REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 11 OF 2019

BETWEEN

JF minor suing through father and next friend JWO....APPELLANT

AND

CHARLES MOLA.....1ST RESPONDENT

MOSES ANAKALO KEYA.....2ND RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon.P. Wamucii Nyotah, RM dated 25th January 2019 at Kisii Magistrates Court in Civil Case No. 202 of 2018*)

JUDGMENT

1. The appellant is dissatisfied with the dismissal of his case on the ground that the trial magistrate held that he had failed to prove his case. The appellant called three witnesses while the respondents did not call any witness.

2. The appellant's case was that on 22nd December 207, the appellant was riding motor vehicle registration number KBS 299G along the Kisii – Kisumu Road near Nyakoe when it lost control and the plaintiff was injured as a result. The appellant's father, JWO (PW 3), testified that on the material day he was travelling with his son when the vehicle lost control. When cross-examined, he stated that, "*The accident happened at Nyakoe. The vehicle was on the left hand side. The car just started moving fast on a slope. The driver tried to control it by pressing the brakes but the brakes failed. My son got injured.*"

3. PC Caleb Osodo (PW 2) from Kisii Central Police Station confirmed that he accident involving motor vehicle registration KBS 299G being driven by the 1st respondent. He told the court that the driver lost control as the brakes failed and landed the vehicle landed into a ditch.

4. After considering the evidence, the trial magistrate expressed herself as follows:

> *[10] From the evidence, it appears that the accident came about after the brakes filed. In my view, I do not think that the driver of the vehicle was negligent in any way because PW 2 and PW 3 said the brakes failed. Brakes can fail without any fault on the part of the driver. The driver would only be liable if the evidence shows that the brakes were defective before the particular failure that occasioned the accident and the driver knew about it and failed to do something about it. In fact, PW 3 who was aboard the vehicle said the driver tried to control it but brakes failed. There is no evidence that the vehicle had pre-accident defects. The blame placed on the driver of the vehicle in the police abstract was not supported by evidence and that must be the reasons why he was not charged with any offence despite being 'blamed'. In my view none of the particulars of negligence outlined under paragraphs 7 of the plaint have been proved. The claim lacks merit and I dismiss it.*

5. The appellant's complaint is that the trial magistrate failed to evaluate the evidence, consider the pleadings and appreciate the standard and burden of proof. He contended that the trial court failed to find that the appellant had proved his case on a balance of probabilities. The respondent took the position that the decision of the trial magistrate was supported by the evidence and there was no reason for this court to reach a different conclusion.

6. The key issue in this appeal is whether the appellant proved his case on the balance of probabilities. The appellant was asserting that the accident took place and that the respondents were liable. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Section 107(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, which provides:

107. (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.

7. The evidential burden is the burden cast on any party to prove a particular fact which he desires the court to believe in its existence. That is captured in **sections 109** and **112** of the ***Evidence Act*** as follows:

109. 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.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

8. The appellant had the duty to prove that the respondents were at fault. As the Court of Appeal stated in ***Kiema Mutuku v. Kenya Cargo Hauling Services Ltd*. [1991] 2 KAR 258**, *"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"*. He was required to prove the claim of negligence set out in the statement of claim. In order to make his case, the appellant pleaded that following particulars of negligence against the respondents;

a) Failing to observe the Highway Code.

b) Failing to service and or maintain the said motor vehicle in a road worth condition.

c) Driving a defective motor vehicle.

d) Driving without due care and attention in the circumstances.

e) Driving at an excessive speed.

f) Driving of the road.

g) Causing the motor vehicle aforesaid to occasion the accident.

h) Driving while in the influence of intoxicating substances.

9. From the testimony of PW 3, it clear that the appellant proved several of the particulars of negligence he had pleaded and it is not difficult to see that the trial magistrate fell into error by requiring the appellant to disprove the fact that the respondents was not negligent. I would add that failure of brakes is not a normal occurrence and it connotes failure to service a vehicle or that the vehicle was not road worthy which is an indication of negligence. Moreover, the appellant's evidence was uncontroverted yet the trial magistrate went on to find that the accident was inevitable and or indeed unavoidable since driver did all he could by exerting the brakes to avoid the accident.

10. The respondents did not call any evidence to show that the accident was inevitable and it was wrong for the trial magistrate to infer the defence of inevitable accident and reverse the burden of proof by requiring the appellant to disapprove a non-existent defence. The defence of inevitable accident was considered in ***Dewshi v Kuldip's Touring Co.* [1969] E.A 189**. **192** where the Court of Appeal for East Africa quoted Lord Esher in ***The Schwan v The Albano* [1892] P. 419** who observed as follows;

What is the proper definition of inevitable accident? To my mind these cases show clearly what is the proper definition of inevitable accident as distinguished from mere negligence –that is a mere want of reasonable care and skill. In my opinion, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken between the case of inevitable accident and a mere want of reasonable care and skill.

In the same case, the Court cited ***Barkway v South Wales Transport Co.* [1948] 2 All ER 460, 465** where Buckhill LJ., stated:

I think that the defendants, in order to avoid liability, must prove to the satisfaction of the Court that they took all reasonable steps to ascertain that the tyre was fit for use … and I think on the evidence they failed to do so…

11. It was the duty of the respondents to plead inevitable accident and to call evidence to support that defence as required by **sections 109** and **112** of the ***Evidence Act*** particularly given the roadworthiness was a matter within their knowledge. They did not. The appellant's case was uncontroverted and having evaluated the evidence as the first appellate court, I find the respondents fully liable. The plaintiff was a passenger and no evidence was let to show that he contributed to the accident in any way.

12. As regards assessment and quantum of damages, the appellant sustained soft tissue injuries which included a brain concussion, bruises on the left elbow, bruises on both knees, blunt injury on the right knee and blunt injuries on the forehead. The trial magistrate awarded Kshs. 100,000/- as general damages. The appellant did not complain against the award nor did the respondent cross-appeal.

13. The appellant complained that he was not awarded special damages. According to the plaint, the appellant sought Kshs. 7,350.00 incurred from paying for a KRA Search (Kshs. 850.00) and the Medical Examination Report from Dr Morebu (PW 1) (Kshs. 6,500.00). The trial magistrate stated that she would have awarded these amounts as they were proved hence I do not find any error.

14. I allow the appeal, set aside the judgment of the subordinate court dismissing the suit and substitute with a judgment for the appellant against the respondents, jointly and severally, for Kshs. 107,350/-. The award shall accrue interest from the date of judgment in the subordinate court. The appellant shall have costs of this suit in the subordinate court and costs of this appeal which I assess at Kshs. 25,000/- exclusive of court fees.

DATED and **DELIVERED** at **KISII** this **18th** day of **APRIL** 2019.

D.S. MAJANJA

JUDGE

Mr Mogire instructed by Ombuhi K. Mogire and Company Advocates for the appellant.

Ms Angasa instructed by Omwega & Company Advocates for the respondents.