



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 1 OF 2014**

**JAPHETH MJOMBA.....APPELLANT**

**-VERSUS-**

**SALIM RASHID.....RESPONDENT**

**JUDGEMENT**

1. This Appeal arises from a judgment and decree entered in Mombasa CMCC 2788 of 2004. In that suit, the Respondent sued the Appellants for both general and special damages in respect of a road traffic accident in which the Appellant sustained some personal injuries.
2. The claim was fully contested in the lower Court and the Learned Trial Magistrate rendered a reserved judgment on 29<sup>th</sup> November 2013 in which he found the Appellants had failed to discharge the burden of proof placed upon him and dismissed his suit with costs.
3. The Appellant is aggrieved with the judgment of the Learned Trial Magistrate on liability and quantum. He has filed a memorandum of appeal dated 9<sup>th</sup> January 2014 and filed on the same day. The appeal has enumerated 6 grounds of appeal that can be summarized in the following two grounds:-

**a. Whether the trial magistrate erred in law and fact in dismissing the appellant's suit with costs on the basis that he had not proved liability against the respondent on a balance of probabilities.**

**b. Whether the trial magistrate erred in law and fact in assessing damages that were inordinately low.**

4. By consent of the parties, the Appeal was heard by way of written submissions. The Appellant's written submissions were filed on the 5<sup>th</sup> April 2017 while the Respondent's written submission were filed on the 22<sup>nd</sup> May 2017. The same were highlighted on the 24<sup>th</sup> May 2018 and on the 26<sup>th</sup> July 2018.

**The Issues and Determination**

5. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect *Jabane vs. Olenja*, [1986] KLR 661, *Selle vs Associated Motor Boat Company Limited* [1968] EA 123 and *Peters vs. Sunday Post* [1958] E.A. 424.
6. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR the Court of Appeal was clear that the appellate court should be slow to differ with the trial court on factual findings and should only do so with caution and in cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the trial court acted on wrong principles of law in arriving at the findings he did. These same principles were also restated in *Mwangi & Another Vs Wambugu* [1983] 2 KLR 100.
7. The applicable law as regards this appeal has been stated in various legal treatises and judicial decisions. A regards an action in negligence the author of *Halsbury's Laws Of England*, 4th Edition at paragraph 662 at page 476 sets out what is required to be proved in an action such as the Appellant's:-

**“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”**

8. The rudiments of an action for breach of statutory duty are similarly stated in Clerk & Lindsell on Torts, Eighteenth Edition at paragraph 11-04 page 600 as follows:

i. **“The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficient simply that the loss would not have occurred if the defendant had complied with terms of the statute. This rule performs a function similar to that of remoteness of damage.**

ii. **It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.**

iii. **As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused his loss, which he will fail to do if the damage would have occurred in any event.**

iv. **Finally, there is the question whether there are any defences available to the action.”**

9. It is an undisputed fact as evidenced by the testimony of the Appellant and the police officer who testified that an accident did occur. This accident was reported to the police as shown by the Police abstract produced in evidence as an exhibit and the occurrence book. It is also not disputed that the appellant herein was riding a bicycle when he was hit by a motor vehicle registration no. KAG 023S. Those however were not enough. The Appellant had a duty to prove negligence proving him the accident occurred.

10. In this case, I am in agreement with the trial court’s finding that the Appellant chose not to advance his theory of how the accident occurred. He stated that he did not know what hit him and that he only found himself at coast provisional general hospital having sustained injuries. PW3 on the other hand relied on the content of the occurrence book of a report made by his colleagues **P.C Mungai** and **P.C Munywoki** and produced an abstract which did not disclose who was to blame for the accident. Both the documents did not State how the accident occurred or who was to be blamed for the accident but instead reliance was placed on pieces of a vehicles windscreen collected at the scene of the accident which comprised of an insurance sticker belonging to the Respondent vehicle attached. No eye witness was called by the Appellant to give evidence of how the accident occurred and the Appellant did not call his uncle whom he alleged told him how the accident occurred. That evidence proved that there was an accident but it had no bearing on whose negligence led to the accident.

11. It is the primary responsibility of the plaintiff to prove his case against the Defendant on a balance of probabilities as espoused in **Sections 107,108 and 109 of the Evidence Act, Section 108** thereof provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Under **Section 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 be on any particular person. Therefore, the above provisions require the Plaintiff to prove by way of oral or documentary evidence how negligent the Defendant was in the manner in which his motor vehicle was being driven at the material time giving rise to the accident thereby injuring him. It is only after the Appellant has crossed the above stated hurdle that the Respondent would be required to lay before the court evidence on a balance of probabilities to prove how the material accident was caused by and or substantially contributed to by the negligence of the Appellant in order for this Court to find in his favour.

12. In **Nandwa V Kenya Kazi Ltd [1988] KLR 488**, the Court of Appeal stated that:

**“....In an action for negligence, the burden to prove that the accident was caused by the negligence of the defendant is upon the plaintiff. However, if in the cause of that there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff’s favour unless the defendant’s evidence provides some answer adequate to displace that inference....”**

**Similarly, in MUTHUKU -VS- KENYA CARGO HANDLING SERVICES LTD. (1991) KLR. 464, "Our law has not yet reached the stage of liability without fault', it is incumbent upon the Plaintiff to prove the fault (liability), while bearing in mind that the party alleged to be at fault must engage the Defendant in its affairs within standards of protection against any unforeseeable risks”.**

13. It is my finding that the Appellant did not discharge its burden of proof placed upon him in order for the burden of proof to shift to the Respondent.

14. Consequently, upon a careful evaluation of all evidence on record and the respective submissions, I am of the view that the trial court neither misapprehended the evidence tendered before it nor relied on the wrong principles in arriving at its findings. In the premises, it is also my finding that the Appellant did not discharge the burden of proof placed upon him in order for the burden of proof to shift to the Respondent as a result his appeal on liability are hereby dismissed.

### **Quantum**

15. It is well settled in law that even where the action is dismissed, the damages must be assessed and further that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law a principle that was dealt with. In **Margaret T. Nyaga vs Victoria Wambua Kioko [2004] eKLR**.

16. In the case of **Butt vs Khan (1977) 1 KAR**, the court rendered itself on the same issue and held as follows:-

**“An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”**

17. The Appellant relied on the case of **Beatrice Kaweru vs Eliud Njuguna H.C.C.C.4348/1988** where Kshs. 250,000/= was awarded for injuries that included loss of 2 upper teeth, fracture of the left radius, left femur and acetabulum. The Appellant also relied on the case of **Ali Mbwana Shalli vs Afrique Car Hire and Another HCC 447/1990** Mombasa where the Plaintiff sustained a head injury concussion, multiple bruises on the face, contused wound on scalp 3' x right side back 5' x 2', chest injury and he was awarded Kshs. 180,000/=.

18. It is quite clear from the judgment appeal from that the learned magistrate was very conscious of the fact that the injuries suffered in the present case were less severe than in the case of **Beatrice Kaweru and Ali Mbwana Shalli Afrique Car Hire**. The injuries suffered in the two cited cases were not comparable to the injuries sustained by the Appellant herein as the Appellant injuries were less severe. The learned magistrate awarded half of the damages awarded in the **Mbwana Shalli Afrique Car Hire** case. I find no misdirection on the part of the learned magistrate. I also find that the award of general damages was not excessive. It was justified considering the injuries suffered.

19. For the above reasons, I dismiss this Appeal and uphold the decision of the learned magistrate. I award costs of Appeal to the Respondent.

**Dated** and delivered at **Mombasa** this **31st** day of **October 2019**.

**P.J.O. OTIENO**

**JUDGE**