REPUBLIC OF KENYA

IN THE HIGH

AT KIAMBU

CIVIL APPEAL NO. 176 OF 2017

SAMUEL KIMANI.....1ST APPELLANT

JOSEPH WACHIRA.....2ND .APPELLANT

VERSUS

MARY WANJIKU KAMAU.....1ST RESPONDENT

NUCLEAR INVESTMENTS.....2ND RESPONDENT

(Being an appeal from the judgment of Honourable C. C.Oluoch (Mrs) Principal Magistrate

Kiambu delivered on 15th January 2014 in CMCC No. 86 of 2011)

JUDGMENT

1. The 1st Respondent was injured in a Road Traffic accident along Kiambu road on the 13th October 2010 involving motor vehicle Reg. No. KAN 932J.

She sued the driver and apparent owner for damages arising from the injuries by her plaint dated the 17th June 2011.

2. The (defendants) Appellants in their defence dated 25th July 2011 denied the claim including ownership of the accident vehicle as well as the occurrence of the accident but in the alternative attributed contributory negligence to the 1st Respondent (plaintiff).

Upon hearing the case the trial magistrate found that the accident vehicle was owned by the 2nd respondent Nuclear Investments and that the driver the 1st defendant as wholly to blame, and therefore the 1st Defendant was vicariously liable for the driver's negligence.

3. The Appeal is against the above findings, and mainly that the trial magistrate erred in law and fact in failing to apportion liability between the parties, that the 2nd Respondent owned the accident vehicle without any proof of ownership and that the 1st appellant was vicariously liable.

4. The award of damages in general damages is also attacked as being excessive in the circumstances. This court has been urged to allow the appeal in the manner that the Appellants are not liable to the 1st Respondent in both liability and damages.

Both parties filed written submissions on the appeal.

5. The duty of an appellate court is to re-evaluate and re-consider the evidence adduced before the trial court and come up with its own findings – **Mwanasokoni -vs- Kenya Bus Services & Others (1982-88) IKAL 278.** That it will not normally interfere with the trial court's findings of fact unless they are based on no evidence or it is shown that the court relied on wrong principles in reaching the findings.

See also **Selle & Another –vs- Associated Motor Boat Ltd and Another (1968) EA 1.**

6. **Liability**

The Respondents case was urged through **PW1**, who was **the plaintiff.** It was her evidence that about 6.30p.m. after crossing the Kiambu road from the opposite side, a speeding vehicle hit her and later found herself at the Kiambu District Hospital. She stated that she blamed the driver of the vehicle for overspending and overlapping.

She testified that there was no zebra crossing at point where she crossed the road.

7. The 1st Respondent produced motor vehicle search certificate – **PExt 4a and b** showing that the Accident vehicle was registered in name of 3rd Respondent and a letter produced as **PExt 5** indicated that the insured(of Invesco Insurance Company) was Samuel Kimani the 1st appellant (1st defendant) and was the author of the letter. The said letter stated that he was the owner of the vehicle and that the driver Joseph Wachira Karugu the 2nd Appellant was his driver. **PExt 7** was a letter showing that the 1st Appellant was the policy holder. It was authored by Invesco Insurance Co. Ltd.

8. The Appellants did not call any witness but filed written submissions in which citing **Section 8 of the Traffic Act** stated that the person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the vehicle and that no evidence was adduced that the Appellants were owners or had any relationship with the accident vehicle and therefore no liability could be attached to them.

9. The 1st Respondents advocates too filed their submissions urging that the letter by the Insurance Company – **PExt 7** and the certificate from KRA were proof that the vehicle belonged to the 1st Appellant and the 2nd appellant was his driver.

10. **Issues for determination**

From the evidence the issues that arise for determination are:

1. Ownership of motor vehicle Reg. No. KAN 932J as at 13th October 2010

2. Whether the driver of the said motor vehicle was negligent and if so, whether the owner was vicariously liable in negligence for the accident.

3. Whether the 1st Respondent proved her case to the required standard and if so whether general damages awarded are consumerate with the injuries sustained.

11. **Ownership of motor vehicle**

Though denied in the statement of defence, evidence adduced is clear that indeed an accident occurred on the 13th October 2010 involving the 1st Respondent and the said motor vehicle registration No. KAW 932J on the material date and place – police abstract, PExt No.2.

PExt 5 A letter from the Registrar of Motor vehicles indicated its ownership on the material date as one **Martin Njuguna Kuria** (Page 26 Record of Appeal) - who is not a party to the primary suit.

12. However **PExt 7**, a letter written by the 1st Appellant confirms he was the owner of the vehicle and the 2nd Appellant was his driver.

The police abstract too shows the 2nd Appellant as the driver of the vehicle.

I have perused the Record of Appeal as well as the primary file. I have not seen the list of Exhibits, and in particular **PExt No. 5**, said to be the certificate of search from the Registrar of Motor vehicles at the date of accident.

13. The certificate of ownership of the vehicle stated on Page 26 Record of Appeal is for the vehicle but not for the relevant period, the 13th October 2010 but for the 5th April 2011. It is not marked as an exhibit either. In my view then, the said certificate of no evidential value, having not been produced and admitted as an exhibit.

PExt 7 was produced and admitted as an exhibit without objection by the Appellants.

14. **Section 8 Traffic Act** cited above is clear that ownership of a vehicle can be proved by other means. The letter authored by the 1st Appellant himself, admitting the occurrence of the accident ownership of the vehicle and that the 2nd Appellant as his driver are of proof of ownership. All what it means is that the vehicle had changed hands from the registered owner to the 1st Appellant who had not effected the said change at the Registrar of Motor Vehicles – **JRS Group Ltd –vs- Kennedy Odhiambo Andwak (2016) e KLR** and **Samuel Mukunya Kamunge –vs- John Mwangi Kamaru Nyeri HCCA No. 34 of 2002 (2005) e KLR.**

15. It is true that a motor vehicle search certificate would have shown the registered owner as at the date of accident. Failure to produce the same in my view was not fatal as express admission of the ownership was made by the 1st Appellant.

16. In the circumstances I decline to find otherwise as urged by the Appellants.

In the same breath, the 1st Appellant having confirmed in the letter – **PExt 7** – that the 2nd Appellant was his driver, and there having been no challenge to the letter, then that is taken as the truth as it was not challenged or at all – **Motex Knitwear Ltd –s- Gopitex Knitwear Mills Ltd – Milimani HCCC No. 834 of 2002.**

17**.** For the foregoing, I come to the conclusion that the accident vehicle belonged to the 1st Appellant and the 2nd Appellant was his duly authorized driver.

18. **Who was to blame for the accident**

There was very scanty evidence on this issue. The police officer who investigated the case did not testify. I wholly agree with the Appellants submissions that the 1st Respondent did nothing to avoid the accident

Her evidence was that

> ***"---After crossing the road I saw a vehicle KAM 932J (should be KAN 932J). After crossing the road the speeding vehicle hit me. I later found myself in hospital…"***

19. On cross examination, **PW1** testified that

> ***"---there was no zebra crossing. There is a stage. The vehicle was over speeding --- there is a junction and stage…."***

That piece of evidence does not show where the point of impact was, at the stage or on the road or off the road or elsewhere.

20. In **Patrick Mutie Kamau & Another –vs- Wambui Ndurumo** the court held that

> ***"---pedestrians too have a duty of care to other road users and are obligated to follow the High Code, that they ought to take care of their own safety and not to run across the road when it is not safe and if they do so, it is at their own peril and cannot blame an oncoming vehicle which is unable to avoid the accident due to short distance."***

21. Further in **Kiema Muthungu –vs- Kenya Cargo Handling Service Ltd (1991)2,** it was held that

> ***"There can be no liability without fault and a plaintiff must prove some negligence on the part of the defendant where the claim is based on negligence***."

22. Combing through the entire evidence it is evident that the 1st Respondent failed in her duty to take care of her own safety by crossing the road on a no zebra crossing busy road. She too did not adduce sufficient evidence to demonstrate how if at all the accident vehicle was overtaking and/or overspeeding and the point of impact.

23. The first Respondent failed to prove to the required standard of proof the particulars of negligence she pleaded in her plaint as stated in **Statpack Industries –vs- James Mbithi Munyao Nairobi H.C. Appeal No. 1152 of 2003** that

> ***"It is trite law that the burden of proof of any fact or allegations is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence***
>
> ***An injury per se is not sufficient to hold someone liable."***

24. Having stated as above I come to the conclusion that the trial magistrate erred in fact by failing to sufficiently analyse the evidence on record and came to findings not based on the evidence. The 1st Respondent did not show how the appellant's driver (2nd Appellant) failed to control or manage the vehicle so as to avoid the accident.

25. It is not always that when someone's evidence is uncontroverted it is always truthful and should be accepted as such. Proof of the allegations must be tendered as stated under **Section 107-108 of the Evidence Act**. See **Patrick Mutie Kamau** case and **Kiema Muthungu (Supra).**

26. To that extent I allow the appeal on the matter of liability, and more specifically that the 2nd Appellant was not to blame for the accident and therefore as the duly authorised driver of the 1st Appellant, the 1st defendant too cannot be held to have been vicariously liable for the actions and alleged negligence of his driver.

27. ***Quantum*** **of Damages**

I have considered the injuries sustained by the 1st Respondent and the award given by the trial court.

Dr. Mwaura's medical report stated the injuries as

- **Sprain at the neck**
- **Blunt head injury**
- **Subluxation right acromio-claricular joint**
- **Blunt injury to chestwall, cut on the dorsal surface.**

28. The principles to be applied by an appellate court in interfering with the trial court's discretion in assessment of damages was stated in **Kemfro Africa Ltd –vs- Lubia & Another (No.2) (1985) e KLR**, thus the court must be satisfied that in assessing the damages, it took into account an irrelevant factor or left out of account a relevant one or that the amount is so inordinately low or high that it must be a wholly erroneous estimate of the damage.

29. It is not for the court to award what is proposed by either party as submitted by the Appellant.

It is clearly a misguided submission. That court must take all circumstances into account, including the parties proposals and precedents.

30. The injuries at issue were of soft tissue nature.

The parties did not provide the court with recent decisions on comparable injuries and awards.

I do not agree that an award of Kshs.50,000/= would be fair citing a 2002 authority as suggested by the appellants. That does not compare well with the Appellants injuries.

31. In the case **George Kinyanjui t/a Climax Coaches & Another –vs- Hussein Mahad Kuyale (2016) e KLR** for soft tissue injuries to the chest and neck and posterior of neck and stiffness, the High Court reduced an award of kshs.650,000/= to Kshs.120,000/= in 2016**.**

32. In **Channan Agricultural Contractors Ltd –vs- Fred Barasa Mutayo (2013) e KLR**, for soft tissue injuries the High Court reviewed downwards an award of Kshs.255,000/= to Kshs.127,500/= so is in the case **Purity Wambui Muriithi –vs- Highlands Mineral Water Co. Ltd (2015) e KLR.** The court reduced the award on soft tissue injuries to the left elbow, pelvic region, lowerback and knee, comparable to the 1st Respondents injuries from Kshs.700,000/= to Kshs.150,000/=.

33. Had the Appeal on liability not succeeded, I would have reduced the award of general damages for pain and suffering the from the trial court's award of Kshs.350,000/= to **Kshs.180,000/=.**

34. The upshot is that the appeal is allowed with costs to the Appellants.

Dated and signed at Nakuru this 23rd Day of January 2019

J.N. MULWA

JUDGE

Dated, Signed and Delivered at Kiambu this 21st Day of February 2019

C. MEOLI

JUDGE