



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 613 OF 2015

JOSEPH KARANJA GITAUAPPELLANT

VERSUS

ERICK MUNENE KIMANI1ST RESPONDENT

MARGARET WATURI MUNENE.....2ND RESPONDENT

JUDGMENT

1. The brief background to this appeal is that the appellant was the plaintiff in a suit instituted in the lower court in which he had sued the respondents (then the defendants) for special damages in the sum of KShs.23,715 and general damages for pain, suffering and loss of amenities following an accident on 17th June 2013 in which he sustained personal injuries. His case was that the accident was caused by the negligence of the respondents.

2. In his plaint dated 4th July 2014, the appellant averred that on the aforesaid date, he was standing off the road along Riara-Kangima Road when a motor vehicle registration number KBS 045X which was owned by the respondents knocked him down occasioning him serious injuries. He asserted that the accident was caused by the sole negligence of the respondents' driver and that they were therefore vicariously liable for their driver's negligence. The particulars of the driver's negligence were pleaded in paragraph 5 of the plaint.

3. The respondents in their joint statement of defence dated 11th August 2014 admitted the occurrence of the accident but denied all other allegations in the plaint and put the appellant to strict proof thereof. In the alternative and without prejudice to their denial of liability, the respondents claimed that the accident was solely caused or substantially contributed to by the negligence of the plaintiff. The particulars of the plaintiff's negligence were pleaded in paragraph 6 of the plaint.

4. After a full trial, the learned trial magistrate rendered her decision on 7th December 2015. She dismissed the appellant's suit with costs. The appellant was aggrieved by the lower court's decision hence this appeal. In his grounds of appeal encapsulated in the memorandum of appeal dated 15th December 2015, the appellant relied on eight grounds of appeal which can be condensed into four main grounds as follows:

- i. That the learned trial magistrate erred in law in failing to find that the plaintiff had proved his case which was against the weight of the evidence adduced in the trial.
- ii. That the learned trial magistrate erred in law and fact in laying a higher burden of proof than that required in civil cases.
- iii. That the learned trial magistrate erred in law in failing to find that the defendant had a higher duty of care than the plaintiff.
- iv. That the learned trial magistrate erred in law and fact in failing to make an assessment of damages.

5. This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of the first appellate court is now well settled. The first appellate court is duty bound to reconsider and to re-evaluate all the evidence adduced before the trial court and make its own independent conclusions regarding the validity or otherwise of the decision challenged on appeal. **See: *Selle & Another V Associated Motor Boat Company Limited & Others [1968] EA 123; Kenya Ports Authority V Kuston (K) Limited, [2009] 2 EA 212.***

6. When the appeal came up for hearing, parties consented to having the same prosecuted by way of written submissions which they duly filed and which I have considered together with the authorities cited. I have also considered the grounds of appeal, the evidence tendered before the trial court as well as the judgment of the learned trial magistrate. Having done so, I find that only two key issues arise for my determination which are as follows:

- i. Whether the trial court erred in law in its finding that the appellant had failed to prove his claim against the respondents on a

balance of probabilities and in dismissing his suit with costs.

ii. Whether the trial court erred in failing to assess the damages that would have been payable to the appellant had he succeed in his suit.

7. Before addressing the two issues I have isolated above for my determination, I think it is important to first briefly summarize the evidence that was tendered before the trial court.

8. The record of the lower court reveals that the appellant called two witnesses in support of his case while the respondents called one witness. The appellant testified as PW1. He recalled that on 17th June 2013, he was standing off the road near a place where a bus belonging to Mukore Gateway Academy registration number KBS 034 X was stuck in the mud. The 1st respondent was the proprietor of the academy which owned the bus. PW1 stated that as he was leaning on a tree off the road and after the bus was released from the mud, its driver boarded and started the bus which accelerated towards his direction at high speed and knocked him down. He lost consciousness and only regained it while in hospital. He blamed the driver for the accident allegedly because he failed to control the bus.

9. In his evidence under cross examination, the appellant changed his version of the story and maintained that he had been standing next to a tree and not leaning on it as stated in his evidence in chief. He denied the respondents' claim that he was injured when he was helping to push the bus off the mud. He admitted that he was the one who supplied the information recorded in his treatment notes which indicated that he sustained his injuries when the vehicle lost control as he was pushing it and he was hit by a tree.

10. PW2 was the doctor who examined the appellant on 20th October 2014 and prepared a medical report which he produced as pexhibit 6.

11. In his evidence, DW1 who was the driver of the bus in question denied the appellant's claim that he lost control of the bus and knocked him down when he was standing under a tree. He stated that he could not have driven at high speed since it had rained heavily that morning and it was muddy. He recalled that the appellant was among the people who had volunteered to push the bus off the mud and when he eventually got out of the vehicle, he saw the appellant with a lot of mud on his chest. The appellant did not complain that he had been hurt. Instead, he walked to board a private vehicle which left the scene. By making this assertion, DW1 was implying that by the time the appellant left the scene, he had not sustained the injuries described in the plaint and in the medical report since if he had, he would not have been able to simply walk away.

12. In her judgment, the learned trial magistrate doubted the credibility of the appellant and made a finding of fact that his narration of events regarding how the accident occurred was untrue. She chose to believe the defendant's evidence that the appellant could have been injured when pushing the bus. She stated as follows:

“This court believes that the accused (obviously referring to the plaintiff) MUST have fallen when pushing the bus. The degree of injury, this old man could sustain if crashed against a tree by a whole bus would have been unbearable. It could have been God’s miracle to have him whole again after such a crush from a highly accelerated bus hitting a human being against a tree. The court does not buy the plaintiff’s claims. It is either a lie or exaggerated story. Plaintiff cannot prove a claim on an untrue story. The entire claim is dismissed with costs to the defendant.”

13. It is important to point out that though an appellate court is mandated to interfere with findings of fact made by a trial court, it is trite that the court can only disturb findings of fact made by the trial court if it is satisfied that it is based on no evidence or on a misrepresentation of the evidence or that it was based on the wrong legal principles. See: Makube V Nyamoro, [1983] KLR 403; Kiruga V Kiruga & Another, [1988] KLR 348.

14. In this case, the learned trial magistrate made a finding of fact that the appellant was an unreliable and untruthful witness and she chose not to believe his evidence. I am unable to fault the finding of the trial court on the credibility of the appellant given that unlike the learned trial magistrate, I did not have an opportunity to see and hear the appellant when he testified in court. The trial court having analyzed the evidence offered by the appellant and DW1 chose to believe the evidence of DW1 which it was entitled to do as long as it gave its reasons for so doing.

15. Though I agree with the appellant that the learned trial magistrate made some assumptions and findings which were not based on the evidence on record, it is my finding that this notwithstanding, the evidence adduced by the appellant on its own without any other evidence collaborating his narration regarding how the accident occurred was insufficient to prove his claim that the accident was negligently caused by DW1 in the manner alleged.

16. It is a cardinal principle of the law of evidence that he who alleges must prove. See *Section 107 to 109 of the Evidence Act*. It was not the duty of the respondents to prove how the accident occurred. The onus was on the appellant to tender credible evidence which was sufficient to prove on a balance of probabilities that he sustained the injuries pleaded in the plaint in an accident which was caused by the negligence of the respondent's agent.

17. In this case, the appellant did not adduce any other independent evidence to substantiate his claim regarding how the accident occurred. His evidence was entirely disputed by DW1 who was the only other eye witness to the accident. The evidence on record therefore amounted to the word of the appellant against that of DW1. Under *Section 3 (4) of the Evidence Act*, a fact is not proved if it is not proved nor disproved.

18. In the absence of any other evidence to corroborate the appellant's testimony, I have come to the same conclusion as the learned trial magistrate albeit for different reasons, that the appellant failed to prove his claim against the respondents on a balance of probabilities as required by the law. It is thus my finding that the learned trial magistrate did not err when she dismissed the plaintiff's suit with costs.

19. Turning to the appellant's other complaint that the trial magistrate erred by not assessing damages she would have awarded him had she found in his favour, I note that the appellant did not cite any law which makes it mandatory for a court which had dismissed a suit to make an assessment of damages it would have awarded to a litigant had the suit been successful and I am not aware of any. I however agree with the authorities cited by the appellant in his submissions namely, *John Wainaina Kagwe V Husein Dairy Limited, [2013] eKLR* and *Selle V Associated Motor Boat Company Limited, [1968] EA 123* that in a suit for damages, it is desirable for a court which dismisses the plaintiff's suit to make findings as to the amount of damages it would have awarded the plaintiff had the suit been successful. However, this is a rule of practice which has not found expression in any law. Having dismissed the appellant's claim, the appellant was not entitled to any damages. And although as a matter of good practice it would have been appropriate for the learned trial magistrate to indicate what damages in her opinion would have been payable to the appellant had she allowed his claim, the failure to do so in my view did not amount to error of law.

20. For all the foregoing reasons, I am satisfied that this appeal lacks merit and it is hereby dismissed with costs.

It is so ordered.

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

C. W. GITHUA

JUDGE

In the presence of:

Ms Wangui holding brief Mr. Mwaniki for the appellant

Mr. Maina holding brief for Mr. Ngoloma for the respondents

Mr. Salach: Court Assistant