



REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL NO. 40 OF 2017

DAVID ABRAHAM TECHEYO.....APPELLANT

VERSUS

KINYUA MORRIS.....RESPONDENT

(Being an appeal from the entire Judgement of Honourable Mr. H. I. Mwendwa (RM) sitting at the Kikuyu Principal Magistrate's court delivered on the 10th day of March 2017 in Kikuyu PMCC No. 72 of 2012)

JUDGMENT

1. The Respondent was on the 3rd December 2011 knocked down while he walked along the pedestrian path on Waiyaki way by a motor vehicle Reg. No. KBJ 486Y registered in the name of the Appellant Kinyua Morris.

He was injured. He sued the owner of the vehicle alleging negligence on the driver and sought damages for pain suffering, and special damages in the sum of Kshs.8,600/= by his plaint dated the 29th March 2012.

2. By a defence dated 9th July 2012 the Appellant denied the Respondent's claim including ownership of the vehicle and occurrence of the accident involving his vehicle and the respondent.

In the alternative, the Appellant attributed the occurrence of the accident to the respondent's negligence.

3. In his judgment, the trial magistrate made findings that the Respondent (defendant) was not liable for the injuries sustained by the appellant (plaintiff), and that had the appellant proved his case against the respondent, he would have awarded Kshs.200,000/= in general damages and Kshs.7,000/= proven special damages.

4. The above findings are the subject of this appeal. Six grounds have been preferred but may be summarized into two:

1. That the trial magistrate erred in law and fact by relying on extraneous matters thereby arrived at an erroneous decision.

2. That the trial magistrate erred in law and fact by dismissing the appellants case against the appellants uncontroverted evidence.

Parties filed written submissions on the appeal.

5. The duty of the 1st appellate court as stated in the case **Kenya Power & Lighting Co. Ltd -vs- EKO & Another (2018) e KLR** is to re-evaluate and re-consider the totality of evidence adduced before the trial court and come up with its own findings and conclusions. While doing so, it has to keep in mind that for action in negligence, the burden of proof lies with the plaintiff to prove and establish the elements of the alleged negligence – **Trendsetters Tyres Ltd -vs- John Wekesa Wepukhulu (2010) e KLR**.

6. **The issues** that arise for determination

(1) Whether the Appellant's injuries were caused by the respondent's motor vehicle Registration NO. KBJ 486Y.

(2) If the answer to (1) above is in the affirmative, whether the Appellant proved negligence on the driver of motor vehicle registration No. KBJ 486Y to the required standard.

7. As I proceed to re-evaluate the evidence on record, I must remind myself that

“It is a strong thing for an appellate court to differ from the findings on question of fact of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses testify – Peters -vs- Sunday Post Ltd (1958) EA 424.”

8. **Section 78(2) Civil Procedure Act** empowers an appellate court to assume the jurisdiction of the trial court and perform the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted therein.

The appellant’s case is based on alleged negligence of the respondent. As such it is expected by law to establish on a balance of probability that

a) the Appellant’s duty of care

b) that the Appellant breached that duty and

c) The respondent suffered injury as a result of the breach.

9. **The Appellant’s case** according to his recorded testimony as **PW2** was that as he headed to his residence on the 3rd December 2011 at about 11.50 p.m. and walking on the left side of the road he was suddenly knocked by a vehicle which after hit a tree. He testified that when the driver came out he was drunk.

He then went to report at the Kabete police station but was asked to go to hospital first for First Aid. He did not but first went back to take the registration number of the vehicle that he stated to have been KBJ 486Y a Toyota Voxy, but found it being towed. It was his evidence that he then went to Kenyatta National Hospital for treatment and was issued with a treatment document dated 4th December 2011 at 1.50a.m. He later obtained a police abstract from Kabete police station.

10. It was his testimony that the driver of the vehicle (Respondent) was not watchful in the control of the vehicle.

On cross examination the Appellant stated that there was another accident that had occurred earlier at the same place but did not witness it stating that it is the police who informed him and that another report of the accident had been made by the driver of the vehicle.

11. The appellant further stated that he was hit by the vehicle’s side mirror from behind and fell by the head. He denied having contributed to the accident.

The Respondent (Defendant in the primary suit) did not call any evidence but got its medical report by Dr. P.M. Wambugu dated 2nd December 2013 produced as an exhibit by consent of the parties. It was his evidence that there was no eye witness to the accident.

12. **PW1** was police constable Charles Ondieki from Kabete police station. He confirmed the occurrence of the accident involving the vehicle and a victim named David Abraham Techeyo, and that the driver Morris Kitonga made a report at 2.35a.m. Reading from the Occurrence book, it was his evidence that the driver hit a tree but did not indicate that anybody was hit or injured upto the 5th December 2011 when the Appellant made a report at the police station.

13. He produced the police abstract. He was not the investigating officer. He did not know whether the driver was charged or not.

He further confirmed that there were two reports of the accident.

14. The respondent did not call any evidence on the occurrence of the accident.

Upon the above uncontroverted evidence the trial magistrate framed an **issue for determination as to whether the appellant was hit by the accident vehicle**, and proceeded to analyse the evidence, coming to a conclusion that the Appellant did not prove his case on a balance of probability and dismissed it holding that it is safe to conclude that the plaintiff (Appellant) may have been a victim of the initial (earlier) accident.

15. In his statement of defence, the appellant denied occurrence of the accident. The appellant did not prove that the driver of the accident was drunk as he alleged.

The Respondent had filed a witness statement on the 25th August 2014 but it was not produced as an exhibit as such it remained as a document of no evidential value.

It is trite that unless a document is produced and admitted as an exhibit, its contents are of no evidential value - **Court of Appeal in Kenneth Nyaga Mwige –vs- Austin Kiguta & 2 Others (2015) e KLR.**

16. The allegations of negligence by the Respondent are stated as permitting the driver to manage and control the vehicle at a very high speed without regard to other road users, failure to control the vehicle so as to avoid the accident and reliance on the doctrine of *Res Ipsa Loquitur*.

17. I have analysed the appellant’s evidence. He did not attempt to prove any of the particulars of negligence. All he testified to is that he was hit from behind while walking off the road. He did not give an estimate of what he termed as high speed, nor did he testify to the vehicle having been trying to overtake when it was unsafe as pleaded in his plaint.

18. **Section 107 & 108 of the Evidence Act** enjoins a party who alleges a fact to prove. It is not enough to allege. The burden of proof lies with the plaintiff to prove each element of the tort of negligence as stated in its pleading.

In the case **Treadsetters Tyres Ltd (Supra)** the court rendered that

“...the evidence called must consist of such either proved or admitted evidence, and after it is concluded, two questions arise, whether on that evidence negligence may be reasonably inferred and whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

19. The Respondent did not call evidence on the occurrence of the accident. It was therefore a trial by way of formal proof. Even then, that evidence though unchallenged cannot be taken to be the gospel truth and credible. A party must call such evidence that proves the allegations of negligence to the required standard upon a balance of probability.

20. In the case **Alfred Kioko Muteti –vs- Timothy Miheso & Another (2015) e KLR**, the court held that he who alleges must prove and that the burden does not shift to the adverse party even if the case proceeds by way of formal proof.

Having analysed the evidence adduced at the trial court, it is not easy to come to a finding that the appellant discharged the burden of proof to the required standard.

21. I am unable to agree with the appellant’s evidence that when he went to make the report at the police station, there were no officers to enter the report in the Occurrence Book (OB) while at the same time stating that the police officers asked him to seek treatment first. He was unable to explain satisfactorily why there could be two O.B reports over the same accident, and even then why he took two days to go back to make the report at the police station.

22. It was the appellant’s evidence that he found the Respondent at the scene of accident after coming from the police station with other people who were helping him to tow the vehicle from the scene.

He did not call any of those people to testify.

The evidence of an eye and independent witness is very vital as it is more credible as an eye witness may have no interest in the outcome of a case but only to testify as to what he saw for purposes of assisting the court in coming to a fair and just determination of the issue at hand.

23. There having been so such evidence, it was upon the appellant to place before the court credible evidence to sustain the averments in his plaint.

The trial Magistrate heard and made observations as the Appellant testified. It was upon such observations that he was able to fault the appellant for instance, obtaining two receipts from Sunbeam clinic on two different dates the 4th December 2011 and 13th December 2011, yet he never testified to have gone to the said clinic more than once.

24. The police officer who attended court was not the investigating officer. It was his evidence that the matter was pending under investigation. Without the police file, his averments that the respondent gave false information cannot be said to be credible. It was but hearsay.

25. **Visram J** (as he then was) in **Kajogi M’ mugaa –vs- Francis Muthoni (2012) e KLR** referring to the case **Statpack Industries –vs- James Mbithi Munyao C.A No.152 of 2002** discussing the matter of **causation** rendered

“---coming to the more important issue of causation it is trite law that the burden of proof of any fact or allegation is in the plaintiff. He must prove a causal link between someone’s negligence and his injury, he must adduce evidence from which on a balance of probability a connection between the two may be drawn. Not every injury is necessarily a result of someone’s negligence.

An injury perse is not sufficient to hold someone liable for the same.”

26. The above paragraph summarizes the circumstances on this appeal. The appellant failed in his duty to link his injuries to the alleged negligence of the Respondent, and to sufficiently pin down the Respondent as being the one who knocked him down. I therefore do not find the link between his injuries and the Respondent’s negligence if any.

27. It is also not possible to determine from which accident the appellant sustained his injuries. I say so because it was his evidence that he had been told by the police officers of another accident earlier at the same place. It is possible that the appellant may have been injured in that accident. It was his duty to ascertain whether or not there was such accident, and to persuade the court by evidence that no other accident was reported on the said place except the one he alleges to have been involved in.

28. The trial magistrate is faulted for invoking and taking into account extraneous factors like delay in delivery of the judgment.

Issues as to when a judgment may be delivered and delay thereof cannot in my option be said to be extraneous factors. The appellant did not disclose what extraneous factors he stated to have influenced the decision of the trial Magistrate. Suspicions without basis cannot be basis in law to invalidate an otherwise valid judgment.

29. The upshot is that this court is unable to find in favour of the appellant as no fault has been demonstrated.

It is my further finding that the appellant's evidence was riddled with contradictions and inconsistencies leading the court to the only findings and conclusion that the appellant did not prove his case against the Respondent upon a balance of probability.

The upshot is that the appeal is without merit and is dismissed with costs.

Dated and signed at Nakuru this 27th Day of March 2019.

.....

J.N. MULWA

JUDGE

Dated, signed and Delivered at Kiambu this 10th day of April 2019.

.....

C. MEOLI

JUDGE