REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 149 OF 2017

STANLEY OGUTI ATTAI...................................APPELLANT

-VERSUS-

PETER CHEGE MBUGUA..............................RESPONDENT

(Being an appeal from the Judgment /Decree of Hon. J. Omido, S.R.M in Nakuru CMCC.459 OF 2011)

JUDGMENT

INTRODUCTION

1. The Appellant who was the plaintiff in the lower court filed suit against the defendant/respondent seeking general and special damages for the injuries he sustained when he was knocked by the defendant's vehicle registration number KAU 525 Salon along Nehru Pandit road.

2. The trial magistrate found that the plaintiff/appellant failed to prove his case on a balance of probabilities. The appellant being aggrieved by the said determination filed this appeal on the following grounds:-

i. That the learned magistrate erred in law and in fact and misdirected himself in finding that the appellant had not proved his case to the required standard.

ii. That the learned magistrate erred in law and in fact in misapprehending evidence and failing to properly deal with the evidence adduced in court by the appellant and therefore making a finding that is incongruent with principles, authorities and evidence on record.

iii. That the learned magistrate erred in law and in fact and misdirected himself on the principle of law and evidence by failing and/or giving inadequate consideration to the evidence adduced by the appellant in court.

iv. That the learned magistrate erred in law and in fact by failing to find that the respondent was 100% liable and assess an award of damages appropriately.

v. That the learned magistrate erred in fact and in law in placing a lot of weight on the respondent's evidence as opposed to that of the appellant.

APPELLANT'S SUBMISSIONS

3. The appellant urged this court to examine and evaluate evidence adduced and make an independent decision. He submitted that, the trial magistrate's reliance on indication of blame in police abstract is

faulty. Appellant submitted that the police were never cross-examined on the basis of their findings; that the trial court ought to have considered evidence wholesome.

4. The appellant was hit from the rear and it follows therefore that the motor vehicle driver was to blame and urged the court to find the respondent 100% liable for the accident and award damages assessed by the lower court plus special damages, which were not assessed, and costs.

RESPONDENT'S SUBMISSIONS

5. Respondent argued that the appellant in his evidence admitted that he was not on the veranda but on the edge of the road when he was hit. He further submitted that the abstract, occurrence book and initial investigations blamed the appellant for the accident.

6. Respondent submitted that the burden of proof lie with the appellant as provided in **Section 107 of the Evidence Act**; and that he/appellant failed to prove negligence on part of the respondent. Further **Halsbury's Law** of **England, 4th Edition** at **page 476** state that the burden of proof in an action for damages for negligence rests primarily on the plaintiff.

7. Further, the respondent cited several authorities which include the case of **Grace Kanini Muthini Vs Kenya Bus Services & Another** where **Justice Ringera** held that, it is common position that where a plaintiff has not proven negligence against the defendant on a balance of probabilities, then the court cannot find fault without evidence; that the court cannot decide the matter by adopting one or the other probability without supporting evidence. **Judge Ringera** in his conclusion stated as follows;

> **"I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident…"**

8. Further, in the case of **East Produce (K) Limited Vs Christopher Astiado Osiro Civil Appeal No.43 of 2001** where the court held that its trite law that the onus of proof is on he who alleges.

9. In conclusion, the respondent submitted that the appellant did not establish that causation of the accident by respondent at all and equally the negligence of the driver of the subject motor vehicle was never established and or demonstrated by the appellant. That the respondent agree with decision of the trial magistrate to hold the appellant 100% liable as police abstract show that he was to blame for the accident.

ANALYSIS AND DETERMINATION

10. This being the first appellate court, I am required to reevaluate evidence adduced in the trial court and arrive at an independent determination. While doing this, I am minded of the fact that unlike the trial court, I never took evidence first hand and never got opportunity to observe demeanor of witnesses. For this, I give due allowance.

11. I have perused and considered the lower court record; I have also perused and considered submissions by parties herein. There is no dispute that an accident occurred on 6th November 2010 involving the appellant and the respondent's motor vehicle registration number KAU 525 along Nehru Pandit road Nakuru town. It is also not disputed that the appellant sustained injuries as a result of the collision.

12. The appellant testified that he was knocked from behind while walking and the vehicle run over him. He blamed the driver of the vehicle for failing to control the vehicle. He said he was walking on the sidewalk on left hand side of the road at around 7.30 pm. In cross examination, he said there were no women selling vegetables near the road.

13. The question that arise is, did the trial magistrate err in relying on police abstract to absolve the respondent from blame? PW4 a police officer confirmed that the driver reported the accident and the

report received from the driver was that, the street was crowded and appellant herein was hit from behind and run over by the vehicle. He said that one **PC Kungu** investigated the matter and the matter was still under investigation. He said the occurrence book does not show that plaintiff was to blame.

14. The contents of the abstract is extracts from the occurrence book and investigation diary. PW4 who produced police abstract confirmed that the matter was still under investigation. He also confirmed that occurrence book did not indicate that the appellant was to blame. He said one **PC Caroline** filled police abstract. The question that arise therefore is, where did she extract information reflected on the police abstract? How did she conclude that appellant was to blame yet investigations were not complete? There was need to subject the contents of police abstract to scrutiny and consider the other evidence adduced in court.

15. In his judgment, the trial magistrate found the appellant 100% liable on the basis that he was blamed for the accident in the police abstract. As seen above at the time of filling police abstract the investigations were not complete and in the initial report, the appellant was not blamed. In my view the untested police abstract was not a conclusive document to inform the court on who was to blame for the accident. From the foregoing, I find that the magistrate acted in error by relying on police abstract and excluding other evidence availed in court. He ought to have considered evidence adduced in court as the accident was still under investigation.

16. Having found the above, I now wish to consider whether on considering evidence adduced before court, the appellant proved his case on a balance of probabilities. Record show that DW1 confirmed that the accident occurred at around 7.10 pm; darkness was setting in and the road was crowded. He said he did not see the appellant before the collision. He never explained whether there was any obstruction, which could have prevented him from seeing other road users. A driver is expected to take due care of the other road users while driving. With the aid of headlamps and side mirrors, a driver is expected to ensure safety of other road users. Failing to see the appellant, is clear indication that the respondent never exercised the care expected of a driver driving on the road and especially in a crowded area. If the respondent had seen the appellant, chances are that he would have tried to swerve to avoid collision or reduce the impact.

17. Further to the above, no evidence was adduced by the respondent as to whether he alerted the appellant and other road users of his vehicle coming from behind. Moving from behind, the respondent was in a better position to see people walking ahead unless there was obstruction which has not been stated. His duty to other road users was higher than that of pedestrians walking ahead of him. He never talked of having attempted to brake or swerve to avoid the accident. There is no indication that the appellant suddenly rushed to cross the road

18. In my view, higher percentage of blame is on the respondent. I therefore apportion liability at 20:80 in favour of the plaintiff. Plaintiff to shoulder 20% liability and defendant 80% liability.

19. Damages to remain as assessed by the trial court.

20. <u>FINAL ORDERS</u>

1. Judgment delivered on 28th July 2017 dismissing the appellant's suit is set aside.

2. Liability is apportioned at 20: 80 in favour of the appellant/plaintiff

3. Appellant awarded damages of kshs 120,000 as assessed by the trial court subject to contribution

4. Each party to bear own costs of appeal.

Judgment dated, signed and delivered at Nakuru this 31st day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Mr. Mboga Counsel for Appellant - absent

Ogange holding for Ms. Odhiambo Counsel for Respondent