REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

APPELLATE SIDE

CIVIL APPEAL NO. 12 OF 2013

PETER KAMAU GITHUKA.....APPELLANT

-VERSUS-

MATHEWS WABONGA MAKOKHA.....1ST RESPONDENT

JOHN MASAKARI.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Eldoret delivered by Hon. T. Nzioki, PM, on 7 February 2013 in Eldoret CMCC No. 223 of 2011)

JUDGMENT

[1] Before the Court for determination is this appeal, filed by **Peter Kamau Githuka,** who was the Plaintiff before the lower court in **Eldoret CMCC No. 223 of 20ll: Peter Kamau Githuka vs. Mathews Mabonga Makokha.** The Appellant had sued the Respondent contending that on or about the **1 November 2010** at around 7.15 p.m. or thereabout, he was walking alongside the Eldoret-Kitale Road at **Mti Moja** when the Respondent drove and/or controlled **Motor Vehicle Registration No. KXZ 385 Peugeot 504 Saloon** along the said road in such a negligent manner that he caused an accident by hitting him and thereby occasioning him serious bodily injuries.

[2] The Appellant thereafter filed an Amended Plaint on **13 July 2011** with the leave of the Court. The effect of the amendment was to enjoin the 2nd Respondent to the suit as the 2nd Defendant, on the premise that he was the owner of the subject motor vehicle at the time of the accident. It was, thus, the contention of the Appellant before the lower court that collision occurred solely due to the negligence of the 1st Respondent in driving and controlling the said motor vehicle, for which the 2nd Respondent is vicariously liable. It was on that basis that the Appellant claimed Special and General Damages, costs and interest against the Respondents.

[3] Upon hearing the parties, the lower court came to the conclusion that the Appellant had failed to prove a case against the 2 nd Respondent with regard to the allegations that he was the owner of the subject motor vehicle. He however found the 1st Respondent 100% liable and awarded the Appellant a total of **Kshs. 1,041,246/=** against him in Special and General Damages for pain, suffering and loss of amenities, in a Judgment delivered on **7 February 2013.**

[4] Being dissatisfied with the Judgment of the lower court, the Appellant appealed the decision on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and fact in dismissing the suit against the 2nd Respondent contrary to the evidence and pleadings before court.
>
> **[b]** That the Learned Trial Magistrate erred in law and in fact in failing to find that the 2nd Respondent is vicariously liable for the negligence of the 1st Respondent.
>
> **[c]** That the Learned Trial Magistrate erred in law and in fact in finding the 1st Respondent 100% liable and proceeding to dismiss the suit against the 2nd Respondent who was the owner of the subject motor vehicle.
>
> **[d]** That the Learned Trial Magistrate erred in law and fact in awarding the Appellant half costs as against the 1st Respondent whereas the court found the 1st Respondent 100% liable.
>
> **[e]** That the Learned Trial Magistrate erred in law and fact in failing to take into account the pleadings, evidence and submissions by

the Appellant showing that the 2nd Respondent was the owner of the subject motor vehicle.

[f] That the Learned Trial Magistrate erred in law and fact in finding to hold that the Respondents were jointly and severally liable.

[5] It was thus the Appellant's prayer that the Judgment and Decree in **Eldoret CMCC No. 223 of 2011** dismissing his case against the 2nd Respondent be set aside; that an order be made holding the 2nd Respondent vicariously liable for the negligence of the 1st Respondent; and that an award of full costs in respect of **Eldoret CMCC No. 223 of 2011**, as well as the costs of this appeal, be made in his favour.

[6] Directions were given on **7 September 2018** that the appeal be canvassed by way of written submissions; and whereas the Appellant's Counsel filed written submissions on **2 October 2018**, no submissions were filed by the Respondent. In her written submissions, Counsel for the Appellant framed the following two issues for the Court's determination:

[a] Whether the trial magistrate erred in dismissing the suit against the 2nd Respondent;

[b] Whether the award of half costs against the 1st Respondent was proper.

[7] On a first appeal such as this, it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; while giving allowance for the fact that it did not have the advantage of seeing or hearing the witnesses. This was well stated in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[8] The Appellant testified before the lower court as **PW1** and stated how, on the **1 November 2010**, he was knocked by **Motor vehicle Registration No. KXZ 385** near Kobil Petrol Station at **Mti Moja** on the Eldoret-Kitale Road. It was his evidence that he sustained serious injuries on head and both legs; and that he was taken to **Moi Teaching and Referral Hospital** where he was admitted from **1 November 2010** to **24 November 2010.** He produced treatment documents before the lower court to prove his injuries. He also called as his witness, **Dr. Joseph Embenzi (PW2),** a Senior Medical Officer at **Moi Teaching and Referral Hospital**, who confirmed that the Appellant was indeed admitted at their facility from **1 November 2010** to **24 November 2010** in connection with injuries sustained in a road traffic accident. **PW2** testified to the following as the injuries sustained by the Appellant:

[a] Bruising of the scalp

[b] Cut wound on the upper lip

[c] Abrasions on the left knee

[d] The right thigh was deformed and tender

[e] The left leg was deformed

[f] Fracture of the right femur

[g] Fracture of the left fibula

[h] Fracture of the tibia

[9] The Appellant also called **CI Humphrey Andayi (PW3),** who was then the Officer in Charge, Traffic Duties in Eldoret, as his witness. **PW3** confirmed that the occurrence of the accident in question was brought to their attention and that the driver was arraigned in court, charged with two counts of failing to stop after an accident and failing to report an accident. According to him, the driver, the 1st Respondent herein, was to blame for the accident.

[10] On his part, the 1st Respondent testified as **DW1** and conceded that he was driving **Motor Vehicle Registration No. KXZ 385 Peugeot Saloon** on **1 November 2010** at around 7.30 p.m. when the accident occurred. He explained that, as he was driving from **Eldoret** towards **Webuye**, he heard some sound on reaching **Mti Moja**. He checked and noted that the right-side mirror was missing. He then stopped the car and looked behind, and saw a man lying in the middle of the right-side lane of the road, facing **Webuye** direction. He went to the scene and found the victim writhing in pain and holding his fractured leg. He added that he escorted him to **Moi Teaching and Referral Hospital** for treatment. He further conceded that he was charged with the offences of failing to report an accident and failing to stop after an accident; which he admitted, and was fined **Kshs. 1,000/=.** He blamed the Appellant for the accident contending that he seemed drunk and that he crossed the road without a proper lookout.

[11] It was upon the aforestated evidence that the lower court found the 1st Respondent fully liable for the accident. The trial court however exonerated the 2nd Respondent from blame, reasoning that:

> **"The onus to prove that the 2nd Defendant was the registered owner of the accident motor vehicle lies on the Plaintiff. It was not sufficient for the Plaintiff to allege in the Plaint and in evidence during the trial that the 2nd Defendant was the registered owner of the accident vehicle. The Plaintiff was expected to adduce evidence to prove that the 2nd defendant was a registered owner and/or a beneficial owner of the accident motor vehicle. The police abstract produced by PW.3 was of no assistance on this issue. Only the name of the driver and the insurer were stated on the police abstract. In the absence of such evidence I find that the Plaintiff failed to proof the claim against the 2nd Defendant and hereby order that the suit as against the 2nd Defendant is dismissed. Since the 2nd defendant never participated in the trial I order that the 2nd Defendant shall be awarded 50% of the costs."**

[12] Thus, the twin issues for determination are, firstly whether the trial magistrate's finding in respect of the 2nd Respondent's liability is tenable and secondly, whether the award of half costs against the Appellant in favour of the 2nd Respondent was proper.

On the 2nd Respondent's liability

[13] Granted the finding of the lower court, it is imperative to ascertain what the parties set out in their respective pleadings and whether the same was proved, bearing in mind that the burden of proof rests on he who alleges. **Section 107(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** is explicit that:

> **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.**

[14] Likewise, **Section 109** of the **Evidence Act** is pertinent. It states that:

> **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.**

[15] In the Amended Plaint and the Further Amended Plaint, the Appellant presented his case against the 2nd Defendant and alleged vicarious liability against him for the negligence of the 1st Respondent. The lower court record further shows that the 2nd Defendant was duly served with the Plaint and Summons to Enter Appearance; and that he entered appearance and filed a Defence dated **13 September 2011**. In paragraph 2 of that Defence, he acknowledged that he was the owner of the subject motor vehicle, **Registration No. KXZ 385 Peugeot 504 Saloon**; and in paragraph 3 thereof, the averred that:

> **"In the alternative and without prejudice to the foregoing the 2nd defendant states that the alleged accident was wholly caused by and or substantially contributed to [by] the negligence on the part of the plaintiff being under influence of alcohol careless whist walking and crossing on the highway."**

[16] Thereafter, the Respondents appointed **M/s Manani, Lilan & Company Advocates** to act for them, and the said firm filed a joint Defence dated **5 March 2012**. Again, at paragraph 3 thereof, the Respondents unequivocally admitted the contents of paragraph 3 of the Further Amended Plaint, which paragraph states that:

> **"At all material times to this suit the 2nd defendant was and is still the owner of motor vehicle registration No. KXZ 385 Peugeot 504 Saloon which was being driven by the 1st Defendant as his driver at all material times."**

[17] Granted that scenario, the Appellant cannot be faulted for not presenting evidence in proof of the 2nd Respondent's ownership of the subject motor vehicle for **Order 13 Rule 1** of the **Civil Procedure Rules** recognizes that:

> **"Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party."**

[18] Needless to say that, where there is an admission, the onus of proof is eased with reference to the admitted facts. Hence, in **Dakianga Distributors (K) Ltd vs. Kenya Seed Company Ltd [2015] eKLR,** the Court of Appeal quoted with approval the following passage from **Bullen and Leake and Jacob's Precedents of Pleadings (12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5)**) on the purpose of pleadings:

> **The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.**

[19] The parties having, thus, delimited the issues in controversy by their pleadings by excluding the 2nd Respondent's ownership of the subject motor vehicle, it was a misdirection for the lower court to expect the Appellant to prove the 2nd Respondent's ownership of the subject motor vehicle beyond the oral evidence in that regard adduced by the Appellant. Accordingly, the Learned Trial Magistrate erred in dismissing the Appellant's case against the 2nd Respondent in the face of his clear admission of ownership of the accident motor vehicle in his pleadings.

On the issue of costs

[20] Having found that ownership was admitted by the 2nd Respondent, it would follow that the order on costs is untenable. The proviso to **Section 27(1)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** is explicit that costs follow the event, the event herein being that the Appellant was the successful litigant before the lower court. It was therefore anomalous for him to be condemned to pay costs to the 2nd Respondent.

[21] In the result, I find merit in the appeal and would accordingly set aside the orders of the lower court absolving the 2nd Respondent from liability and replace it with an order holding the two Respondents jointly and severally liable to the Appellant in the sum of **Kshs. 1,041,246/=** that was awarded by the lower court together with interest thereon and costs of both the lower court and the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST 2019

OLGA SEWE

JUDGE