in failing to take into account the evidence of DW1 to the effect that the out-patient number 7186 the Respondent produced in court belongs to another patient by the name Lilian Omenge who was treated on 17.3.2008 one month before the occurrence of the accident on 4.4.2008.

7. THAT the learned trial magistrate erred in law and fact in failing to make a finding that the Respondent's purported claim was a fraud and consequently dismiss the same.

8. THAT the learned trial magistrate erred in law and fact by overly relying upon the evidence of the Respondent which was not proved when awarding damages.

9. THAT the learned trial magistrate erred in law and fact in awarding the Respondent special damages of Kshs. 3,500/= that was not proved.

10. THAT the trial magistrate erred in law and fact in making an award in general damages of Kshs. 120,000/= that was so excessive as to amount to an erroneous estimate of loss or damage and/or injuries which do not exist.

11. THAT the learned trial magistrate erred in law and fact in failing to consider the 1st Appellant's submissions and legal authorities relied upon in support thereof.

12. THAT the learned trial magistrate's decision albeit, a discretionary one was plainly wrong."

It is his prayer that this appeal be allowed and that the judgement of the lower court delivered on 20th April 2012 be set aside and be substituted with an order dismissing the suit with costs. He also prays that the costs of this appeal be awarded to him.

The appeal is opposed and when Counsels for the parties came before me they agreed to canvass the appeal by way of written submissions. The submissions were duly received and initially this judgement was scheduled for 29th November 2018 but due to an official commitment the same was not delivered. The delay is regretted.

I have had ample opportunity to consider the submissions and the authorities cited by both sides fully. I have also as is my duty as the first appellate court considered the evidence adduced at the trial so as to draw my own conclusions while appreciating and make due allowance for the fact that I neither heard nor saw the witnesses. I am also alive to the principle in **Mbogo Vs. Shah & Another [1986] EA 93** that unless it is shown that the trial court misdirected itself or took into account extraneous circumstances hence arriving a wrong decision, I cannot interfere with the decision of the trial court.

The issue for determination really is whether or not negligence was proved against the appellant. In his judgement, the trial magistrate points out that this was a test suit which was to determine the issue of liability. The Advocates for the parties had consented to that and urged that the finding on liability would hold in SRM CC 53 of 2008. It therefore behooved the plaintiff to adduce evidence to support the grounds of negligence pleaded in her plaint. He who alleges must prove is a rule of evidence which does not change even in a motor accident claim. The person claiming must prove negligence on a balance of probability and only once he/she establishes a prima facie case should the defendant be required to call evidence in rebuttal. In **Nandwa Vs. Kenya Kazi Ltd [1988] KLR 488** the court held: -

"*3.* In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the court of trial there is proved a set of facts which raises a *prima facie* inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."

This is not one such case as the respondent did not prove a set of facts which raises a prima facie inference that the appellant was to blame for the accident.

In this case the respondent's evidence was as follows and it was short so I will quote her verbatim: -

"I am Maurine Otwori. My ID is 21971004. I was involved in a traffic road accident on 4th April 2008. I was going from Nyamira towards Kisii direction where my home is. In the course of my travel and on arriving at Getare an accident occurred. I was injured on my head, legs, hands and back. I went to Getare Dispensary and later Kisii District Hospital. I was treated and discharged. This is the treatment note. The treatment note is marked MF I.

I reported the matter at Nyamira Police Station and I was issued with a P3 Form and a Police Abstract. This is the P3 Form and this is the Abstract. P3 Form is marked MF II and MF III.

I was examined by Dr. Ajuoga. I paid Kshs. 3,500/=. This is the report of and the receipt. The report is marked MF V, receipt Ex. No. VI.

I was examined by another Doctor at Nakuru. I have not healed completely. I pray for compensation and costs of the suit. That is all.

Signed

16/07/2009"

The cross examination was equally short and even there she did not give evidence on the manner in which the accident occurred and clearly the particulars of negligence pleaded in the plaint were not proved at all. In my finding the trial magistrate had no evidence upon which he could find the appellant negligent. His apportionment of liability was based on no evidence. If it was based on the fact that the appellant did not attend court to give evidence, then that was a misdirection.

As I have stated the law is that the onus and burden of proof was on the respondent – **see Sections 107, 108 and 109** of the **Evidence Act** which state: -

"107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

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 shall lie on any particular person."

The above sections of the Evidence Act place the burden of proof squarely on the plaintiff in a case not the defendant. As the law stands there can be no liability without fault. The award of damages that followed the apportionment of liability had no basis in law as negligence had not been proved against the appellant and this court would do well to interfere with it.

The appeal is merited. It is allowed and the judgement of the lower court is set aside and substituted with an order dismissing the suit in the court below with costs to the appellant who shall also get the costs of this appeal.

It is so ordered.

Signed, dated and delivered at Nyamira this 24th day of January 2019.

E. N. MAINA

JUDGE