REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 144 OF 2014

JOSEPHAT MULEI MUSYOKI...........1ST APPELLANT

JOSEPH MATATA KYENZE...............2ND APPELLANT

VERSUS

MARTIN SHIKUKU................................RESPONDENT

JUDGMENT

1. The respondent, *Martin Shikuku* was the plaintiff in Milimani CMCC No. 6813 of 2010. He had sued the two appellants (then the defendants) for recovery of special and general damages as a result of personal injuries sustained in a road traffic accident on or about 27th March 2010 whose occurrence he blamed on the negligence of the 2nd appellant who was the driver of motor vehicle registration number KBG 780V which was owned by the 1st appellant.

2. In his plaint dated 12th October 2010, the respondent averred that he was lawfully walking off Kiserian Road near Total Petrol Station when the 2nd appellant being the driver, servant and or agent of the 1st appellant negligently drove, managed and or controlled motor vehicle registration number KBG 780V with the result that he caused the accident in which he sustained personal injuries. The particulars of the 2nd appellant's negligence are pleaded in paragraph 5 of the plaint.

3. Besides the claim for special and general damages, the respondent also sought damages for loss of earnings at the rate of KShs.500 per day from the date of the accident to the date of filing suit and damages for loss of earning capacity.

4. In their joint statement of defence, the appellants did not deny that the aforesaid vehicle was owned by the 1st appellant and was being driven by the 2nd appellant along the Kiserian Road on the date in question. They denied the respondent's claim that the accident was caused by the 2nd appellant's negligence and put the respondent to strict proof thereof.

5. After a full trial, the learned trial magistrate (*Hon. R.A Oganyo (Mrs.) SPM*) rendered her judgment on 3rd April 2014 and found the appellants jointly liable for the accident at 100%. On quantum, she awarded damages under the following heads as follows:

(a) Pain and suffering: KShs.1,200,000

(b) Loss of earning capacity: KShs.449,280

(c) Special damages: KShs.37,954

(d) Loss of earnings: KShs.84,000

The respondent was thus awarded a total sum of KShs.1,771,234 together with costs and interest.

6. The appellants were dissatisfied with the trial court's judgment hence this appeal. In their memorandum of appeal, they relied on eight grounds of appeal which are reproduced hereunder:

1) THAT the learned trial magistrate erred in law and in fact by finding the appellants 100% liable.

2) THAT the learned trial magistrate erred in law and in fact in awarding damages for loss of earning capacity and loss of earnings despite making a finding that there was no evidence of the respondent's earnings.

3) THAT the learned trial magistrate erred in law and in fact by computing and awarding damages twice for loss of earning capacity and loss of earnings based on a wrong multiplicand of Kshs.500/= per day which was not proved and further failed to subject the earnings to taxation.

4) THAT the learned trial magistrate erred in law and in fact by awarding damages for future earnings which were not pleaded or proved.

5) THAT the learned trial magistrate erred in law and in fact by relying on the unverifiable and contradictory testimony of the respondent.

6) THAT the learned trial magistrate erred in law and in fact by assessing and awarding unreasonable and excessive general damages of Kshs.1,200,000/= while there was no evidence or basis to support such an award.

7) THAT the learned trial magistrate misdirected herself in law and in fact in awarding the respondent 20% permanent incapacity that was not pleaded or supported by any evidence on record.

8) THAT the learned trial magistrate's judgment does not comply with the law.

7. The appeal was argued orally before me on 18th December 2018. Learned counsel *Mr. Ngechu* represented the appellants while learned counsel *Ms Obaga* appeared for the respondent.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. As the first appellate court, I am fully aware of my duty to revisit and re-evaluate all the evidence presented to the lower court to arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of hearing and seeing the witnesses. **See**: ***Selle & Another V Associated Motor Boat Company Limited& Others [1968] EA 123***; ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR***.

9. I have carefully considered the grounds of appeal, the evidence adduced before the trial court and the rival submissions made by counsel on record and all the authorities cited. I have also read the judgment of the learned trial magistrate. Needless to state, the grounds of appeal show that this is an appeal on both liability and quantum.

10. Before addressing grounds 1 and 5 which fault the trial magistrate's finding on liability, it is important to revisit the evidence that was presented to the trial court regarding the manner in which the accident happened. The record reveals that the respondent testified as PW2 in support of his case and called one additional witness *Dr. Wokabi* who testified as PW1. The appellants did not adduce any evidence in support of their statement in defence.

11. In his evidence, PW2 recalled that on the material date at around 2 pm, he was walking off the Kiserian Road near Total Petrol Station when a vehicle hit him from behind and threw him into a stationary lorry which was nearby. In his evidence under cross examination, he admitted that he did not have an opportunity to look behind before he was hit and he did not therefore know which vehicle hit him or how it was being driven prior to the accident. As the accident occurred near Kiserian Police Station, the police went to the scene and took him to Kenyatta National Hospital for treatment.

12. While making her finding on liability, the learned trial magistrate stated *inter alia* as follows:

"The defendants never presented any witness to controvert the plaintiff's testimony as regards the manner in which the accident had happened. Hence I believe the plaintiff that the defendant's vehicle left its correct path and veered off the road at about 4.30pm when it was still day time and hit the plaintiff from behind.

Therefore I wholly hold the 2nd defendant directly liable and the 1st defendant vicariously liable."

13. It is trite law that he who alleges must prove. The respondent in his pleadings alleged that he was injured in an accident which was negligently caused by the 2nd appellant. The respondent by his own admission did not witness how the accident occurred. He did not see the vehicle which hit him from behind or how it was being driven prior to the accident. Though the respondent claimed that the accident occurred near a petrol station and that police went to the scene soon after the accident, he did not call any other person who may have witnessed the accident or any of the police officers who visited the scene to testify on the circumstances that led to the occurrence of the accident.

14. In my view, the respondent's evidence did not prove that the 2nd appellant negligently caused the accident by carelessly driving the 1st appellant's motor vehicle. The only fact that the respondent's evidence proved is that an accident occurred on the material date as a result of which he sustained some injuries. But the fact that an accident occurred is not by itself evidence that it was caused by another person's negligence. Negligence as pleaded in the plaint must be proved by cogent and credible evidence to the standard required by the law which is on a balance of probabilities in civil cases. The respondent in this case did not prove the particulars of negligence attributed to the 2nd appellant in paragraph 5 of his plaint. The fact that the appellants did not adduce any evidence in their defence did not negate this fact. The burden of proof was on the respondent not on the appellants.

15. It is not lost on me that there was a police abstract which formed part of the respondent's evidence and which named the 2nd appellant as the driver of the vehicle which had allegedly caused the accident. In the absence of evidence from the police officer who may have investigated the accident or the police officer who authored the police abstract, no nexus was established between the contents of the police

abstract and the accident in question. Put differently, there was no evidence to verify the veracity of the information contained in the police abstract. My take therefore is that the police abstract had little or no probative value.

16. In view of the foregoing, it is my finding that the learned trial magistrate erred in her finding on liability. The fact that the appellants did not offer any evidence to controvert the respondent's evidence was not sufficient to make a finding that the respondent had proved his case to the required standard while in fact he had not. There is nothing in terms of solid evidence to show that the appellants were to blame for the accident or that they were at the scene of the accident at the very least. Though in a situation where the defendants do not adduce evidence the plaintiff's evidence is to be believed, for that evidence to form the basis of a finding in negligence, it must establish that the defendants were guilty of some act or omission which was negligent and which was the direct cause of the accident in question.

17. After my analysis of the evidence on record, I have come to the conclusion that the evidence adduced in this case was insufficient to prove that the 2nd appellant caused the accident in which the respondent was injured by negligent driving. The learned trial magistrate therefore erred in finding that the 2nd appellant was directly liable and that the 1st appellant was vicariously liable at 100%.

18. This finding is sufficient to dispose of this appeal since it automatically determines the appeal on quantum. Having found that the evidence on record was insufficient to prove the allegations of negligence against the appellants, it goes without saying that the learned trial magistrate erred in awarding damages in favour of the respondent against the appellants when there was no legal basis for so doing.

19. For all the foregoing reasons, I find merit in this appeal and it is hereby allowed. I consequently set aside the judgment and decree of the lower court and substitute it with a judgment of this court dismissing the respondent's suit with costs.

20. On costs, the order that best commends itself to me is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of April, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mrs. Githae for the appellant

Mr. Mulanga for the respondent

Mr. Salach: Court Assistant